

Comments On The Draft Law “On Introducing Amendments And Supplements To The RA Law ‘On Television And Radio’”

1. The draft does not clearly define and distinguish the status of digital broadcasters and broadcasting transmitters, the mechanisms for regulating their activities and the relations between these entities. Particularly, it is known that digitalization involves new role-players such as a network operator, multiplex operators and TV companies - the content providers. Moreover, the functions of the first two can be carried out by a single entity.

Besides, the draft authors have not defined the notion of “network operator” except for the state network operator and the draft does not provide for a regulatory body for supervising the activities of these operators in future.

2. According to Part 1 of Article 7 of the draft law, “in the Republic of Armenia broadcasting of TV and radio programs is conducted based on licensing”. Thus, it is not clear to which of the abovementioned digital broadcasters this provision applies (this issue will become more topical after complete digitalization). Part 1 of Article 3 of the draft stipulates “Television and radio broadcasting - dissemination of pictures and (or) sounds or their conditional signs with the help of electromagnetic waves, through transmitting lines (including cable connection) or without transmitting lines (...)”. Digital broadcasting presumes that the abovementioned function is to be carried out not by TV or radio companies, i.e. the content providers, but by the multiplexers.

In this regard, neither the draft nor the Concept Paper on Digitalization of Television Broadcasting provides for a clear definition and distinction of the activities of digital broadcasting role-players, moreover they lay ground for confusion. At the same time, the draft does not outline the principles for licensing multiplexers, network operators, TV and radio companies.

3. According to Article 47 of the draft law, 18 TV companies will be broadcasting through the digital network on the territory of the RA. It is not clear how this limitation on the number of TV companies is justified and substantiated. The determination of a specific number can only be justified by the results of an audit of TV frequencies. Several international experts have also noted the need for conducting an objective and transparent audit. According to representatives of the RA Ministry of Economy, such an audit has been implemented in the RA. Nonetheless, the results of the audit have not been publicized till now, and the reason behind this remains unclear.

Recommendation Rec(2003)9 by the CoE Committee of Ministers is noteworthy¹. It states that the switch over to digital broadcasting should not be used for diminishing pluralism.

Moreover, if the state does not have enough financial means for creating a broader digital network involving more TV companies, then how can the transitional provision, enabling legal entities to create private networks only after 2015, be substantiated? Additionally, it stipulates that “the licensing procedure and terms (carried out by the National Commission on Television and Radio) for creating a private digital broadcast network by legal entities *may* be set forth from January 1, 2015”. Such networks are already efficiently operating, and in fact the draft is not clear as to their fate.

¹ Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies)

4. It is undeniable that broadcasting needs to be regulated. However, while multiplexers require a complex licensing procedure through a competitive process due to the fact that they are dealing with a limited public resource, in future TV and radio companies should get the right to produce, broadcast and rebroadcast programs according to a simplified procedure. With this license, the company should be able to decide on the type of broadcasting channel - satellite, cable or terrestrial. Taking into account that the draft law limits the number of licenses to be granted and some TV companies will be deprived of the right to broadcast, the companies, using private networks, should be entitled to the right to broadcast as soon as possible.

5. Despite the fact that the Concept Paper on Digitalization of Television Broadcasting provides for several standards of digital broadcast signals, it is not clear what specific standard(s) will be used in the RA. Therefore, the selection of this/these standard(s) must be clarified and duly justified.

6. Part 3 of Article 58 of the draft law says, "TV and radio companies have the right to go to court to have NCTR decision(s) recognized as invalid or changed. The presence of an appeal to the Court does not, however, prevent the enforcement of the administrative penalty (towards the company that filed the claim)." Also, according to Article 61 of the draft law, when a TV and radio company is deprived of its license, the NCTR announces a new competition and the winner is given a new license for digital broadcasting. Thus, the company deprived of the license cannot broadcast until the court's final verdict, while its place will be taken by another broadcaster. A question arises as to what will happen if as a result of court hearings lasting a year or two, the court finds the deprivation of license unfounded.

We recommend that as long as a complaint is under consideration in court by a TV and radio company, the enforcement of the NCTR decision regarding this company should be suspended. If a new licensing competition is announced, to maintain the principle of equality the new license should be given for a period of 10 years.

7. As mentioned above, given that the draft restricts the number of licenses to be granted and some TV companies operating now will lose the right to broadcast, the role of satellite broadcasting is further emphasized.

Article 23 of the draft stipulates that "television and radio companies can broadcast via satellite through a contract with the satellite agency." The study of the draft shows that according to Article 3 of the draft, a television and radio company is a legal entity that transmits or re-transmits TV and radio programs and is responsible for the implementation of this law and other legal regulations. The same draft, as well as the legislation in force stipulate that transmission and retransmission can be carried out only with possession of a license. Article 23 of the document therefore implies that satellite broadcasting can be implemented only by licensed TV companies, which is nothing else but a constraint on the freedom of expression. International practice shows that satellite broadcasting can be implemented by any private company through a simplified licensing procedure.

8. Article 18 of the draft notes that "legal entities may be licensed for no more than one TV and radio company, or one TV company and/or one radio company, implementing on-air broadcasting." In this regard, this restriction should also be applied to entities related to these companies, such as their subsidiary company.

9. No distinction is made in the draft law as to regional TV companies and their licensing. This raises serious concerns. Before the introduction of private broadcasting networks, regional TV companies, except for the ones operating through the national network, will presumably close down. According to the Appendix of CoE Recommendation Rec(2003)9, "Given that simultaneous analogue and digital broadcasting is costly, member states should seek ways of

encouraging a rapid changeover to digital broadcasting while making sure that the interests of the public as well as the interests and constraints of all categories of broadcasters, particularly non-commercial and regional/local broadcasters, are taken into account (...)."

10. The draft law removes the obligation imposed on the National Commission on Television and Radio (NCTR), which is prescribed by Article 48 of the current RA Law "On Television and Radio". According to this Article "(...) The National Commission on Television and Radio at least once a year shall publicize the frequency list (...)". This provision should be reinstalled in the draft, as its absence blurs facts about the licensing procedures, the exact number of multiplexers and the broadcast network capacity, while their publication is subject to different interpretations and bureaucratic discretion.

11. As mentioned above, the transitional provision of the draft law stipulates that "the licensing procedure and terms (implemented by the National Commission on Television and Radio) for creating a private digital broadcast network by legal entities *may* be set forth from January 1, 2015". This formulation is unjustified, as the broadcast licensing competitions should not depend on the discretion of the NCTR, but imposed on the regulatory body as an obligation. Therefore, we recommend prescribing in the draft that in cases when licensing bids are present for free frequencies, a competition should be held.

12. Both the draft law and the Concept Paper on Digitalization of Television Broadcasting, adopted on November 12, 2009, do not include the principles for the envisaged social package. Particularly it is not clear if the 18 TV companies included in the digital broadcasting network are part of that social package or whether they will be after 2015. If not, then how will the package be formed after 2015? In our perception, a new social package should be developed after 2015. The procedure of forming such a package should be determined by the draft or other official documents (for example, Government decree, concept, etc.).

13. The draft law should dwell on the kinds of investments required from the TV companies which have obtained broadcast licenses, as well as specify the structure of such investments.

14. It is not clear how the results of the research, administered by "Telemidiacontrol" CJSC and presented by the RA Ministry of Economy, can be related to the profiles for TV companies, as defined by the draft. The definition of such profiles should be preceded by more thorough studies, which are not shown by the draft authors. Therefore, the related provisions of the draft law cannot be considered justified.

15. The draft law does not show clearly if it is called to regulate procedures dealing only with digitalization, or to improve the whole Broadcast Law. In case of the first, it is not clear how digitalization is in any way related to the revision of limitations for commercial advertising by TV and radio companies. In case of the second, we do not understand why the draft law does not touch upon more crucial issues, such as increasing the independence of the NCTR and the Council of the Public TV and Radio Company.

16. The study of the draft as well as the acting legislation shows that the Public TV and Radio Company (PTRC) is under the control of the NCTR. According to Part 1 of Article 35 of the draft law, "the National Commission on Television and Radio Company is an independent regulatory body entitled to ensure the freedom, independence and diversity of broadcast media, broadcast licensing as stipulated by law, as well as control over the TV and radio companies, including control over the activities of the Public Television and Radio Company". Nevertheless, the draft law fails to provide specific mechanisms, by which the NCTR shall oversee the activities of the PTRC. No clear distinction of mechanisms of control by the NCTR over public and private TV and radio companies is made. Moreover, it is not clear whether under such circumstances the

NCTR is competent, for example, in case of violation by the PTRC to warn, fine and suspend its programs, or use other sanctions towards it, prescribed by the draft law.

17. The broadcast digitalization constitutes some danger for pluralism. Therefore, it presumes a simultaneous enhancement of the role of the regulatory body and the guarantees of its independence. The draft law does not define additional mechanisms for ensuring the independence of the NCTR. According to the current procedure, half of the NCTR members are appointed by the RA President, while the other half are elected by parliamentary majority. This cannot ensure the social diversity of the NCTR structure. The need for this was recalled in a number of international documents regarding Armenia, including PACE Resolutions 1532(2007), 1609(2008), 1620(2008), 1643(2008), 1677(2009).

18. The RA authorities were supposed to take measures for restoring the violated right to freely impart information and ideas of the “A1+” TV company founder, “Meltex” LLC, based on the ruling of the European Court of Human Rights on June 17, 2008. To this very day no steps have been taken, and this draft law once again fails to provide for such provisions. On the contrary, by prescribing a limited number of broadcast licenses, the draft law reduces the possibility of “A1+” to obtain a broadcast license.

19. The draft law removes the provision prescribed by Article 50 of the current Law “On Television and Radio”, which stipulates that “the National Commission on Television and Radio must duly justify its decisions on selecting the licensee, refusing to grant a license, or revoking a license and ensure the publicity and accessibility of all justifications made”. This provision should be necessarily reinstated, as the requirement of ensuring a transparent licensing procedure by the NCTR as well as providing a due justification for refusing to grant licenses was imposed by the ruling of European Court of Human Rights of June 17, 2008 on the case of “A1+” TV company founder, “Meltex” LLC. The absence of such provision runs counter to the abovementioned decision and diminishes the low degree of transparency of NCTR, as it is.

20. The draft law and the Concept Paper should clearly state that their provisions do not concern the regulation of Internet broadcasting.