

American University of Armenia

**Master's Paper
Obtaining Television Broadcasting License**

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1. INTRODUCTION

This paper discusses the broadcasting regulation in Armenia focusing on the problems revealed by practice and confirmed by the latest judgment of the ECHR¹ and makes suggestions on how to make the regulation in Armenia in compliance with the European model of regulation and, in particular, of freedom of expression.

Radio waves are regulated in order to ensure their usefulness in communicating information. There are two principal means of transporting information-radio waves transmitting information through the air or electricity (electrons) or light (photons) transmitting information through wires or cable.² Transporting information through the air is possible due to wavelengths of radio waves called “electromagnetic spectrum” (hereafter spectrum). States have to coordinate use and allocation of the spectrum with the International Telecommunications Union (ITU) because radio waves do not respect national boundaries. ITU is an international organization which in particular provides states with a list of frequencies available for their use.³ The most important characteristic of the spectrum is its scarcity because it renders the use of a frequency at the same time by more than one user impossible by causing interference that prevents anyone from receiving the information. The tool used by the state –as the holder of the airwaves on its own name but on behalf of the public– to regulate the telecommunications industry is licensing. Therefore, there is a limited access to the industry of producing, marketing and trading information and ideas through the most massive of the mass media-TV. Gaining access to this industry is possible only by founding a TV company and obtaining a TV broadcasting license.⁴ A license is an official permission entitling a person to engage in a type of activity as well as an official document

¹ *Meltex LTD v. Armenia*

² TELECOMMUNICATIONS LAW: THE UNITED STATES MODEL FOR ECONOMIC REGULATION OF TELECOMMUNICATIONS PROVIDERS, p.1, Steven Semerano, Thomas Jefferson School of Law, San Diego, California, USA, <http://www.eolss.net/>

³ TV and Radio Broadcasting Act of RA of 09.10.2000 (Broadcasting Act) , Article 48

⁴ Id. Article 7

confirming that right.⁵ In order to get a license, one has to go through an administrative process carried out pursuant to the procedure provided for by law and ending up either by granting or rejecting a license sought.

The main actors of the licensing process are TV companies seeking a license and the National TV and Radio Commission (hereafter NTRC) which is entrusted with regulatory authority by the state to regulate and oversee the telecommunications industry in Armenia. The NTRC is an independent regulatory authority comprised of 8 members, half of whom are elected by the National Assembly of RA for a term of six years and the other half of whom are appointed by the President of the Republic, again for a term of six years.⁶ The NTRC's task is to allocate broadcasting frequencies on a public and competitive basis and to grant licenses.⁷

The other actors-TV companies- are legal entities which can be founded by natural or legal persons except for the following:

- representatives of the government or local self government bodies,
- members of the Council of the Public TV and Radio company,
- members of the NTRC, political parties,
- persons serving a prison term and persons incapacitated by a court order
- and persons below the age 18.⁸

Also, at the time of establishing TV and Radio companies or thereafter the amount of foreign capital can not be equal or exceed the amount of the capital that would influence the decision making of the company.⁹

Licensing affects both economic and socio-political interests of those companies.

Economic interests include the right to conduct a business and to retain it. Companies need a

⁵ Law of RA on Licensing of 30.05.2001, Article 3

⁶ Broadcasting Act, Articles 37 and 39

⁷ Id. Article 37

⁸ Broadcasting Act, Article 17

⁹ Id.

license to get an access to the broadcasting market and resources. Governments sometimes argue in case of a dispute that TV companies are corporate bodies whose activities are commercial and whose sole object is to gain profit and that freedom of expression exercised by them is exclusively for pecuniary gain.¹⁰ However, the European Court of Human Rights (ECHR), has unequivocally ruled that any denial of a license is a per se interference with the freedom of expression enshrined by Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter Convention) and such interference must satisfy certain requirements of lawfulness, legitimate aim, necessity and proportionality.¹¹ Thus, while regulating the allocation of broadcasting resources the states must ensure the fulfillment of those requirements.

The transaction at issue is also of a great significance for the public at large. Information – a powerful product – is consumed by the whole public. The latter is interested in consuming quality products. Moreover, the public also has a right guaranteed by Article 10 of the Convention to receive information from an independent source.¹² In order to serve the public in the best manner, that is, to meet the needs of the public in the best manner, the telecommunications industry must provide pluralism and diversity, independence, quality and accessibility of information.¹³ Being informed (when the information satisfies the abovementioned criteria) has a positive and sometimes irreplaceable effect on the functioning of the democracy, effective citizenship, as well as the educational level taking into account

¹⁰ See e. g. case of *Autronic AG v. Switzerland*, ECHR

¹¹ *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*

¹² Independence should not be confused with impartiality. The broadcaster is free to choose the information and ideas it wants to impart but it has to remain free of any type of political pressure or influence.

¹³ DOES PUBLIC SERVICE BROADCASTING SERVE THE PUBLIC? THE FUTURE OF TELEVISION IN THE CHANGING MEDIA LANDSCAPE, MACHIEL VAN DIJK, RICHARD NAHUIS, AND DANIEL WAAGMEESTER, <http://springerlink.com>

the fact that people spend more time watching TV over their lifetime than they do it in a classroom or while reading.¹⁴

In the other market economy industries product quality and low prices are ensured by competitive forces. The state regulation of the market is drawn to the minimum in terms of, in particular, access to the market and also pricing. There is unlimited access to the sectors of industries and the competition enables the efficient allocation of resources. This rule, however, does not work for the telecommunications industry because of the scarcity of the spectrum.¹⁵ Therefore there is a need for a more intrusive state regulation to ensure what is usually being ensured by competitive forces.¹⁶ The state tries to ensure the quality through competitive granting of a license aimed at choosing licensees that are best able to serve the public interest.

The extent to which the regulatory process succeeds directly relates to the efficient allocation of media resources and the extent of public benefit. The question of choosing a licensee is a matter of policy concern and here the regulatory authorities in the American and European models of regulation enjoy the widest discretion.¹⁷ What is required of these authorities is to give a reasoned explanation of the policy choice they have made by granting a license to a given company rather than to the other. Otherwise, the freedom of expression of denied company is violated. Therefore, there is a need for a regulatory framework and practice which ensures predictability and limits arbitrariness in terms of regulation.

2. ARMENIAN LEGAL FRAMEWORK

Relevant Law

¹⁴ Id., PLURALISM IN DIGITAL BROADCASTING: MYTHS, REALITIES AND THE BOUNDARIES OF EU ACTION, MONICA ARINO

¹⁵ See 1

¹⁶ This does not mean that there is no competition in the telecommunications industry, but rather that it does not produce the same effect as in other industries because of the limited access. In Armenia e. g. there are now some two or three channels which are broadcasted throughout the whole territory of the country.

¹⁷ See 1

The RA rules which regulate the licensing process include: the RA Constitution¹⁸ (in particular Articles 24 and 44); the Convention (in particular Article 10); the RA Television and Radio Broadcasting Act (hereinafter Broadcasting Act) which is the main legislative act regulating the RA TV and Radio industry (in particular, Articles 7, 20, 37, 39, 47, 50, 51 and 54 thereof); the NTRC Regulations Act (in particular Articles 30, 31, 61, 63 and 67); the Law of RA on the Fundamentals of Administrative Activity and Administrative Process as licensing is an administrative process and therefore the whole act- read together with the Broadcasting Act- is relevant; the Law of RA on Licensing (in particular Articles 4, 9, 10 and 43); Decision no. 4 approving the Tendering Rules for Television and Radio Broadcasting Licenses (hereinafter the Tendering Rules) (in particular Paragraphs 18, 19, 20 and 22).

Case studies

The case of Meltex LTD (hereinafter Meltex Case) will be examined in this part in order to reveal any deficiencies in the implementation of the law in practice with regard to licensing of TV broadcasting. This TV Company participated in licensing tenders for different bands 7 times and was denied a license all 7 times during the period of 2002-2004. Meltex LTD claimed that all the decisions denying it licenses were not reasoned and therefore were arbitrary. It challenged the relevant decisions of the NTRC before the RA Commercial Court. The Commercial Court did not rule in the company's favour and the latter appealed to the Court of Cassation. The Court of Cassation upheld the judgment of the Commercial Court. So, after having exhausted all the effective domestic remedies the applicant company lodged an application with the ECHR invoking *inter alia* Article 10 of the Convention on freedom of expression. The decisions rendered with regard to this company by the national authorities, including those of the judiciary, were almost identical in nature and language.

¹⁸ Adopted on 5 July 1995

The ECHR handed down its judgment on the application of Meltex on 17 January 2008.¹⁹ The circumstances of the Meltex case- which participated in tenders to obtain a license for A1+ TV Company created by it- are the following:

Meltex LTD participated in licensing tenders 7 times and was denied a license all 7 times. By holding a points-based vote²⁰ the NTRC recognized the competitors of Meltex as the winners of tenders and therefore granted licenses to them. The NTRC sent a copy of its decisions - which were almost identical in wording -each time to Meltex. All the decisions particularly stated:

“Based on Articles 37 and 50 of [the Broadcasting Act], Articles 30, 31 and 63 of [the NTRC] Regulations Act and Paragraph 19 of Decision no. 4 of [the NTRC] of 24 January 2002 approving [the Tendering Rules], and taking into account the results of the call for tenders for TV broadcasting on band..... in the area of Yerevan, [the NTRC] decides (1) to recognize as the winner of the call for tenders for TV broadcasting on band....in the area of Yerevan, and (2) to grant a television broadcasting license to”

Each time Meltex sent a letter asking to give reasons for the refusal of its bid and got answers identical in wording each time:

“...when granting a license through a tendering procedure, [the NTRC] only makes a decision recognizing the best organization as the winner and grants or refuses a broadcasting license. Meltex LTD was not selected as the best organization in the call for tenders for band”

Meltex challenged the decisions of the NTRC before the Commercial Court asking to annul them and thereafter lodged an appeal in the Court of Cassation of RA. Both of these courts upheld the decisions of the NTRC.

The relevant law applicable at the time was the following:

- “An applicant shall be informed in writing of the reasons for the refusal of a license within ten days from the date of the decision.”²¹

¹⁹ Also, the case of Noyan Tapan LTD, which is very similar to the case of Meltex LTD, has been declared partly admissible by the ECHR and awaits examination on the merits.

²⁰ Points-based vote is voting by the NTRC members through assigning a grade or points in order to determine the winner of the tender.

²¹ Article 51 of the Broadcasting Act

- “In order to grant a broadcasting licence, the NTRC, at its meeting and within the period prescribed by the tendering rules, shall adopt a decision on the basis of the results of a call for tenders.”²²
- “Following the consideration of a bid, the NTRC shall adopt one of the following decisions: (a) to grant a license; or (b) to refuse a license.”²³
- “A copy of the decision granting or refusing a license shall be duly sent to the applicant within ten days from its adoption.”²⁴
- “The NTRC shall hold an open points-based vote in the order in which the bids are examined. The best organization shall be selected according to the results of the points-based vote.”²⁵
- “The NTRC shall adopt a decision recognizing the best organization as the winner and granting a television and radio broadcasting license.”²⁶

The law and its uncertainty in particular were the main “haven” for the government in the ECHR in the Meltex case. That is why the knowledge of the rules in force at the material time will help us later to understand whether anything has changed so far and whether the government could bring the same arguments nowadays.

On 23 March 2004 the RA Commercial Court found that

“[The NTRC's] decision to grant a license to the winner of the call for tenders cannot be interpreted other than as a decision refusing a licence to the other participants in the bidding. Following the adoption of a decision by [the NTRC] determining the winner of the call for tenders and awarding a licence to it, there can be no uncertainty for the other participants in the tender process as to whether their bid has or has not been refused, since they are told who the winner is and, consequently, that they have not won.... Thus, in the light of the above the court concludes that [the second applicant] was informed in a timely and lawful manner about the decisions concerning the results of the television broadcasting licensing tender processes....which in substance contained the grounds and reasons for the refusal of bids. Consequently, [the NTRC] did not display inaction and did

²² Article 61 of the NTRC Regulations Act

²³ Id. Article 63

²⁴ Id. Article 67

²⁵ Paragraph 18 of the Tendering Rules

²⁶ Id. Paragraph 19

not violate rights of Meltex LTD guaranteed by law; therefore these claims are unfounded and must be dismissed.”

The most interesting and amazing point in the Commercial Court's findings is that in the Court's view a notice communicated to an applicant indicating that the latter was denied a license because it did not win the competition (and it did not win the competition because another company was recognized as a winner) is a grounded and a reasoned decision. The Commercial Court did not even consider the issue about how it would be possible for the denied applicant to challenge the NTRC decision on the merits and how the Court itself would be able to exercise review over that decision on the merits. So, the case proceeded to the ECHR.

Before the ECHR Meltex LTD claimed that the decisions of the NTRC were not properly reasoned and arbitrary and thus violated its right to freedom of expression enshrined by Article 10 of the Convention.²⁷ Article 10 reads as follows:

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

The RA Government contended before the ECHR that a denial of a license did not amount to an interference with the freedom of expression of the applicant because a broadcasting license was granted by comparing the various bids entered following a call for tenders.²⁸ Unsuccessful applicants were not refused a licence but rather were not recognized as the winners of the call for tenders, which was what had happened in the applicant company's case. The NTRC had not taken any decisions refusing a license to the applicant company, but had simply announced the winners of the calls for tenders. The Court rejected this argument and recalled that a denial of a license is a per se interference with the freedom of expression and has to satisfy certain requirements of lawfulness, necessity and proportionality, that is, it must be determined whether the interference was “prescribed by law” (in terms of both

²⁷ See 1, para. 73

²⁸ Id., para. 72

domestic law and the Convention standards of lawfulness), pursued one or more legitimate aims under the third sentence of paragraph 1²⁹ of Article 10 or under paragraph 2 thereof, and was “necessary in a democratic society”.³⁰ When the Court finds that the interference was not “prescribed by law” it just stops there and does not examine the other two issues. This is how the Court did in the instant case. It rejected the government's argument that the applicant company had been informed of the reasons for its failure to win in the calls for tenders in question since it was aware that it had scored fewer points than the other companies and thus the decisions to refuse licences *were reasoned*. The Court concluded that the interferences with the applicant company's freedom to impart information and ideas, namely the seven denials of a broadcasting license, did not meet the Convention requirement of lawfulness because there were not reasoned.³¹ The licensing authority, the NTRC, gave no reasons whatsoever for its decisions repeatedly denying the applicant company a broadcasting license. On each occasion the NTRC simply announced the winner of each call for tenders, providing no reasons as to why this or that company's bid met the requisite criteria laid down by the Broadcasting Act more than those of the applicant company. The Court pointed out that this practice - unlawful under the Convention- was a result of the vagueness of the Law which laid down the criteria the NTRC has to apply in choosing a licensee but did not explicitly require giving reasons in applying these criteria.³²

The policy behind the decision of the Court is the following: as pointed out on many occasions by the Parliamentary Assembly and Committee of Ministers of the Council of

²⁹ Under this paragraph States are permitted to regulate by means of a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. The grant of a license may also be made conditional on such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. However, the compatibility of such interferences must be assessed in the light of the requirements of paragraph 2 (see *United Christian Broadcasters Ltd and Demuth*, §§ 33, cit).

³⁰ See 1, para. 72

³¹ Id., para. 84

³² Id., para. 78

Europe the “the vagueness of the law in force ha[d] resulted in the [NTRC] being given outright discretionary powers.”³³ In the ECHR's own words

“...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. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”³⁴

So, even the vagueness of the law is not a justification for the exercise of a discretionary power without any limits. If there is a problem with the law it must be changed³⁵ so that to prevent arbitrary interference with fundamental rights and freedoms.

Step by step analysis

The process of licensing can be divided into three stages:

1. placing a call for tender and submission of necessary documentation and a bid
2. presentation of the bids by the participants and assessment of the bids
3. making a decision to grant or refuse a license

1. The NTRC announces a licensing competition six months prior to the expiration date of the license for broadcasting TV programs and when there is an unoccupied frequency.³⁶

The competition is carried out publicly. The NTRC announces a competition in the mass media, publishing the following information:

- activities subject to licensing,
- the face value of the frequency allotted by the license,
- description of the frequency, where appropriate;

³³Resolution 1361 (2004) of the Parliamentary Assembly of the Council of Europe (PACE): Honouring of obligations and commitments by Armenia, 27 January 2004

³⁴ See 1, para. 81

³⁵ Although ECHR never requires expressly to change the law it is clear that if the government wants to avoid future judgments against it the law must be clarified. Further, the Committee of Ministers- which oversees the execution of the Court's judgments- may require as a general remedy to amend the law.

³⁶ Tendering Rules, Section 3

- the area of coverage (the zone),
- competition terms which are defined by the NTRC for each competition separately,
- the date, time and venue of carrying out the competition,
- the form of the application and the list of the necessary documents,
- dates and the venue of accepting the application,
- the necessary documents and the competition bid,
- the amount of the licensing payment and the form of payment,
- sources of additional information (telephone number, fax, E-mail), as well as technical requirements set out by the NTRC the prospective licensee has to meet.³⁷

An applicant should strictly comply with the terms of the competition. The terms may contain requirements on the subject matter of TV and radio programs; contains technical criteria and standards of producing and broadcasting TV programs. An applicant must submit proposals in the bid on how it is going to fulfill each of the requirements mentioned in the terms of the competition. The competition bid may contain additional suggestions.³⁸

The NTRC accepts the application, the necessary documents and the competition bid within 90 days after publishing the information about the competition and provides the applicant with a receipt.³⁹

The application for licensing the broadcasting of television programs shall contain:

- The type of a television and radio broadcasting company (airing, cable, wire);
- The name and domicile of the applicant;
- The subject and the specialization of television and radio programs;
- The regularity and the maximum volume of television and radio programs;

³⁷ Id. Section 6

³⁸ Id. Sections 7-9

³⁹ Id. Section 10

- The language of television and radio programs, as well as the language programs, if there are any;
- The coverage area of the program and the population number;
- Information about the applicant's other licenses for other television and radio companies or media, as well as information about the producing and broadcasting them;
- Information about technical facilities;
- Information about possible financial resources;
- Preliminary information about the number, education and level of professionalism of the staff;
- Documents about the company, status of legal entity, and a receipt of dues payment for taking part in the licensing competition, attached to the application.⁴⁰

The competition bid must be sealed with the applicant's seal, placed in a folder, and submitted in two copies; otherwise it will not be accepted. The copies of the competition bid are inserted into an envelope by an employee of the NTRC secretariat in the presence of the applicant, and sealed with the seals of the applicant and the NTRC.

If there are shortcomings in the application and the necessary documents, the NTRC tells the applicant about it while accepting them, and mentions it in the receipt.

A legal entity, that has submitted an application, necessary documents and a competition bid to the NTRC secretariat in time and according to the stipulated procedure, is considered to be a participant of the competition.

2. The NTRC discusses the bids at an open session, according to the order of registration. In order to present the competition bid, the NTRC gives the sealed envelope to the participant.

The latter has 30 minutes to present the bid. The competition participant has the right to submit petitions. The NTRC's decision about the submitted petition is final. In addition to the

⁴⁰ Broadcasting Act, Article 49

30 minutes mentioned 15 minutes are stipulated for questions and answers.

The bid of an applicant that has not entered an appearance at the session is not discussed.

After the competition proposals of the session participants are published, the NTRC stays the session in order to examine the competition proposals.

3. The NTRC selects the best organization on the 150th day after publishing information about the competition.

The selection of the winner is carried out taking into account:

- a) the predominance of programs produced in-house;
- b) the predominance of programs produced in Armenia;
- c) the technical and financial capacity of the applicant;
- d) the professional level of the staff.⁴¹

Financial capacity is assessed based on whether it is sufficient to implement the submitted plan.

The NTRC carries out an open points-based voting according to the order of discussing the application bids. Before the voting the participants can make announcements and make motions. The best organization is selected according to the results of the points-based voting. In case of one participant no voting is carried out.

The NTRC makes a decision on acknowledging the best organization as a winner and granting a license for broadcasting TV programs. In case other conditions are equal priority is given to the TV Company that has not violated the legislation on television in the process of its activities; has at least 3 years of experience in the sphere of producing and broadcasting TV programs. In case 1/5 of the frequencies of a certain range are not occupied, the NTRC may give priority to the TV Company that carries out complete re-broadcasting of foreign TV and radio programs. The application of the organization not recognized as the winner is considered rejected. Although Article 50 of the Broadcasting Act requires from the NTRC to

⁴¹ Id. Article 50

substantiate its decisions to grant or to refuse a license, the case examined above illustrates that “substantiation” in practice is understood as merely stating that the applicant has not been recognized as the best organization. Currently the applicants can rely on the judgment of the ECHR on Meltex LTD as well as other relevant case law of the Court because according to the Judicial Code of RA the Armenian Courts have to abide by the rules established by the case law of the Court.⁴² Unsuccessful applicants can also rely on Article 57 of the Law on Fundamentals of Administrative Activity and Administrative Process according to which an administrative act shall contain all the relevant factual and legal grounds for adopting it. It means that the NTRC has to give reasoning on why it has given priority to one of the bids over the others.

The copies of the decision of the NTRC shall be served on the participants within 10 days. Minutes about the results of the competition are drawn up in two copies on the following day of making the decision. The competition bid of the winning organization is attached to the minutes and is considered a licensing condition which means that the licensee has to strictly comply with it otherwise the license can be revoked. The session chairman and the winner of the competition sign the minutes. One of the copies of the minutes is given to the winner of the competition.⁴³

So, the only material alteration in the RA broadcasting regulatory framework after the last denial of a license to Meltex LTD was the adoption of the Law on the Fundamentals of Administrative Process and Administrative Action which can be considered a great change if its requirements as to the reasoning of administrative acts are implemented.

3. INTERNATIONAL BEST PRACTICE

The right to freedom of expression has a special scope and character, which are evidenced by the dual aspect of freedom of expression. As noted by the Inter American Court of Human Rights:

⁴² Judicial Code, Article 15

⁴³ Tendering rules, Sections 21-23

“It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.... In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.”⁴⁴

The state regulation of broadcasting should aim at ensuring the effective exercise of the right to freedom of expression in compliance with the international standards. The two basic principles that permeate the international standards of broadcast regulation are independence and pluralism. Those two principles are set out by the Council of Europe in a number of its recommendations⁴⁵ and were established by various UN bodies, by regional systems for the protection of human rights and by leading national courts, as well as in some cases, by established practice of democratic States.⁴⁶ This section will discuss the international standards of independence in broadcast regulation *vis a vis* the regulation in force in Armenia, as well as some aspects of the principles of administrative justice, which, pursuant to both national law and international standards must be ensured by the independent regulatory body and by the judiciary.

The international standard for the broadcasting regulation requires that an independent regulatory body oversee all licensing processes and decisions in the public interest. The independence here refers to the central idea that, while there is a need to regulate broadcasting, such regulation should not be subject to the control of political factions or commercial interests. This basic principle is expressed succinctly as: “All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments

⁴⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion, OC-5/85 of 13 November 1985, Series A, No. 5, para. 30-2.

⁴⁵ See, in particular, Committee of Ministers Recommendation Rec(2000)23; Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (*Adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies*)

⁴⁶ Submission to the Inter-American NTRC on Human Rights: International Standards on the Regulation of Broadcasting, “Article 19” Global Campaign for Freedom of expression, available at www.article19.org

process for members which is transparent, allows for public input and is not controlled by any particular political party.”⁴⁷

The founding and operation of an independent regulatory body is ensured in the Constitution of RA⁴⁸ as well as in the Broadcasting Act of RA and the Regulations Act of the NTRC. It should be noted that the current regulation in Armenia principally complies with the applicable international standards:

- the independence of the regulatory body is provided for specifically and explicitly in the legislation which establishes the body and also in the Constitution;
- there is a clear legislative statement of overall broadcast policy; and
- the powers and responsibilities of the regulatory body are clearly defined.

In addition, rules relating to membership, formal accountability to the public through a multi-party body, and funding arrangements principally comply with international standards.⁴⁹

However, the current regulation in Armenia, with respect to the independence of the regulatory body, does not comply with international standards in terms of participation of the public in the appointment of the members of the NTRC. The membership of the governing boards of these bodies is central to their independence and, in turn, the manner of appointing them is the key to this. Therefore, the appointment process should be open and transparent, involve the participation of civil society, public participation and consultation, and should not be controlled by any particular political party. Membership overall should be required to be reasonably representative of society as a whole.⁵⁰ In most Council of Europe member states the members of regulatory authorities are appointed by the parliament or by the head of state at the proposal of parliament. In some member states, in order to ensure that the membership

⁴⁷ Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, adopted in 2003. Available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf>

⁴⁸ Constitution of RA, Article 83.2

⁴⁹ See Broadcasting Act of RA, articles 37-46

⁵⁰ Id. 3, this particularly means that the process of the formation of the regulatory body should be conducted with close cooperation with the civil society representatives and with their participation through e. g. nominating or approving candidates to the membership to those bodies.

of the regulatory authority reflects the country's social and political diversity, part or all of the members are nominated by non-governmental groups, which are considered to be representative of society. Further, in a few member states, the law provides objective selection criteria for the appointment of members.⁵¹ Armenia also should consider the involvement of the non-governmental groups in this process because this seems to be the best way to ensure public participation.

The Armenian legal framework in this respect also fails to comply with international standards on the independence of the regulatory body in terms of the removal of its members. The international standard requires that only the appointing body should have the power to dismiss members of regulatory bodies.⁵² According to the RA Broadcasting Act, the RA President removes the members of the NTRC appointed by her/him. The other 4 members, elected by a simple majority vote in the RA National Assembly may be removed by the decision of the President of the RA National Assembly.⁵³ Thus, half of the members of the NTRC can be removed from office before the expiration of their terms by an official other than the one who elected them. This seems to be at variance with the established international standard.

As to the principles of administrative justice, the international standard provides that all decisions by the regulatory bodies should be subject to the principles of administrative due process and be accompanied by written reasons.⁵⁴ The function of the regulatory body is to allocate the limited number of TV bands available through licensing. In this highly competitive selection process a new type of administrative proceeding has emerged- the

⁵¹ Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (*Adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies*)

⁵² Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation, available at www.article19.org

⁵³ Broadcasting Act of RA, Article 45

⁵⁴ *Id.* 9

comparative hearing.⁵⁵ Thus, the process of the assessment of the bids by the NTRC as well as the principles applied to such decision-making warrants discussion.

Assessment of bids

The NTRC assesses bids for licenses by holding a points-based vote founded on the four criteria mentioned in the second section. The NTRC, however, holds a points-based vote during which its members assign a grade to the applicant's bid. Thus, each NTRC member assigns per grade to each bid. However, the justification of the final decision to grant or to deny a license to a given applicant would become much easier if NTRC members assessed the bid based on the four criteria provided for by the RA Broadcasting Act and assigned four grades instead of one. The NTRC members would show by those grades their assessment as to whether a given applicant meets the criteria set forth by law and would express their opinion with this regard by assigning points. The law in Bulgaria for instance provides with this respect that a bid shall be assessed on each of the criteria applied, e.g. transparency and structure of the [operator's] capital -0 to 5 points; experience in setting up TV programs- 0 to 10 points; degree of legality of the previous experience- 0 to 10 points etc.⁵⁶ This helps to enhance certainty in the assessment of the bids and helps the regulatory body to follow a logical process it must go through in reaching a decision. I am not clear about this paragraph.

Although the NTRC holds public sessions, it does not conduct public discussions, nor receives and discusses comments from the public as it is done e. g. in Canada. There are two types of public processes conducted by the Canadian Radio-television and Telecommunications NTRC (CRTC) to meet the accepted standard. The first one is called “public hearings”. Anyone interested in participating in a public hearing must submit written comments by the announced deadline date. Since public hearings often include an oral process where participants can express their views in person, interested parties should clearly

⁵⁵ **FCC Comparative Hearings**, *Harvard Law Review*, Vol. 64, No. 6 (Apr., 1951), pp. 947-958

⁵⁶ ECHR, CASE OF GLAS NADEZHDA EOOD AND ELENKOV v. BULGARIA, Application no. 14134/02, October 11, 2007

indicate in their written submission whether or not they want to be heard. If there is an oral process, teleconferencing facilities may be made available so that interested parties from all areas of the country might participate. The CRTC generally relies on the public hearing process when it deals with applications for new broadcasting licenses and when it is considering a major policy issue or amendments to its regulations. The second type of public processes is called “public notice”. There is no oral phase to a public notice process. It is strictly a written process. Interested parties must submit written comments by the announced deadline date. The CRTC uses the public notice process to deal with applications to renew or amend broadcasting licenses. It also uses this process to obtain submissions on broadcasting and telecommunication topics that do not require in-person discussions. The CRTC invites Canadians to participate in its public processes. One can find out about upcoming proceedings through: official CRTC announcements which are available from any CRTC office and the CRTC website (official announcements about broadcasting applications or issues also appear in the Canada Gazette); information sheets which the CRTC sends to target groups and, in rural communities, ensures they are posted in rural post offices; newspaper advertisements – in affected communities (the CRTC places advertisements in newspapers of general circulation as well as community papers). The CRTC emphasizes that public processes help evaluate applications for new broadcasting licenses, to renew licenses and make changes to existing ones; evaluate the performance of licensed broadcasters (i.e. radio and television stations), cable companies; update its policies.⁵⁷ So, Armenia may use the CRTC practice with regard to public processes as a model while developing its own.

Decision-making

As mentioned above, the international standard requires that all decisions taken and regulations adopted by regulatory authorities must be duly reasoned, in accordance with national law; open to review by the competent jurisdictions according to national law; and

⁵⁷ See the official website of Canadian Radio-television and Telecommunications NTRC www.crtc.gc.ca

made available to the public.⁵⁸ The policy behind this is the following: the law typifies situations, that is, it classifies individual situations under a certain type. However, two situations are never absolutely identical. It is impossible both theoretically and practically. By standardizing situations and providing one regulation, the law also standardizes and typifies justice, thus precluding the time-consuming quest for justice in every individual case.⁵⁹ However, justice – as the highest guideline of the contemporary legal system – is always individual. Approximate justice always means a departure from the ideal, absolute justice.⁶⁰ This means that the very advantage of the law – definition of typified situations and their equal regulation – forms also the disadvantage of the law. There are two ways to redress this departure from justice in each individual case and to make the law flexible. One way is to prescribe general clauses and to leave the interpretation to the implementing body. The second way is to grant those bodies discretionary powers. The discretionary power of an administrative institution or a court means that the law gives the applier the **choice** between **different legal consequences**.⁶¹ The NTRC, for instance, has the power to choose whether to grant or to deny a license to a given applicant.

The grant of a discretionary power, however, undermines the other fundamental principle of law, that of legal certainty. The principle of legal certainty provides that an individual must be able to find out the content of existing legal norms, so that he can plan his actions correspondingly.⁶² This situation must be redressed by the applying administrative body. The latter, in particular, is obliged to **substantiate** a decision directed outwardly, i.e. a decision aimed at a person (usually an administrative act), indicating the considerations that

⁵⁸ Committee of Ministers Recommendation Rec(2000)23

⁵⁹ Egils Levits, Judge of the Court of Justice of the European Communities, General Clauses and Discretionary Power of Administrative Institutions and Courts. Functions in Laws, Application in Individual Cases, Control in Higher Administrative Institutions and in Courts, para. 12

⁶⁰ Id. Para 16

⁶¹ Id. Para. 24

⁶² Tridimas T. *The General Principles of EC Law*. Oxford: Oxford University Press, 2000, p. 163

have led to the relevant outcome.⁶³ The administrative body must keep in mind that discretionary power is a legislative technique the application of which ensures a **higher level of justice in individual cases** and that it may use its discretionary power only for this purpose.⁶⁴

The Law of RA on the Fundamentals of Administrative Action and Administrative Process provides that written administrative act or administrative act confirmed in writing shall contain justification wherein all substantial factual and legal grounds for the issuance of the decision shall be mentioned. If the administrative act was issued as a result of the exercise of the administrative body's discretionary power, the administrative body must mention those considerations on the basis of which it has chosen a particular solution.⁶⁵ In the Soviet legal system, however, appropriate exercise of the discretionary power of administration did not form a part of legal education. Thus, in the most of the post-soviet countries the appropriate exercise of the discretionary power, along with a clear and convincing substantiation thereof still continues to be one of the most serious problems in public administration.⁶⁶

The Administrative Procedure Act (APA) of the United States of America provides that "...All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record, as well the appropriate rule, order, sanction, relief, or denial thereof."⁶⁷ The US courts divide findings into two groups: basic and ultimate. The distinction was explained in a federal case as follows: (1) From consideration of the evidence, a determination of facts of a basic or underlying nature must be reached; and (2) from these basic facts the ultimate facts, usually

⁶³ Article 41 of the *Charter of Fundamental Rights of the European Union* has risen to the level of human rights the individual's right to know the reasons for any decision aimed at them.

⁶⁴ Id. 15, para. 25

⁶⁵ Law of RA on the Fundamentals of Administrative Action and Administrative Process, Article 57

⁶⁶ Id. 15, para. 47

⁶⁷ The Federal APA, U. S.C. §557(c)

in the language of the statute, are to be inferred.⁶⁸ It is not enough for any agency to make only ultimate findings. “Findings of ultimate facts expressed in the language of the statute are not enough in the absence of findings to support them.”⁶⁹ The reason most mentioned by the US courts is the need for findings as a basis for effective judicial review. In Justice Cardozo's words “We must know what a decision means before the duty becomes ours to say whether it is right or wrong”.⁷⁰ Indeed, the findings requirement “is not a mere technicality but is an absolute necessity without which judicial review would be impossible.”⁷¹ In order for the courts to meaningfully review the findings of an administrative body, “those findings must be sufficiently detailed to include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.”⁷² Failure to do so renders the decision “arbitrary and capricious”. Disclosing the steps by which the ultimate findings were reached is an integral part of the logical process a tribunal must go through in reaching a decision.⁷³

In a landmark case⁷⁴ the US Court of Appeals for the District of Columbia set forth two requirements which are peculiarly applicable to FCC comparative hearings. First, findings must be made with respect to every important difference between the applicants. Second, the final conclusion must rest upon a composite consideration of the findings, for and against each applicant.⁷⁵ The overall policy behind this is the following: to prevent arbitrary and capricious decisions in a manner violative of due process; to provide explanation to the parties involved as to the basis for the discretion; to give guidance to parties similarly situated; and to provide a basis for judicial review by the courts.⁷⁶

The quick review of the international standards on broadcast regulation and on licensing of broadcasting in particular shows that the main requirements in this field concern

⁶⁸ See *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554 (D. C. Cir.)

⁶⁹ *Blue Cross v. Bell*, 607 P.2d 498

⁷⁰ *US v. Chicago*, 294 U. S. 499

⁷¹ *CF Industries v. PSC*, 599 S. W.2d 536

⁷² *Milne Truck Lines, Inc. v. Public Serv. Commn.*, 720 P.2d 1373

⁷³ *Administrative Law, A Casebook*, Schwartz B., Corrada R., Brown R., Aspen Publishers, 2006, p. 563

⁷⁴ *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D. C. Circuit 1949)

⁷⁵ See 40, at 957

⁷⁶ See 58

the independence of the regulatory body, public participation in the appointment process of those bodies, as well as in the assessment process of bids, and the reasoning of the decisions to grant or to deny a license. The next section will restate the problems disclosed in this respect in the Armenian legal framework and will propose some possible solutions to them.

4. Reform

The problems discovered and discussed in the preceding sections with regard to broadcasting regulations in Armenia are the following:

- (a) the RA Broadcasting Act does not provide for public participation in the appointment process of the NTRC members;
- (b) the NTRC members elected by the RA National Assembly may be removed before the expiry of the term of office by the decision of the President of the National Assembly;
- (c) while the Broadcasting Act lays down criteria for the evaluation of bids, it does not require to assess them based on each of those criteria;
- (d) the Broadcasting Act does not provide for public participation in the process of examination of bids;
- (e) the NTRC fails to duly substantiate its decisions.

Reform both in legislation and in practice is needed to address these problems and to bring the broadcasting (licensing) regulation in Armenia in line with the established international standards. The following are possible solutions to address these problems:

- (a) The RA National Assembly amends the RA Broadcasting act to make provision for the participation of the civil society representatives in the appointment and/or election process of the NTRC members by the RA President and the National Assembly. This should involve including a provision in the Broadcasting Act which would provide that the local NGOs operating e. g. for at least 5 years in the field of media, law, telecommunications, arts, sciences or other sectors shall nominate candidates for the membership in the NTRC.

Alternatively, the Broadcasting Act should provide that candidates must obtain a given number of recommendations from those NGOs in order to be eligible for candidacy to the appointment and/or election. In either case the Broadcasting Act should provide that the appointment process go through a public process either oral or documentary (through written comments) where the members of the public will be able to express their opinion on a given candidacy. The appointing or electing authority should on its part provide some feedback to those opinions and comments.

(b) The National Assembly amends the Broadcasting Act to abolish the rule prescribing that members of the NTRC may be removed from office by the decision of the President of the RA National Assembly. The Act should vest this power in the National Assembly itself.

(c) The National Assembly amends the Broadcasting Act to provide that the NTRC conducts a points-based vote to evaluate a bid on each of the criteria laid down by the Broadcasting Act. This could be done as follows:

- predominance of programs produced in-house – 0 to 5 points
- predominance of programs produced in Armenia- 0 to 5 points
- technical and financial capacity of the applicant 0 to 10 points
- professional level of the staff- 0 to 10 points.

(d) The National Assembly amends the Broadcasting Act to make provision for public processes in the process of examination of the bids. The Canadian practice presented above may serve as a possible model for defining a procedure for conducting such public processes. However, the National Assembly should prescribe that the NTRC shall give reasons in its decisions on why it took into account given opinions and/comments and why it rejected others.

(e) As already mentioned the Law of RA on the Fundamentals of Administrative Action and Administrative Process stipulates that any administrative act, such as a decision of the NTRC to deny a license, shall contain justification where all substantial factual and legal grounds for

the issuance of the decision shall be mentioned. However, in order to assimilate this legislative measure into current legal practices the analysis of discretionary power of administrative institution in the process of legal education, as well as vocational training and re-training of public officials of administrative agencies and of judges deserves more careful attention. Here the role of the judiciary is especially important as a powerful mechanism of review over the executive. Therefore, an established practice of remanding the arbitrary decisions of administrative agencies should be developed whenever they fail to duly substantiate the exercise of discretionary power in a certain manner.

In its established case-law the ECHR has reiterated that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.”⁷⁷ Armenia became a member of the so-called European family in 2001 and has undertaken *inter alia* a commitment to build a democratic society where the basic human rights and freedoms are respected and ensured. The RA government special committee- which has a mandate of investigating cases the RA government loses in the ECHR in order to discover those public officials whose mistakes resulted in an ECHR judgment against Armenia and to reimburse the loss caused to the state budget- concluded in the Meltex case that there was no public official who made a mistake but rather that the Meltex case was a consequence of an erroneous practice. This practice caused a damage of 30,000 euro to the pocket of RA citizens and a continuous violation (6 year) of the right to freedom of expression of a company which. Thus, it is now really time for changes both in law and in practice and not only because of the ECHR judgment or forthcoming requirements by the Committee of Ministers to provide remedies of general and individual nature but because Armenia itself made this choice 7 years ago.

⁷⁷ See e. g. *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2329-30, § 46;

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