Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

LEGAL ANALYSIS OF THE LAW ON MAKING AMENDMENTS AND SUPPLEMENTS TO THE REPUBLIC OF ARMENIA LAW ON TELEVISION AND RADIO

Commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Professor Dr Katrin Nyman Metcalf, Tallinn Law School at Tallinn University of Technology, independent communications law consultant

January 2016

Table of Contents

I. Summary

This report analyses the Law on Making Amendments and Supplements to the Republic of Armenia Law on Television and Radio of December 2015. The Law is evaluated based on international standards and OSCE commitments. Such standards and commitments show that freedom of expression is not an absolute right, but that any direct or indirect limitations must be considered carefully. Freedom of expression is not just as a basic right but also as a prerequisite for exercising other human rights and fundamental freedoms. Proportionality and necessity of any limitations to free speech are essential.

The main aim of the amendments to the Armenian Law on Television and Radio is to prepare for digital switchover. The amendments are welcome as they enable private entities to provide digital transmission. Quite a lot of the content is of a practical and technical nature and does not raise concerns from a freedom of expression viewpoint. At the same time there are some unclarities and issues that could be handled slightly differently to be even more in line with best international standards. Some recommendations are made and these matters pointed out in an Article by Article analysis.

The main concern is that some of the requirements on private entities may be onerous and thus discourage an active market. Special requirements made on private companies should be proportional and necessary. Private firms must be able to operate on market conditions and any requirements must be clear.

It is also important that the process with licensing for the digital multiplexes is not delayed. The draft needs to be stricter regarding under what conditions such a delay may be possible.

Some other amendments – not related to digitalisation – are also made. These are mainly uncontroversial.

II. Recommendations

- To develop a diverse digital broadcasting environment, it is important to have an attractive and realistic market for private multiplexers. Restrictions on how they operate should be kept to a minimum and fit the Armenian reality. Special requirements to ensure sustainability can be made as licensing criteria by the regulator.

- Any limitations imposed on private operators need to be very clear (so for example "communications network" must be defined in law). The need to own all infrastructure components could be re-evaluated.

- The proposed definitions should be reviewed to fit with the existing law and to not make any normative presumptions in definitions.

- There should not be any possibility to delay the call for tenders.

- If the transitional period is short – as it should be – there should not be any new competitions arranged but local TV and radio stations should be allowed to continue operating until the digital multiplexes start operation.

III. Analysis

III.1 Introduction

The aim of most of the provisions of the Law on Making Amendments and Supplements to the Republic of Armenia Law on Television and Radio of December 2015 is to prepare for digital switchover. Armenia has worked on the legislative, regulatory and practical details of such switchover for many years. It is important to ensure a proper legal framework so that market participants can have legal certainty. Thus, the Law is to be welcomed. It enables private firms to participate in the digital broadcasting market. To a large extent the content is of a practical and technical nature and does not raise concerns from a freedom of expression viewpoint. There are however some unclarities and a few issues that could be handled slightly differently to be even more in line with best international standards.

The main concern is that the Law appears to set quite strict requirements on private multiplex operators, which may make the market less attractive. It is in line with international practice to set requirements for licensees in regulated markets but such requirements should be kept to a minimum and only be applied if the market itself does not sufficiently take care of relevant needs. There might be a risk that some of the stipulations deter some potential market participants.

Some provisions (including on matters that are not directly linked to the digitalisation, relating e.g. to licensing) are somewhat unclear. One such unclarity that could entail a risk is the possibility that a call for tender for the multiplex licences is delayed.

III.2 International standards and OSCE commitments

This report is based on the mandate of the OSCE in relation to freedom of expression as set out in international instruments such as the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights, to which OSCE Participating States - including the Republic of Armenia - have declared their commitment.[1]

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.” This right is further specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights.

Freedom of expression is also stipulated by Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR):[2]

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

[1] Helsinki Final Act (1975), Part VII; reiterated e.g. in the Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension (1990) and later statements.
[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950. www.echr.coe.int/NR/...DC13.../Convention_ENG.pdf

authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In the 1999 OSCE Charter for European Security the role of free and independent media as an essential component of any democratic, free and open society is stressed.[3] The Mandate of the OSCE Representative on Freedom of the Media is, based on OSCE principles and commitments, to observe relevant media developments in all participating States and on this basis advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media.[4]

Each country has the right to determine the details of its media policies and laws. Article 10 of the European Convention explicitly mentions the right to have licensing rules, which is relevant for this Law. International best practices have developed on how to best respect the principles included in international commitments on freedom of expression and ensure that this freedom can be implemented in practice. In this context the principles established by the European Court of Human Rights that any restrictions to human rights, including freedom of expression, should be proportional, necessary in a democratic society and set out in law are essential. Limitations to freedom of expression must be very carefully made given the importance of the right – not just as a basic right but also as a prerequisite for exercising many other human rights and fundamental freedoms.

Regarding licensing criteria and processes, including such matters as the Law analysed here deals with, the importance of freedom of expression principles is that such criteria and processes must not prevent or make obstacles to the activities of free media or other communications market participants. Rules must be legitimate and also applied in a proportional manner.

III.3 Article by Article analysis

Article 1

Article 1 of the Law on Amendments introduces new definitions to Article 3 of the Law on Radio and Television. It adds definitions of for example private and public multiplexer as well as of Local TV and Radio Company and Public Broadcasting Digital Network. The existing law contains a definition of multiplexer which is slightly different than the definitions here, which could be confusing. It would be better to delete the existing multiplexer definition if it is important to define private and public separately. For the

[3] See point 26 of the Charter for European Security, adopted at the Istanbul Summit of the OSCE, 1999. http://www.osce.org/documents/mcs/1999/11/17497_en.pdf

[4] Mandate of the OSCE Representative on Freedom of the Media 1997, Point 2. http://www.osce.org/pc/40131

private one, the definition contains that such a multiplexer is a legal entity licenced by the National Commission. This is not a good definition as the entity as such may exist and indeed have legal obligations *before* it is licenced (like the obligation to get a licence), but under this definition it is not a Private Multiplexer before it has a licence. The other comment on the definitions is that Local TV and Radio Company only covers entities that existed before 1 January 2015. This is explained by this term being used only in a new point to Article 62 (see Article 9), which sets up a transitional system. Thus it is not wrong but it looks a bit strange to limit the definition in this manner (as local TV and Radio Company in normal speech is a wider and more general term), so it may have been clearer to just deal with this in transitional provisions to the law.

Article 2

This Article adds a new point 3 to Article 9 in the Law on Radio and Television regarding rebroadcasting. It stipulates that broadcasting of advertisements is prohibited during re-broadcasting of foreign programmes unless decided differently by law or international treaties. Domestic as well as rebroadcast adverts are prohibited. It is up to each country to decide the details of its advertising rules and there is no detailed best international practice, so there is nothing preventing such a provision, but it can be questioned why there is this special rule for rebroadcasting banning also domestic adverts.

The background to this ban is given in the justification note as a problem with a variety of products and services sold in Armenia being advertised on rebroadcast channels without taxes being paid. As stated in the justification, the problem becomes more topical for private multiplexers, when the number of rebroadcast TV and radio programs will significantly increase. This latter statement is correct and it is justified to deal with the issue, but it still does not fully explain why broadcasters could not insert domestic adverts (and pay the taxes referred to). However, although this is unclear it is up to the legislator to decide its advertising rules as long as it has in mind that private broadcasters must have reasonable chance of getting sufficient income.

Article 3

Article 3 is the main Article of the draft Law and contains a new section 6.1 to the Law on Radio and Television, on licensing of private multiplexers. The first new Article proposed (Article 55) stipulates that private multiplexers should be licenced by the National Commission, the regulator. This requirement fits better here than in the definition, as commented on above. Provided there is a transparent and objective process, there is no objection to licensing requirements for multiplexers, which indeed is in line with international practice. The importance of an open and non-discriminatory procedure is essential.[5]

The multiplexers should be Armenian legal entities. Such nationality requirements are quite common for media companies. What is a bit confusing in the Article is that foreign ownership is allowed to 50% of shares said to be "*necessary for adoption of decisions*". With

[5] The European Court of Justice has in 2015 (Judgment in case C-376/13, European Commission v Republic of Bulgaria, 23 April 2015) dealt with the licensing process for multiplexes, which was found to have been too restrictive. The case is concerned with details of EU rules that are not applicable to Armenia, but can be said to also highlight a general best practice of an open process or in any case clear justification for any limitations on who can apply and how licenses are awarded.

exactly 50% presumably one does not have a decisive majority. Exceptions to the nationality requirement can be made by international agreements.

According to point 2 of the proposed Article 55 the coverage area of the private multiplexers must be no smaller than of Armenia´s public broadcasting digital network and the multiplexer must have its own electronic communications network. This is a fair requirement which could be motivated by economic factors. Exact requirements should be further specified in the licensing documents so that applicants have clear rules on what the exact expectations are. Though the possible implications for media pluralism should be taken into account and carefully analysed. Point 3 stresses how all network components must be the property of the multiplexer. It is not clear why such requirements are needed as it could be foreseen to lease some of the components for example and it is hard to see what negative consequences that would have. If the legislator is worried about the sustainability of the providers (which is a legitimate concern), strict requirements of showing a business plan with all relevant agreements on leasing of equipment or similar could have the same effect as being owner of everything.

In the justification of the law the point above is explained as follows: *Given Armenia's national security considerations, limited strategic resources of the broadcasting network, as well as the need to exercise people's right of getting information the law provides that private broadcasting network should be established and function independently from the existing public network using the infrastructures owned by it (columns, cables, broadcasting equipment, etc.).* This however does not explain the need for the multiplexer to be owner of all infrastructure rather than leasing from another (private) entity.

Point 4 stipulates that "*the private multiplexer shall not have the right to deliver other services other than those that are exclusively related to the activities and operation of the communications network.*" The comment on this is that it is essential to have a clear definition of "communications network" and such a definition appears to be missing in the original Law and in these amendments.

In point 5, requirements for programme (channel) selection is made. The multiplexer is obliged to provide 20% of its capacity within a set timeframe to licensed broadcasters. The rest can be used in different ways, including by the multiplexer itself but not allocated to broadcasters in the public network. The provision appears to be proportional and in line with the aim of the law, to support the creation of additional programme distribution.

Next, a new Article 55.2 is proposed, concerning the tender. This is a very important provision as the process for giving the right to operate the private multiplex is the key to whether this process and the shaping of the media landscape are fully in compliance with international best practice.

There is a deadline for the call for tenders (1 May 2016), which is good in order to prevent further delay in switchover process in Armenia. However, the wording is unclear on whether it may be possible to avoid this deadline ("*in case the competition does not take place*"). There should be strict rules to ensure the competition does take place or very specific reasons why it is not possible to do it – as it now sounds, the regulator could simply state that it did not take place. Then there would be a further delay.

The applicants have three months to submit applications. This is quite long but it is possible that for such a first tender call it is necessary as companies may not have all preparations done (design of the network etc.). Also the evaluation period of six months appears long. The period should be realistic but at the same time not too long. The Article somewhat confusingly talks about a public network unless it refers to a network available to the public.

If there is no reply in the set period, the default position is that the network is approved. This is positive in the sense that it prevents further delay. This should also serve as a call for the regulator to act swiftly and properly, so that there really is a proper examination and analysis of all applications. After receiving technical expertise there will be public hearings. Specific criteria for the process can be set by the regulator. This is all good and in line with international practice. It may be considered to broadcast the public hearing over internet or allow also comments via internet, to make it easier for interested parties to participate.

Article 4

In addition to the provisions necessary for the process of digitalisation, some other amendments are made to the Law on Radio and Television to clean up some unclear or undesired consequences of the existing legislative text, as explained in the justification. This includes a change in the duties of hotels when it comes to cable broadcasting. They will no longer need licences for cable broadcasting.

Article 5 and 6

The requirement of written permission from the regulator for cable broadcasting within private spaces is deleted. This is a good suggestion as the need for a permission appears unnecessary and almost like a licensing requirement for what according to the law should be unlicensed.

Article 7

A new Article 61.1 is added, dealing with termination of private multiplexer licences. This short Article is a logical corollary to the new provisions on licensing such multiplexers and ensures that if they do not perform their duties, their licence may be terminated.

Article 8

Deletion of Article 62.13 is in line with the changes made.

Article 9

Article 9 introduces a new point 16 to Article 62 (transitional provisions) on local TV and radio companies. The content is that such broadcasters can continue to broadcast until the private multiplexers start operating. Although the idea of such extension free of charge and without new conditions is good, it is unclear why the Article mentions prolongation until a new tender. This sounds as if the same analogue broadcasting could be tendered again, which should not be the case. The prolongation should be extended until the private multiplexes start operating as a transitional measure.

Article 10

The law will enter into force on 1 January 2016.

Justifications and impact analysis

The draft includes some small and uncontroversial amendments to other laws, such as on licensing and on state duties. There are also regulatory impact assessments on corruption, environmental consequences, social protection and health care. The assessment that there are no such consequences of note can be shared. As for the regulatory impact assessments on competition and on the economy, especially small and medium sized enterprises, these are issues that may be influenced by the amendments but not in any manner that would need any specific additional impact assessment at this time. The same is true for the budgetary impact assessment.