

Broadcast licensing law: experience in Central Asia and South Caucasus

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The licensing of broadcasters is almost as old as broadcasting itself. The electromagnetic spectrum is limited in nature and cannot accommodate everyone who wants to get onto the airwaves. So by the 1920s there was a need for national and international bodies to take charge of allocating frequencies. Correctly assuming that the airwaves are as much a public and national asset as the land, natural resources, rivers and littoral waters, states decided that they were entitled on the public's behalf to set up bodies to distribute frequencies within the radiomagnetic spectrum and to oversee their use. Licensing frequencies has become a distinct form of media control, and it seems that rubber stamps for publishers have been replaced with licences for broadcasters. This might be presented as a move by officialdom to make up for the chance it missed in the late 19th century to control the print media, which has made its break for freedom.

In our once common country the practice of licensing broadcasters began on 14 July 1990, when the Decree of President Mikhail Gorbachev "On democratisation and development of television and radio broadcasting in the USSR" was issued. It gave Councils of People's Deputies (or Soviets) at all levels and public organizations the right to open television and radio facilities and studios and formulated the need for legislation on television and radio broadcasting. This decree and the government resolution that followed it provided the legal basis for the country's first non-state television and radio programmes.

As with the introduction of media registration by the USSR statute "On the press and other mass media" at about the same time, licensing television and radio could be viewed as a curtailment of the freedom of mass information because not all applications to broadcast are granted. However, given the letter and spirit of international agreements¹ and having studied how broadcasters around the world operate in practice, our opinion is that in fact the opposite applies - in a democratic state licensing per se does not obstruct this freedom and, moreover, can and should promote it.

¹ See, e.g., Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector.

It is in the public interest to allocate frequencies to those who offer the optimum service. And licensing can also ensure that broadcasters comply with defined social objectives, for example to protect minors and guarantee diversity in politics and information. So there is a need for the sector to be properly regulated, to not only uphold this freedom but also balance it against other legitimate rights and interests.

It is within this context that we shall examine the licensing process in the Central Asian and South Caucasus states. Broadcast licensing generally has a dual nature in these countries, in that nearly everywhere two licences must be obtained: one (to use a frequency for broadcasting) from the state body that administers communications (usually the communications ministry), and another (to actually disseminate television and radio programmes) from the licensing authority.

The communications (sometimes called the "technical") licence is everywhere secondary to the broadcasting licence and on receipt of the latter is issued more or less automatically, although it should be noted that some states are visibly tightening this process as well.

The situation in Armenia and Tajikistan, where the broadcasting laws require a third licence, to produce television and radio programmes, is surely one of diminishing freedom of mass information .

But this aside, the licensing of broadcasting itself, of the actual dissemination of television and radio programming, remains the primary factor in regulating the audiovisual media across the post-Soviet landscape. In most of the countries in this study (Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, and Tajikistan), licensing is governed by the statutes on television and radio broadcasting. Armenia even defines the aims and composition of their regulatory and licensing authorities in the national constitution. Other countries in this study define the procedure through presidential decrees and government resolutions.

Formation and functions of the licensing authority. We shall now look at how the national licensing authorities are constituted and on what principles they operate. We need to establish the extent to which they are governed by the public interest and freedom of information as they allocate frequencies and oversee adherence to licence terms. We shall study the procedure in which these authorities are formed; the requirements placed on their members, their terms of office and security of tenure; their powers; how open is their work; how they are funded; and how accountable they are to the public.

Georgia's communications and post statute of 1999 set up a National Regulatory Commission for Communications and Post, which oversees and

licenses the broadcasting sector. In theory, the Commission is a public entity and a standing and independent state body not subordinate to any state authority. Yet all three of its members are appointed to their six-year terms of office by the president.

The Commission's members and their close relatives may not have any direct or indirect proprietary or financial interest in a licence holder or be in receipt of any income or other benefit from an existing or applicant licence holder, or hold any position in any commercial undertaking of a licence holder.

The Commission's primary functions are:

1. to determine the conditions for licensing and also, in the procedure required by law, to issue, renew, suspend and revoke licences;
2. to certificate and standardise means of communication;
3. to determine and allocate the radio frequency spectrum in conjunction with the Transport and Communications Ministry and other interested agencies;
4. to allocate radio frequencies;
5. to promote a competitive environment;
6. to rule within its remit on disputes between licence holders and also between them and consumers;
7. to oversee compliance with communications licences and impose penalties as required by law for non-compliance.

The Commission compiles a yearly report on its activities, which it submits to the president, parliament and Transport and Communications Ministry and places in the public domain. It is funded from fees for the issue of licences.

Azerbaijan's licensing authority was set up in 2003, a year following the enactment of a broadcasting statute and approval by the president of the standing orders of the National Radio and Television Council (NRTC).² The president appoints its members, who may not be prematurely removed, for a term of office of two, four or six years. NRTC members may not be in the employ of the executive authorities or judiciary or engage in any paid activities apart from teaching, creative work or religion.

The NRTC's remit is to:

- prepare and implement an integrated development blueprint for television and radio;

² The statute does not speak on the National Council in a direct way, it mentions a “corresponding state authority” that was later established and staffed by the decree of the president of Azerbaijan.

- define technology and quality standards and norms for broadcasting;
- hold competitions for and issue broadcasting licences;
- oversee the use of broadcasting technologies and rational use of frequencies; ensure post-watershed transmission of programmes potentially harmful or disturbing to minors; prevent promotion of terrorism, gratuitous violence, national or racial or religious discrimination; and oversee distribution of advertising and compliance with broadcasting law.

Among the members of the NRTC's first convocation were an employee at the state broadcaster's finance department, a former director of the *Azerkniga* publishing amalgamation, an employee of the newspaper *Azerbaijan*, a lawyer from the *Ruh* public Committee for Protection of Journalists, and a history teacher from Baku's Slavonic University. This lineup of the NRTC elected the chairman and his deputy, and there was no particular surprise when the chairman for a six-year term turned out to be the head of the socio-political department at the president's executive office.

The pro-government press at the time claimed that "yet another institution of a democratic society" had been established. Newspapers reported that "in order to safeguard the NRTC's independence, its members have been given a number of important guarantees. For example, they may not be removed from office until expiry of their term ... Despite being funded by the state, the NRTC is independent in its work."³ Opposition journalists, however, pointed out that "when the draft broadcasting statute was being debated at the National Assembly, doubts were cast on the Council's ability to be independent. In the first draft, members would be appointed by the president in consultation with parliament. It had been expected that they would be nominated by public organisations and other bodies after broad debate of the candidates, but the president's office insisted that the relevant clauses be removed. This means that it has become, completely and in its entirety, a means for the presidency to control television and radio. Objections against this were sent to a variety of international organisations. Dismay about the new statute was voiced by Council of Europe Secretary General Walter Schwimmer, OSCE Representative on Freedom of the Media Freimut Duve and numerous nongovernmental organisations engaged in this field. Unfortunately, the issue remained unresolved and President Heydar Aliyev had his way. By getting their hands on the Council, the authorities can direct the flow of information as they wish. And if the state of affairs in television

³ *Создан Национальный совет телевидения и радио // Наш век (Баку) 24.01.2003.*
Source: <http://nashvek.media-az.com/56/news.html>

and radio remains as it is, this could very seriously hamper the progress of democracy, pluralism and freedom of speech and the media. It will end in the authorities completely monopolising politics and shutting their political rivals out of the media.”⁴

Armenia's National Commission on Television and Radio is an independent state body whose activities are governed primarily by laws on broadcasting and its own rules of procedure. It comprises ten members, who are in equal parts appointed by the president and parliament for six-year terms and elect their chairman and his deputy from among themselves. Members have to be citizens of Armenia with substantial experience of journalism, broadcasting, technology, culture, the arts, science or law, be of higher education and have a command of the Armenian language. Places on the Commission may not be taken by members of political parties' governing bodies, public service or commercial broadcasting executives or anyone who has a contractual relationship with a broadcaster or is a founder and (or) owner or co-owner (shareholder or investor) of a broadcaster. The chairman and his deputy may not combine their offices with other paid work apart from teaching, scholarly or creative.

The Commission's remit extends only to licensing and overseeing commercial broadcasters:

- it allocates frequencies and issues licences;
- it monitors programme-making and technologies for compliance with existing standards and licence terms;
- it can suspend a broadcaster pending a court ruling on breach of the broadcasting statute;
- it can revoke a licence in a range of circumstances prescribed by the broadcasting statute.

The National Council is funded by the state, and reports annually on its activities and finances to the National Assembly. It also publishes these reports in the press.

In the **Central Asia** states licensing is carried out by a governmental body (usually advised by a commission at the relevant ministry) or by a government cross-departmental commission. A typical example of the latter is Uzbekistan, where the "Interdepartmental Coordinating Commission for the improvement and increasing the effectiveness of information activities and data transmission at the Cabinet of Ministers of the Republic of

⁴ *Сабиргъзы Ж. О новом органе надзора над телерадиоинформацией (Интервью с Директором Института прав средств массовой информации Рашидом Гаджили) // Новое время (Баку), 25 января 2003 г.*

Uzbekistan" comprises representatives of the Communications and Information Agency, Interior Ministry, National Security Council and Press Agency (all of them government bodies), plus a single journalist.⁵

These authorities have a variety of names but their essence remains the same, in that the members of the body that chooses the winning bidders for licences are appointed by the government. Their terms of office and the criteria for their selection, appointment and removal are not defined and the criteria for awarding licences are vague, their work is not transparent and public, they are funded by the state, and they are not required to - and often do not - account for themselves to the public or parliament.

The licensing authorities in all the countries of the region issue licences and oversee broadcasters' observance of the terms of their licences and the law. In many countries, they also play a role in formulating the national policy and standards for broadcasting, represent their country internationally,⁶ examine complaints including from the viewing and listening public, and so forth.

If broadcasters are to be licensed and the airwaves monitored in the interests of all society, then it is important that the authority doing this should be independent from the state and formed in a way that takes account of public opinion.

Licensing criteria and procedures. The criteria that a licensing authority applies as it chooses the winning bids in a competitive process are an important indication of whether the interests of society and freedom of mass information are being served.

The statutes governing these authorities vary in terms of the quantity and precision of the criteria. In **Azerbaijan** the terms of a competition are being drawn up "the interests of viewers, listeners and the state should be taken into account", and in **Kazakhstan** the Rules for competition for terrestrial broadcasting rights of 2002 favour "the best creative, technological and financial proposals".

In **Armenia**, when the National Commission awards licences it should take into account:

1. the priority given to programming made in-house;
2. the priority given to programming made in Armenia;
3. the applicant's technological and financial resources;
4. the professional training of the bidder's personnel.

⁵ *Media Sustainability Index 2004. The Development of Sustainable Independent Media in Europe and Eurasia.* – Washington, 2005. P. 226, 240, 254, 268.

⁶ E.g., licensing body of Georgia joined European Platform for Regulating Authorities (EPRA).

In **Uzbekistan**, the successful applicant is that which offers the best creative, technological and business proposals that comply with media and communications legislation, the licence terms and also the conditions laid down in the Regulations on the Licensing of Telecommunications. Bids should be evaluated in the light of:

- a) the amount of own programming to be broadcast, transmission times (daily, 24-hour), the ratio of languages within output, planned amount of airtime in the state language;
- b) the variety of methods and means of transmitting information (teletext, language dubbing of soundtracks, etc);
- c) the use of modern studio and transmission technologies;
- d) commitment to make and disseminate (transmit) television and radio programmes in high-quality sound and picture definition;
- e) commitment to extend broadcasting to remote areas;
- f) the economic technicalities (sources of funding and their reliability, revenues and spending);
- g) the target audience for the proposed programming and the ratio of genres;
- h) the level of professional training of journalistic and technical personnel;
- i) the ratio between own production and rebroadcasts;
- j) an applicant's possession of an existing broadcasting network.

An important provision is that if two or more bidders in a competitive process submit proposals that equally meet requirements, then preference goes to the one offering the most money for the licence.

In **Kyrgyzstan**, the licensing body considers the amount of an applicant's own programming, transmission timing (daily, 24-hour), opportunities for carrying additional information, its transmission technologies and equipment and how they are to be used, commitment to extend broadcasting to remote areas; possession of an existing broadcasting network, economic (financial) resources, and the level of professional training of journalistic and technical personnel.

The foregoing shows that as a rule the criteria by no means always have a clear, unambiguous and detailed definition in regulatory instruments. This opens the way for subjectivity and for political or economic pressure on the licensing body.

If a licensing authority is to be independent, it should conduct its work transparently. Open meetings with records available to the public and (or) journalists are a central feature of society's control over the decisions taken by such an important body. In Armenia and Georgia the law requires the

licensing body to convene in public, although they may be held behind closed doors to avoid disclosure of information deemed in law to be secret. In addition, in Georgia rulings and resolutions – including those reached at closed sessions – should be published in the official publication. All resolutions, decisions, instructions, records and other documents of the Commission should be open to perusal by the public.

The legislation of other countries makes no provision for transparency. The maximum degree of openness here is the opportunity for licence applicants or their representatives to be present during evaluation of bids in a competition.

Duration of licences. Nowhere in the world is the right to use a given frequency for television or radio (or indeed other purposes) granted indefinitely. The existing, limited, electromagnetic spectrum means that not everyone who wants to put their programmes on the air can, either now or in the future. Accordingly, and given that radio frequencies use the airspace that belongs to the people (or the state), the rights to operate on them are temporary.

Apart from the criteria for choosing who should have frequencies, overseeing how they use their right to do so, and ensuring independence for the licensing body, we believe that the *duration* of the licence and the conditions for its renewal are also significant.

A short licence not only hampers a broadcaster from recouping its initial investment but also, if there is uncertainty over its extension or renewal, makes that broadcaster excessively dependent on the licensing body. Bearing in mind that the licensing bodies in most post-Soviet countries are dependent on the authorities, that the licensing criteria are vague and that the law gives no preference to existing broadcasters, a short licence leads to commercial broadcasters becoming dependent on the ruling circles' political considerations.

Short licences are detrimental not only to broadcasters' business interests but also, and more importantly, to the development of freedom of mass information. This is not only because of the dependence, just mentioned, of broadcasters on the state. Long-term planning and heavy investment in making and buying programmes creates a stable relationship with the viewing public. To maintain that relationship of trust, the broadcaster strives to meet demand as best it can and primarily by developing information and ideological diversity and highly professional journalism.

If we compare licence durations, we see that the longest ones for national broadcasters are in Georgia. They are usually issued for between

three and seven years, and in some countries for longer if heavy investment is required in, for example, satellite broadcasting.

It is not surprising, therefore, that in those countries where it will be difficult to remedy uncertainties in the licensing procedure, the industry is pushing for existing licences to at least be extended – but without any great success.

From the above, we can say that licence duration, which would seem to be a technical issue, is actually closely linked to the development of freedom of mass information in the broadcasting sector (see Table).

Table. Licence durations in the post-Soviet states

Country	Duration of television broadcasting licence
Azerbaijan	Six years.
Armenia	Seven years for terrestrial TV and radio, ten for cable and wire.
Georgia	Ten years.
Kazakhstan	Three years.
Kyrgyzstan	From three to seven years.
Tajikistan	Five years.
Turkmenistan	Not more than five years.
Uzbekistan	Five years, for cable TV – one year.

The duration of a licence would not of course be so important were its renewal not tied up with excessive or vague requirements.

A study of the highly varied rules for renewal in the post-Soviet states shows the following results, in rising order of strictness.

Azerbaijan will not renew a licence if a broadcaster has committed *multiple* breaches of the law and despite warnings from the appropriate state body failed to remedy them, or if it has had multiple fines or other penalties imposed.

A licence will not be automatically renewed in Georgia if the holder has been fined for breaking the law, or if it has failed to comply with a ruling by the licensing authority, or has broken the terms of the licence.

In Tajikistan, a broadcaster “that has not committed offences in its activities” has a “preferential right” to licence renewal. When a licence is up for renewal, consumer opinion on the quality of programming and also public needs are taken into account.

In Uzbekistan, licences are renewed in the same procedure as the initial application.

Armenia does not renew licences at all, which is one of the most vulnerable aspects of its national broadcasting legislation.

From this comparison we conclude that in most countries a broadcaster must avoid breaking the law and the terms of its licence (which usually require it not to break the law anyway) in order to automatically renew that licence. But the procedure for recording offences is by no means always clearly laid down. In addition, some countries rule out renewal in the event of breaches of licensing authority rulings or even of a code of ethics.

The way in which the licensing authorities operate is bound to leave many unhappy at the choice of successful bidders in competitions. But if we examine the complaints, we discover a definite trend – a reduction in political and news broadcasting in favour of entertainment. In Georgia, local observers speak of the National Regulatory Commission for Communications and Post applying sanctions selectively, and of dual standards.⁷ Numerous licence refusals have been recorded in Tajikistan, including under the pretext that “commercial radio is an invention of world imperialism”.⁸

But the greatest criticism has been directed at Armenia’s National Commission on Television and Radio, especially for its treatment of the A1+ television station. The only channel available nationwide and in the capital and not influenced by the authorities (according to the Yerevan Press Club), it was first refused a licence in a competition held on 2 April 2002. This led to protests that the rules for choosing the winner had been broken, from the Armenian Union of Journalists, the Yerevan Press Club, the Internews non-state organisation and the US embassy. The Council of Europe called on the authorities to urgently amend the broadcasting laws in line with its

⁷ *Ibid.* P. 144.

⁸ *Ибодов Дж.* Правовые основы и практика лицензирования телерадиовещания в республике Таджикистан. Report of the Centre of Journalism in Extreme Situations of the Union of Journalists of Russia of 16.09.2003 (www.cjes.ru). It is hard to label these refusals as groundless since the Regulation on licensing of broadcasting approved by a decree of the Committee on television and radio broadcasting at the Government of Tajikistan (No. 91 of 25 May 2001) allows for refusals in cases when “there is no need (*sic!*) in a particular broadcasting programme, when it does not reflect national interests of the country, or when the Committee finds professional deficiency and incompetence of its founders, or necessity in it in a particular region”.

recommendations.⁹ The criticism grew so loud that the Foreign Ministry stepped in to defend the licensing authority, saying: “We feel it necessary to point out that the competition for frequency 37, as for other frequencies, was called in line with the Statute ‘On television and radio’, which was drafted with input from all television companies, passed by an overwhelming majority in the National Assembly including all influential political forces in the country, and subsequently was the subject of a favourable report by the appropriate department of the Council of Europe.”¹⁰

One might accept this argument, but in the years since then A1+ has bid in twelve competitions including one for digital TV spots and every time been turned down.

So we see that if a licensing authority is not autonomous and if it is dependent on the president or the ruling majority in parliament or the government, then the radio frequency spectrum is not put to effective use from the public’s standpoint and dual standards are applied in respect of loyal or independent broadcasters.

*(based on a chapter from the author’s book **Post-Soviet Perspective on Censorship and Freedom of the Media**. Moscow, UNESCO: 2007)*

⁹ See: Resolution of the Parliamentary Assembly of the Council of Europe 1304 (2002) Honouring of obligations and commitments by Armenia:

<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta02/eres1304.htm>

¹⁰ Еженедельный бюллетень Ереванского пресс-клуба за 30 марта - 5 апреля 2002 г. и за 10-16 февраля 2006 г. (находится в Интернете на сайте www.yrc.am).