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

COMMENTS ON THE DRAFT LAW OF THE REPUBLIC OF ARMENIA ON BROADCASTING

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2009

Having analysed the set of bills of the Republic of Armenia on broadcasting in the context of the Constitution and existing legislation of the Republic of Armenia, as well as international norms on freedom of information and media, the expert commissioned by the Office of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) has come to the following conclusion.

BRIEF SUMMARY OF COMMENTS AND RECOMMENDATIONS

The right to freedom of expression is connected with the right to freedom of the media, guaranteed by a variety of documents of the Organization for Security and Co-operation in Europe (OSCE), with which Armenia has expressed its agreement. The primary goal of regulating the activities of the media is to promote the development of independent and pluralistic media, thereby ensuring the population's right to receive information from diverse sources.

There is a positive obligation of the UN member states to promote freedom of the media, which consists in the need to develop pluralism within the media and ensure equal access for all to them.

While the right to freedom of the media is not absolute, and in a few specific circumstances it may be restricted, by virtue of the fundamental nature of this right, however, the restrictions must be precise and specifically determined in accordance with the principles of a rule-of-law state. This also refers to the quality of the law in question.

Any state authorities empowered to regulate the media must be completely independent of the government and protected against interference on the part of political and business circles.

Public service broadcasting is one of the basic tools of democracies indispensable in ensuring the freedom and transparency of elections, in fighting against hate speech, and in protecting the minority cultures of a country by offering objective news reporting and by broadcasting high quality programmes.

The draft broadcasting law under this analysis consists of four bills to be read by the National Assembly of the Republic of Armenia. The aim of these bills as stated in the Justification is to ensure "independence of the bodies that regulate public and private media (National Commission of Television and Radio and Public Television and Radio Council)".

The bills present a set of numerous amendments and additions to the existing statutes, some related to the changes of the formation and activity of the National Commission of Television and Radio and of the Public Television and Radio Council, but many others making corrections and clarifications that are not necessarily connected to the declared aims of the bills.

Quite a number of amendments bear declaratory character. There are repetitions that create confusion. There are several vague norms that will probably lead to conflicts among enforcing authorities, as well as norms that are hard to implement.

The bills contain some positive changes into the current broadcasting law of Armenia. These are new criteria on which the NTRC is to base its choice in granting a broadcasting licence; new norms regarding sponsorship of television and radio programmes, as well as to ensure transparency of

broadcasters; new procedure for the National Commission on Television and Radio (NTRC) to rebuke broadcasters before suspending their activities, etc.

There are substantial flaws in the amendments of the law on broadcasting that regard selection and appointment of the members of the Council for Public Television and Radio. For example, according to the proposed amendments, candidates to the Council will not ensure ideological and political pluralism that is the essence of any public broadcasting. By definition they do not represent political and ideological minorities, although are supposed to ensure pluralism (according to their oath). They do not represent pluralistic views by the method of appointment (by the President).

The selection process of the candidates to the NTRC has a basic flaw in that none of the tests taken by candidates and requirements subscribed to them demand their integrity, their high moral standing, or the understanding of their mission.

The proposed scheme of financing public broadcasting and regulatory bodies in the sector provides for the majority in the parliament to sanction or support them at ease, thus rendering them dependent on such majority. In this way, instead of following public duty, the "independent public broadcaster" and "independent regulator" will exercise self-censorship.

The bill in a number of articles puts public broadcasting under control of the National Commission on Television and Radio. It makes the broadcaster dependent on two overseeing bodies – the Council and the Commission, appointed (elected) differently and as a result possibly issuing different or even conflicting orders. There is not enough clear division of their competence in regards to public broadcasting thus leading to further conflicts over boundaries of such a division.

The bills ignore an acute problem of the moratorium introduced in 2008 by amendments to the law on broadcasting already adopted by the National Assembly.

Having analysed the draft law on broadcasting the expert comes to the following main recommendations:

- *Eliminate changes of the bills that violate international standards and national legislation of Armenia regarding exceptions to freedom of information and media. Substantiate new norms declaring democracy and pluralism with a practical mechanism serving specifically and directly to these principles.*

- *Whenever necessary clarify positive changes of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" to make them uniform and unambiguous in their implementation.*

- *Change the system of selecting and appointing members of the Council for Public Television and Radio and members of the National Commission on Television and Radio to provide for a possibility of a pluralistic public broadcasting and freedom of expression and information in a civil society.*

- *Change the system of financing Public Television and Radio and that of the National Commission on Television and Radio from the state budget to provide for a possibility of a pluralistic public broadcasting and freedom of expression and information in a civil society. Provide for automatic guarantee of their financial independence from the state.*

- *Remove Public Television and Radio from the competence of the National Commission on Television and Radio, and place it under the sole authority of the Council for Public Television and Radio.*

- *Review the adopted amendments that introduce a moratorium on issuing new broadcasting licenses until the planned digital switchover, scheduled to start in 2010.*

In a number of its resolutions, the Parliamentary Assembly of the Council of Europe (PACE) has called upon the authorities of Armenia to guarantee the independence from any political interest of both the National Commission on Television and Radio and the Council of Public Television and Radio and take steps to ensure freedom and pluralism of the public television and radio.

The Office of the OSCE Representative on Freedom of the Media has consistently supported the preparation of a more liberal law on broadcasting in Armenia, which would envisage participation by non-governmental organizations in its drafting and would facilitate promotion of freedom of expression and freedom of the media in Armenia.

The proposed version of the Draft Law, however, raises doubts that PACE resolutions, as well as the numerous appeals of the OSCE Representative on Freedom of the Media concerning broadcasting legislation, have been adequately reflected in the draft law proposed for discussion. Besides, all recommendations on cancelling tenders for broadcasting frequencies until 20 July 2010 have been completely ignored.

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I. INTERNATIONAL AND CONSTITUTIONAL STANDARDS IN THE SPHERE OF FREEDOM OF EXPRESSION AND FREEDOM OF THE BROADCAST MEDIA

1.1. The significance of freedom of expression and the media

Freedom of expression has long been recognized as one of the most essential human rights. It is of fundamental significance for the functioning of democracy, is a necessary condition for exercising other rights and itself constitutes an integral component of human dignity.

The Republic of Armenia is a member of the United Nations. The Universal Declaration of Human Rights (UDHR), the basic document on human rights, adopted by the General Assembly of the United Nations Organization in 1948, protects freedom of expression in the following wording of Article 19:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*[1]

The Republic of Armenia is a member of the Organization for Security and Co-operation in Europe (OSCE). The Helsinki Final Act declares that "participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion. They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development." The Final Act also states that "participating States will act in conformity with the purposes and principles … of the Universal Declaration of Human Rights."[2]

The International Covenant on Civil and Political Rights (ICCPR)[3] – a United Nations treaty legally binding on and ratified by the Republic of Armenia – guarantees and clarifies the right to freedom of expression in the text of its Article 19:

> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

[1] Resolution 217A (III) of the General Assembly of the United Nations, adopted on 10 December 1948. A/64, page 39-42. See the full official text in English at: http://www.un.org/Overview/rights.html.
[2] Clause VII of the Helsinki Final Act.
[3] The International Covenant on Civil and Political Rights. Adopted by resolution 2200 A (XXI) of the General Assembly dated 16 December 1966. Came into effect on 23 March 1976. See the full official text in English on the website of the UN Office of the High Commissioner for Human Rights at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

The Human Rights Committee, meeting in New York and Geneva, exercises control over due observance of the International Covenant on Civil and Political Rights. It consists of experts and is empowered to consider applications from individuals claiming to have suffered violations of the rights set forth in the Covenant, including the rights envisaged by Article 19. This Committee has determined that:

> *The right to freedom of expression is of paramount importance in any democratic society.*[4]

Declarations of this type abound in precedent-setting court rulings on human rights throughout the world. The European Court of Human Rights, for instance, has stressed that "freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man."[5] As noted in this provision, freedom of expression is of fundamental significance both in itself and as the basis for all other human rights. True democracy is possible only in societies where a free flow of information and ideas is permitted and guaranteed. In addition, freedom of expression is crucial for identifying and disclosing human rights violations and for combating them.

The right to freedom of expression is connected with the right to **freedom of the media**. Freedom of the media is guaranteed by a variety of documents of the Organization for Security and Co-operation in Europe (OSCE), with which Armenia has expressed its agreement, such as the Helsinki Final Act of the Conference on Security and Co-operation in Europe[6], the Final Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe[7], the Charter of Paris agreed in 1990[8], the closing document "Towards a Genuine Partnership in a New Era" of the CSCE Summit in Budapest in 1994,[9] and the Declaration of the OSCE Summit in Istanbul.[10]

The Istanbul Charter for European Security of the OSCE states, in particular:

> *We reaffirm the importance of independent media and free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State*

[4] Case of Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No. 628/1995, para. 10.3.
[5] Case of Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=4647705&skin=hudoc-en.
[6] The Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August, 1975. See in English parts concerning freedom of expression, free flow of information, freedom of the media on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.
[7] Copenhagen session of the CSCE Conference on the Human Dimension, June 1990. See, in particular, clauses 9.1 and 10.1 in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.
[8] Charter of Paris for a New Europe, CSCE Summit, November 1990. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.
[9] Towards a Genuine Partnership in a New Era. OSCE Summit, Budapest, 1994, clauses 36–38. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.
[10] Declaration of the Istanbul OSCE Summit, 1999, clause 27. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.

flow of information, which we consider to be an essential component of any democratic, free and open society.[11]

The Moscow meeting of the CSCE Conference on the Human Dimension unambiguously agreed that "independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms" and that any restrictions on the right to freedom of expression should be established "in accordance with international standards."[12]

A guarantee of freedom of expression is particularly important with respect to the media. This postulate has also been expressed in rulings of **human rights courts**. In this connection, it should be noted that the three regional human rights protection systems – the American Convention on Human Rights,[13] the European Convention on Human Rights (ECHR)[14] and the African Charter on Human and People's Rights[15] – have reflected global recognition of the significance of freedom of the media and of freedom of expression as the vital human rights. They do contain generally recognized principles of international law. By virtue of this, they serve as important comparable examples of the content and application of the right to freedom of the media and of expression and can be used in interpreting, in particular, Article 19 of the ICCPR, which is binding on the Republic of Armenia.

The European Court of Human Rights always stresses the "pre-eminent role of the press in a State governed by the rule of law."[16] In particular, it has noted:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[17]

Moreover, free media, as the United Nations Human Rights Committee has stressed, play a substantial role in the political process:

Free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and

[11] Clause 26 of the Istanbul Summit Declaration.
[12] The Moscow Meeting of the CSCE Conference on the Human Dimension (October 1991), clause 26. See in English on the website of the OSCE Representative on Freedom of the Media at: http://www.osce.org/publications/rfm/2003/10/12253_108_en.pdf.
[13] Adopted on 22 November 1969, came into effect on 18 July 1978.
[14] Adopted on 4 November 1950, came into effect on 3 September 1953.
[15] Adopted on 26 June 1981, came into effect on 21 October 1986.
[16] Case of Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, para. 63. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=thorgeirson&sessionid=4691853&skin=hudoc-en.
[17] Case of Castells v. Spain, 24 April 1992, Application No. 11798/85, para. 43. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=castells&sessionid=4648759&skin=hudoc-en.

other media able to comment on public issues without censorship or restraint and to inform public opinion.[18]

In its turn, the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[19]

The European Court of Human Rights has also stated that it is incumbent on the media to disseminate information and ideas concerning all spheres of public interest:

Although the press should not cross the boundaries set for [protection of the interests defined in Article 10(2) of the European Convention on Human Rights[20]]... *it is, nevertheless, assigned the mission of disseminating information and ideas of public interest; if the press is set the task of disseminating such information and ideas, the public, for its part, has the right to receive them. Otherwise, the press would be unable to fulfill its function as society's watchdog."*[21]

These provisions are reflected in Article 27 and other parts of the **Constitution of the Republic of Armenia** (of 05.07.1995, with amendments).[22]

Everyone shall have the right to freely express his/her opinion. No one shall be forced to recede or change his/her opinion.

Everyone shall have the right to freedom of expression including freedom to search for, receive and impart information and ideas by any means of information regardless of the state frontiers.

Freedom of mass media and other means of mass information shall be guaranteed.

The state shall guarantee the existence and activities of an independent and public radio and television service offering a variety of informational, cultural and entertaining programmes.

In addition, Article 3 of the Constitution stipulates that,

The human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value.

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[18] General comment No. 25 of the United Nations Organization Human Rights Committee, 12 July 1996.
[19] Recommendation "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. 34.
[20] See its text below.
[21] See the case of Castells v. Spain, note 25, para. 43; The Observer and Guardian v. UK, 26 November 1991, Application No. 13585/88, para. 59; and The Sunday Times v. UK (II), 26 November 1991, Application No. 13166/87, para. 65. The texts of these judgments can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=castells&sessionid=4648759&skin=hudoc-en, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=observer&sessionid=4648759&skin=hudoc-en and http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=sunday%20%7C%20times&sessionid=4648759&skin=hudoc-en, respectively.
[22] See http://www.parliament.am/parliament.php?id=constitution&lang=eng#1.

The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law.

The state shall be limited by fundamental human and civil rights as directly applicable.

For the purpose of protecting the right to freedom of expression, it is of vital importance for the media to be able to carry out their activities **independently of state control**. This enables them to function as "society's watchdog" and provides the public with access to a broad range of views, especially on matters affecting public interests. The primary goal of regulating the activities of the media must, therefore, be to promote the development of independent and pluralistic media, thereby ensuring the population's right to receive information from diverse sources.

Article 2 of the ICCPR makes the state responsible for "adopting such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." This means that it is required of states not only to refrain from violating rights but also to undertake positive measures to ensure respect for the rights, including the right to freedom of expression. In fact, states are obliged to create conditions in which diverse and independent media can develop, thereby satisfying the population's right to information.

An important aspect of states' positive obligation to **promote freedom of expression and freedom of the media** consists in the need to develop pluralism within the media and ensure equal access for all to them. The European Court of Human Rights has noted: "[Dissemination] of information and ideas of general interest… cannot be successfully accomplished unless it is grounded in the principle of pluralism."[23]

The United Nations Human Rights Committee has stressed the role of pluralistic media in the process of national construction, noting that attempts to force the media to engage in propaganda of "national unity" infringe on the right to freedom of expression: The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.[24]

1.2 Restrictions on freedom of expression and freedom of broadcasting media

Article 43 of the Constitution of the Republic of Armenia stipulates:

Limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia.

It cannot be disputed that the right to freedom of expression is not absolute: in a few specific circumstances it may be restricted. By virtue of the fundamental nature of this right, however, the

[23] The case of Informationsverein Lentia and Others v. Austria, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=&sessionid=4648759&skin=hudoc-en.

[24] The case of Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para. 9.7.

restrictions must be precise and specifically determined in accordance with the principles of a rule-of-law state. In addition, the restrictions must pursue legitimate goals; the right may not be restricted merely because a statement or expression is seen as insulting or because it challenges accepted dogmas.

The European Court of Human Rights has emphasized that such declarations deserve protection:

> *[Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".*[25]

Besides, the bounds within which legitimate restrictions on freedom of expression may be permitted are established in Article 19, paragraph 3 of the ICCPR quoted above:

> *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputation of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Article 10 of the European Convention on Human Rights ratified by the Republic of Armenia reads as follows:

> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

According to the settled case-law of the European Court of Human Rights, the expression "prescribed by law", which is also used in Articles 9 and 11 of the Convention on Human Rights, and the expression "in accordance with the law", used in Article 8 of the Convention, not only require that an interference with the rights enshrined in these Articles should have some basis in

[25] Case of Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49. The text of the judgment in English can be found on the website of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=4647705&skin=hudoc-en.

domestic law, but also refer to the **quality of the law** in question. That law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [26]

In addition, domestic law must afford a measure of legal protection against **arbitrary interferences** by public authorities with the rights guaranteed by the Convention on Human Rights. 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.[27] As regards licensing procedures in particular, the Court reiterates that the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness.[28]

1.3 Regulatory authorities for the broadcasting sector

It is generally accepted today that any state authorities empowered to regulate the media must be completely **independent** of the government and protected against interference on the part of political and business circles. Otherwise, regulation of the media might easily become subject to abuse for political or commercial purposes. The three special representatives on the right to freedom of expression noted that:

> *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 a process for appointing members that is transparent, allows for public input and is not controlled by any particular political party.*[29]

Article 83.2 of the Constitution of Armenia provides for the establishment of an independent regulator in the broadcasting sector in the following terms:

> *To ensure the goals of freedom, independence and plurality of the broadcasting media, an independent regulatory body shall be established by the law, half of whose members shall be elected by the National Assembly for a six-year term while the other half shall be appointed by the President of the Republic for a six-year term. The National Assembly shall elect the members of this body by a majority of its votes.*

[26] See, among many other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I.
[27] See *Meltex Ltd. and Mesrop Movsesyan v. Armenia* of 17 June 2008, *Rotaru v. Romania* [GC], no. 28341/95, § ..., ECHR 2000-V, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI.
[28] See *Meltex Ltd. and Mesrop Movsesyan v. Armenia* of 17 June 2008, *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, §§ 49-51.
[29] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003. See in English on the website of the Office of the OSCE Representative on Freedom of the Media at: http://www.osce.org/documents/rfm/2003/12/27439_en.pdf.

Concerning specific regulations of the **broadcasting media**, the Committee of Ministers of the Council of Europe adopted on 20 December 2000 Recommendation Rec(2000)23 to member states on the independence and functions of regulatory authorities for the broadcasting sector, in which it recommended that the Member States, *inter alia*, "include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfill their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation".

The guidelines appended to Recommendation Rec(2000)23, provide, as relevant:

> *3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.*
>
> *4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:*
>
> *– regulatory authorities are under the influence of political power;*
>
> *– members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.*
>
> *5. Furthermore, rules should guarantee that the members of these authorities:*
>
> *– are appointed in a democratic and transparent manner;*
>
> *– may not receive any mandate or take any instructions from any person or body;*
>
> *– do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.*
>
> <...>
>
> *13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.*
>
> *14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity.*
>
> <...>
>
> *27. All decisions taken and regulations adopted by the regulatory authorities should be:*

– *duly reasoned, in accordance with national law;*

– *open to review by the competent jurisdictions according to national law;*

– *made available to the public.*

Such independence of the broadcast regulator is a well-established principle in Europe, most recently confirmed by a key Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe. Its text notes that one of the indicators for the media in a democratic society is that "regulatory authorities for the broadcasting media must function in an unbiased and effective manner, for instance when granting licenses".[30]

Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector[31] provides as follows:

> *13. 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 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.*
>
> *By contrast, in a number of countries, members are appointed by sole decision of one state authority, e.g. the head of state or a state department, often without clearly specified selection criteria. The appointment of members of regulatory authorities by the head of state and/or parliament has sometimes been criticised advancing that, in such cases, membership would represent or reproduce political power structures.*
>
> *14. Concerns have often been raised that the nominating or appointing bodies could exert pressure on the members after their appointment. In fact, in some member states, the members of regulatory authorities are frequently accused of acting on behalf of the state body that designated them or political formation behind the designating or appointing authority.*

1.4 Public Service Broadcasting in the Digital Era

Held under the auspices of the OSCE Representative on Freedom of the Media in 2008, the 10th Central Asia Media Conference stated that public service broadcasting is one of the basic tools of democracies indispensable in ensuring the freedom and transparency of elections, in fighting against hate speech, and in protecting the minority cultures of a country by offering objective news reporting and by broadcasting high quality programmes. In the digital era, the importance of advertisement-free public-service broadcasting with high-quality and objective programming only increases.[32]

[30] Item 8.15. See: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm#1.
[31] Adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies.
[32] 10th Central Asia Media Conference "The future of public-service broadcasting and the digital switchover in Central Asia". Almaty, 16-17 October 2008. See: http://www.osce.org/documents/html/pdftohtml/34491_en.pdf.html.

Recommendation Rec(2007)3 of the Committee of Ministers of the Council of Europe to member states on the remit of public service media in the information society of 31 January 2007 provides a focus on the implications of the new digital environment and the specific role of public service broadcasting in the information society. In its preamble, the Recommendation reaffirms that "the specific role of public service broadcasting as a uniting factor, capable of offering a wide choice of programmes and services to all sections of the population, should be maintained in the new digital environment". It states that public service remit is all the more relevant in the digital era and can be offered via diverse platforms resulting in the emergence of public service media. The text recommends that member states guarantee the fundamental role of the public service media in the new digital environment; include provisions in their legislation/regulations specific to the remit of public service media, covering in particular the new communication services; guarantee public service media the financial and organizational conditions required to carry out the function entrusted to them in the new digital environment, in a transparent and accountable manner; enable public service media to respond fully and effectively to the challenges of the information society, respecting the dual structure of the European electronic media landscape of public and private broadcasters and paying attention to market and competition questions; and ensure that universal access to public service media is offered to all individuals and social groups.[33]

Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting is very specific as to the principles applicable to public service broadcasting in the new environment. The first principle has to do with the *remit* of PSB. It insists that "faced with the challenges linked to the arrival of digital technologies, public service broadcasting should preserve its special social remit, including a basic general service that offers news, educational, cultural and entertainment programmes aimed at different categories of the public. Member states should create the financial, technical and other conditions required to enable public service broadcasters to fulfill this remit in the best manner while adapting to the new digital environment."

The second principle relates to *universal access* to public service broadcasting. "Universality is fundamental for the development of public service broadcasting in the digital era. Member states should therefore make sure that the legal, economic and technical conditions are created to enable public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services that are capable of uniting society, particularly given the risk of fragmentation of the audience as a result of the diversification and specialisation of the programmes on offer. In this connection, given the diversification of digital platforms, the must-carry rule should be applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes via these platforms".

The third principle deals with issues of *financing* public service broadcasting. "In the new technological context, without a secure and appropriate financing framework, the reach of public service broadcasters and the scale of their contribution to society may diminish. Faced with increases in the cost of acquiring, producing and storing programmes, and sometimes broadcasting

[33] Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies. See https://wcd.coe.int/rsi/common/renderers/rend_standard.jsp?DocId=38043&SecMode=1&SiteName=cm&Lang=en

costs, member states should give public service broadcasters the possibility of having access to the necessary financial means to fulfil their remit".[34]

Transition to the digital environment offers advantages, but also presents risks. Adequate preparations must be made for it so that it is carried out in the best possible conditions in the interest of the public, as well as of broadcasters and the audiovisual industry as a whole. Although during the transition a balance must be struck between economic interests and social needs, a citizens' perspective must clearly be prioritized. In the coming years some significant switchover obstacles will have to be overcome, although the future benefits of digital broadcasting are indisputable.

States should develop a legislative framework and strategy for digital broadcasting. This recommendation to all national governments has been set out by the Council of Europe in its Committee of Ministers Recommendation (2003)9 to member states on measures to promote the democratic and social contribution of digital broadcasting. This document provides that member states should "create adequate legal and economic conditions for the development of digital broadcasting". In addition, it provides that states should draw up a well-defined strategy that would ensure a carefully thought-out transition from analogue to digital broadcasting. Such a strategy, which is particularly necessary for digital terrestrial television, "should seek to promote co-operation between operators, complementarity between platforms, the interoperability of decoders, the availability of a wide variety of content, including free-to-air radio and television services, and the widest exploitation of the unique opportunities which digital technology can offer following the necessary reallocation of frequencies".[35]

The OSCE Representative on Freedom of the Media believes that such a strategy should not be drafted and adopted as a result of closed-door negotiations between the businesses and the government, but be under constant scrutiny of a wide public discussion to guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes as a result of the switchover. It is preferable that the adopted strategy would lead to new legislation introduced to and adopted by the parliament, rather than governmental decisions or presidential decrees. This will also help manage the transition without compromising legal certainty.

At the recent conferences devoted to the future of public-service broadcasting and the digital switchover held under the auspices of the OSCE Representative on Freedom of the Media in Almaty (10th Central Asia Media Conference, 16-17 October 2008) and in Tbilisi (5th South Caucasus Media Conference, 13-14 November 2008), participants expressed concern that with the digital switchover in force small local private broadcasters that operate over-the-air would not be able to afford to enter the market of digital TV without external help (e.g. stations like GALA-TV in Gyumri, Armenia). They are popular among local audiences, they are important for informational and political pluralism of the media, but the government tends to ignore them in the face of mounting costs of the switchover. Moreover, concern was raised that governments were even satisfied with the inability of small private broadcasters to reach their audience due to the digital switchover.

In this respect, the OSCE Representative on Freedom of the Media would like to reiterate that member states of the Council of Europe, while seeking ways of encouraging a rapid changeover to digital broadcasting, should make sure that the interests of the public, as well as the interests and

[34] Appendix to Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.
[35] 28 May 2003, 840the meeting of the Ministers' Deputies.

constraints of all categories of broadcasters, particularly non-commercial and regional/local broadcasters, are taken into account. In this respect, an appropriate legal framework and favourable economic and technical conditions must be provided.[36]

1.5 Monitoring of obligations of Armenia

As a result of their negotiations to join the Council of Europe, Armenia undertook a number of commitments that were set out in a special memorandum. This was done pursuant to article 3 of the Statute of the Council of Europe, which requires each member to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council (Statute of the Council of Europe, 1949).

The memorandum for Armenia of 28 June 2000 records the need for various reforms to media laws and structures. The authorities undertook commitments, firstly, to pass a new media law within a year, and secondly, to "transform the national television station into a public-service broadcaster managed by an independent body". The new broadcasting law was passed in 2000 and the state broadcaster transformed into public-service in 2001.

On 26 September 2002 at the session of the Parliamentary Assembly of the Council of Europe the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe presented its report on Armenia. The document (in its section on freedom of expression) notes in particular that while Armenia has adopted a broadcasting law, it is imperfect and is not satisfactory by Council of Europe standards. Besides, the law is hotly contested by the media themselves, primarily because the members of the Council of the Public TV and Radio Company and the National Commission on Television and Radio (the bodies that regulate public and private broadcasting, respectively) are appointed by the President. Secondly, "the technical standards laid down are so high that private television companies might find them impossible to comply with, and consequently lose their license". PACE adopted **Resolution 1304 (2002)** on honouring of obligations and commitments by Armenia[37]. The resolution says that since its accession on 25 January 2001 Armenia has made substantial progress towards honouring the obligations and commitments it accepted. As to the media legislation, considering that the allocation of the radio and television broadcasting licenses gave rise to strong protests in April 2002, PACE called on the Armenian authorities "to amend the law on broadcasting without delay, taking into account the recommendations made by the Council of Europe" and remind the authorities of the country about their "firm commitment to organize a new call for tenders for new frequencies on October 25, 2002".

Resolution 1361 (2004) adopted on 27 January 2004 by the Parliamentary Assembly of the Council of Europe “Honouring of obligations and commitments by Armenia” notes in its paragraph 19:

> *As regards freedom of expression and media pluralism, the Assembly is concerned at developments in the audiovisual media in Armenia and expresses serious doubts as to pluralism in the electronic media, regretting in particular that the vagueness of the law in*

[36] Appendix to Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.
[37] All texts adopted by PACE can be found at: http://assembly.coe.int/ASP/Doc/ATListing_E.asp.

force has resulted in the National Television and Radio Commission being given outright discretionary powers in the award of broadcasting licences, in particular as regards the television channel A1+.

Resolution 1374 (2004) adopted by PACE on 28 April 2004 «Honouring of obligations and commitments by Armenia» calls to «create fair conditions for the normal functioning of the media, for example, as regards the issuing of broadcasting licences to television companies, in particular, to television channel A1+".

Resolution 1458 (2005) "Constitutional reform process in Armenia" adopted by the Assembly on 23 June 2005 calls upon the Armenian authorities to "implement without delay the Assembly recommendations with regard to media pluralism in order to guarantee the broadest possible public debate".

On 23 January 2007, at the plenary session of the Parliamentary Assembly of the Council of Europe **Resolution 1532 (2007)** on Armenia's honouring of obligations and commitments to the CoE was adopted. The Resolution noted that the draft broadcasting law package drawn up by the government without prior consultation with media or Council of Europe representatives met with strong criticism, not least concerning the membership of the National Commission of Television and Radio and the method of appointment of its members. In this regard the Assembly urged the Armenian authorities to consult Council of Europe experts and take into account their recommendations before adopting amendments to the law "On Television and Radio" (clause 6.2.1). The Assembly also called on authorities to adopt an open, transparent process of appointing members of the Council of Public TV and Radio Company in accordance with the recommendations of the Venice Commission (clause 6.2.2), as well as take steps to ensure freedom and pluralism of public television and radio on a day-to-day basis (clause 6.2.3).

On 17 April 2008 the Parliamentary Assembly of the Council of Europe adopted **Resolution 1609 (2008)** "The Functioning of Democratic Institutions in Armenia". Clause 8 of the adopted Resolution recalls the commitments of Armenia to the Council of Europe and urges once more the Armenian authorities to undertake a number of reforms without delay. In particular, item 8.3 of the Resolution stipulates: "The independence from any political interest of both National Commission on Television and Radio and the Council of Public Television and Radio must be guaranteed. In addition, the composition of these bodies should be revised in order to ensure that they are truly representative of Armenian society. The recommendations made by the Venice Commission and Council of Europe experts in this respect must finally be taken into account. The Assembly reiterates that apart from reforming the legislation, the authorities must take steps to ensure freedom and pluralism of the public television and radio on a day-to-day basis. Also, the harassment by the tax authorities of opposition electronic and printed media outlets must be stopped."

On 25 June 2008 the Parliamentary Assembly of the Council of Europe adopted **Resolution 1620 (2008)** "The Implementation by Armenia of Assembly Resolution 1609 (2008)". Section 2 ("Fulfillment of the Assembly's Requirements") of the Monitoring Committee report, submitted to PACE consideration, notes, in particular, the judgment of the European Court of Human Rights on the case of *Meltex Ltd. and Mesrop Movsesyan v. Armenia* of 17 June 2008, which found the refusal of the Armenian authorities to grant a broadcasting license to "A1+" TV company to be a violation

of Article 10 of the European Convention of Human Rights and Fundamental Freedoms[38]. "The granting of a license to this independent and popular TV channel has been a long-standing demand of the Assembly. We urge the authorities to grant the broadcasting license to this channel without further delay", the report of the Monitoring Committee stressed. Resolution 1620 (2008) quotes the four main requirements of the Resolution 1609 (2008) and calls "to initiate an open and serious dialogue between all political forces in Armenia" with regard to a number of issues, including freedom and pluralism of the media (paragraph 1.4). Paragraph 6 of Resolution 1620 (2008) says: "The Assembly recalls that there is a need for a pluralistic electronic media environment in Armenia and, referring to the decision of the European Court of Human Rights concerning the denial of broadcasting license to 'A1+', calls on the licensing authority to now ensure an open, fair and transparent licensing procedure, in line with the guidelines, adopted by the Committee of Ministers of the Council of Europe on 26 March 2008 and with the case law of the European Court of Human Rights."

On 27 January 2009 the Parliamentary Assembly of the Council of Europe adopted **Resolution 1643 (2009)** "The Implementation by Armenia of Assembly Resolutions 1609 (2008) and 1620 (2008)" was approved. Clause 10 of the Resolution deals with the situation in the media domain. Thus, in item 10.1 the PACE "welcomes the proposals made with a view to ensuring the independence of the media regulatory bodies in Armenia and calls upon the authorities to fully implement the forthcoming recommendations of the Council of Europe experts in this regard". Item 10.2 of the Resolution refers to the amendment to the RA Law "On Television and Radio", adopted by the Armenian parliament on 10 September 2008, according to which the conductance of broadcast licensing competitions is suspended until 20 July 2010 due to the need to prepare the transition from analogue to digital broadcasting. With this item the PACE underlines that "the technical requirements for the introduction of digital broadcasting should not be used by the authorities to unduly delay the holding of an open, fair and transparent tender for broadcasting licenses, as demanded by the Assembly".

[38] See the full text at the database of the case law of the European Court of Human Rights at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=ARMENIA%20|%2010&sessionid=67430&skin=hudoc-en.

II. ANALYSIS OF THE DRAFT AMENDMENTS TO THE BROADCASTING LAW.

2.1 Methodology

The draft broadcasting law under this analysis consists of the following bills (as of 10.02.2009) to be read by the National Assembly of the Republic of Armenia:

1) "On amending and supplementing the Republic of Armenia law on television and the radio",

2) "On Amending the Republic of Armenia Law 'On Regulations of National Commission of Television and Radio**'",**

3) **"**On Amending the Republic of Armenia Law 'On Regulations of the National Assembly'", and

4) "On supplementing the Republic of Armenia Law 'On State Duties'**".**

This review analyzes the above draft legislation from the point of the international obligations of the Republic of Armenia as a member of the OSCE (see above), international standards, as well as the constitutional provisions of Armenia and its basic acts such as the Law "On the Mass Media".

Also noted are earlier analyses of the draft law on broadcasting made in September 2008 by the OSCE expert Prof. Katrin Nyman-Metcalf.

In this regard we take note that the drafters made an official statement in the "Justification" (memorandum) to the forenamed bills that in their work on the bills they considered relevant recommendations included in the PACE Resolution N 1609.

The aim of these bills (as stated in the explanatory note) is to ensure "independence of the bodies that regulate public and private media (National Commission of Television and Radio and Public Television and Radio Council)". The bills establish a competitive selection of their members supposedly with the same aim. Amendments are declared to establish "mechanisms ensuring their financial independence, as well as provisions on pluralism".

The explanatory note ends with the promise that "the proposed drafts would allow to use legal norms in order to increase the level of the three main elements of independence of the regulatory bodies: administrative independence, financial independence and independence of programming policy".

Thus, the explanatory note can be considered as another benchmark in evaluating the bills.

2.2 General comments on the texts of the bills

The bills present a set of numerous amendments and additions to the existing laws, some related to the changes of the formation and activity of the National Commission of Television and Radio and of the Public Television and Radio Council, but many others making corrections and clarifications that are not necessarily connected to the declared aims of the bills.

Quite a number of amendments bear declaratory character. Thus a mere addition to the law "On Television and Radio Broadcasting" of the words "democracy" (to Art. 42), "pluralism" (to Art. 28) or "diversity of the broadcasting framework" (to Art. 50) is not enough to raise the standards of democracy and pluralism of television and radio.

The draft legislation contains several confusing and vague norms that will probably lead to conflicts among enforcing authorities. For example, Art. 18 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" introduces the following norm:

> *Every year in the expenditure part of the state budget of in the Republic of Armenia, in case of growth of budget revenue part as compared with the previous year, for the Public TV-radio Company the State shall envisage allocations not less than approved by the state budget of the previous year. The allocation shall be such as to ensure the performance of the Council's functions stipulated by the law.*

A similar norm is provided in Art. 21 of the same bill in relation to the National Commission. Performance of the functions can be of different scale and quality, and their level depends on the scale of budgetary allocations. Financial independence of the bodies shall be further discussed in the context of these norms, but the unclear character of the norms should be emphasized.

The whole procedure of appeals against the selection of members of the regulatory bodies, as was stated in the earlier analysis of the draft law on broadcasting made in September 2008 by the OSCE expert Prof. Katrin Nyman-Metcalf, is unclear as the basis for the appeal is not stipulated in the bills.

Finally, the draft legislation contains norms that are difficult to implement. For example, the bills reiterate the current norm of Art. 32 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" by suggesting that "the executive directors of the Public Television Company and the Public Radio Company shall be appointed and dismissed by a two-thirds vote of the Council members". Since the Council for Public Television and Radio consists of five members (see Art. 29 of the law "On Television and Radio Broadcasting", confirmed by the bill on amendments in Art. 14), two-thirds of five make up 3,3333 members of the Council. This norm does not make sense.

This review will not further discuss minor amendments that are introduced with the aim of uniformity or clarity of the law. Instead, it will focus on amendments that are of principal importance.

Recommendations:

- *Substantiate new norms declaring democracy and pluralism, including a practical mechanism serving specifically and directly to these principles.*
- *Clarify norms of the bills that create confusion with regard to their implementation, or that are impossible to implement.*

2.3 Positive changes introduced by the amendments

The bills contain a number of positive changes into the current broadcasting law of Armenia. They are as follows:

2.3.1) Art. 31 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" adds **new criteria** on which the NTRC is to base its choice in granting a broadcasting licence (to Art. 50 of the law on broadcasting). They are "business plan of TV and/or radio company and its practicality"; "diversity of presented programmes and existence of innovations in them"; and "probability of programmes targeted at promoting pluralism and new proposals for the organization of news reports".

Adoption of these norms of the bill would add more precision and legal certainty to the grounds of license awards by the NTRC.

Another amendment stipulated by Art. 31 demands that the norm of Art. 50 of the Law on Broadcasting (as supplemented on 3 December 2003 with effect on 31 January 2004) which currently states that "the National Commission shall give proper reasons for its decisions to select a licence-holder, refuse a licence or invalidate a licence" be supplemented with the words "...and ensure publicity and accessibility of all substantiations". This will oblige the NTRC to make its grounds in awarding and rejecting applications **public**.

These amendments to Art. 50 attempt at following the judgment on the well-known case of *Meltex Ltd. and Mesrop Movsesyan v. Armenia* of 17 June 2008[39] wherein the European Court of Human Rights considered "that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression".

2.3.2) Art. 7 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" introduces a number of changes into Art. 15 of the law on broadcasting regarding **sponsorship** of television and radio programmes. Many of the new norms are similar to those of Art. 17 and 18 of Chapter IV ("Sponsorship") of the European Convention on Transfrontier Television. This is a welcome step to harmonize Armenian legislation on freedom of the media with European standards.

At the same time, with a view of a possible signature and ratification by Armenia of this most important European instrument in the field of television, it is advisable that the amendments openly follow the rules set by the Convention and adopted elsewhere in Europe. For example, that they provide for a clearer view of the nature of sponsorship by stating that:

> *"Sponsorship" means the participation of a natural or legal person, who is not engaged in broadcasting activities or in the production of audiovisual works, in the direct or indirect financing of a programme with a view to promoting the name, trademark, image or activities of that person.*

2.3.3) Freedom of the media is based on free competition of media outlets on the market of ideas. Therefore **transparency** of media organizations is important to help prevent monopolisation or

[39] Ibid.

dominance at this market. Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe makes transparency of media ownership and economic influence over media one of the indicators for the media in a democratic society.[40] In this regard, Art. 9 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" that introduces a new norm to Art. 22 of the broadcasting law and demands from broadcasters "to ensure the transparency of their financial sources, justify and publish the documentary grounds about the financial sources, as well as publish their financial reports" could be a major positive step in the right direction. But to make such a step the norm should be specific as to the character and periodicity of such publications.

2.3.4) An important provision of Art. 20 para (c) of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" states that in case of violating the law on broadcasting or non-compliance with license conditions and/or decisions of the National Commission on Television and Radio this body "shall rebuke the TV and radio company in writing obliging it to meet the requirements and in case of non-performance or their double violation shall suspend functioning of that programme of the TV and radio company until it removes the violations or there is a relevant decision of the court". In effect this limits the current norm of the law on broadcasting that gives the National Commission on Television and Radio an outright power to "suspend functioning of a given programme of the TV/Radio company" (subpara 2 (h) of Art. 37) and obliges the Commission to **rebuke** broadcasters first. At the same time this norm remains unchanged in another article of the law on broadcasting. Art. 58 para 1 (b) stipulates that the National Commission is authorized "to suspend the programmes or the activities of that particular television or radio company until a corresponding decision or a verdict is adopted by the court". Such an unclear half-step, although positive in its nature, only adds to the legal confusion discussed above in this analysis.

2.3.5) Art. 34 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" adds a new paragraph to Art. 55 of the law on broadcasting. It stipulates a set of conditions under which broadcasters shall not be held responsible for "not ensuring broadcasts". If the norm implies that under these conditions the NTRC may not declare the **license invalid** in the context of other provisions of Art.55, then this norm facilitates the freedom of the broadcast media. Unfortunately, the text of the bill, or its English translation, does not allow the expert to come to this conclusion with certainty.

2.3.6) Art. 28 of the bill "On amending and supplementing the Republic of Armenia law on television and radio" adds to the **independence and professionalism** of the members of the National Commission on Television and Radio by introducing changes to Art. 46 of the law on broadcasting. Its current meaning is that none of the Commission members (and not just its Chair and Vice-Chair) shall be engaged in other paid work except for pedagogical, scientific, and creative work. This should, however, be supplemented by provisions on financial stability of the Commission itself which is unfortunately entirely in the hands of the Government as discussed elsewhere in this review.

2.3.7) The bill "On amending and supplementing the Republic of Armenia law on television and the radio" (Art. 11, part b) takes some of the **powers** of the Government in the field of broadcasting and passes them to the National Commission on Television and Radio, which is a positive development provided that such a Commission becomes a regulatory body independent of the government.

[40] Item 8.18. See: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm#1.

2.3.8) The amendment to the law "On state duties" adds to the primary legal act exact criteria for calculating license fees to be paid by broadcasters. It grants a level of legal certainty to applicants for such a license in the sense that this fee is firmly set in a statuary act and will not be changed by the Government's decree.

Recommendations:

- *Whenever necessary clarify positive changes of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" to make them uniform and unambiguous in their implementation.*

2.4 Selection of members of the Council on Public Television and Radio

There are substantial flaws in the amendments to the Law on TV and Radio Broadcasting (to Art. 29) that regard selection and appointment of the members of the Council for Public Television and Radio.

The Council for Public Television and Radio is the management body of the Public Television and Radio Company (Art. 29). Art. 32 of the law on broadcasting defines jurisdiction (competence) of the Council of Public Television and Radio Broadcasting Company. The Council approves the structure of the programmes, proportionality of their components, and the programming schedule. It drafts its Regulations, and defines procedure for the use of the financial resources of the Public TV and Radio Company. The Council approves the status of the staff of the Public Television and Radio Company, forms of contracts to be signed with them, conditions and payments. It defines the list of positions the holders of which do not have the right to be employed by mass media outlets. It sets the rules of competition for the vacant positions of the two Executive Directors, appoints and dismisses them, etc.

The criteria for selecting candidates to the Council are vague. The candidates are supposed to be faithful to the Constitution and laws of the Republic of Armenia, to defend the human rights and fundamental freedoms, to support the formation of civil society by means of ensuring the right of expression, freedom of information and pluralism. They shall perform their duties impartially, with the utmost good faith and integrity, will act on the principle of publicity, impartiality and justice. Yet, if by law members of the Council do not represent political and ideological minorities, it is doubtful that they can in practice ensure pluralism. Also important is that – based on the method of their appointment – neither do they represent pluralistic views.

Thus the law reaffirms Armenia's current method of constituting its public service broadcasting regulator which attracts constant criticism from European bodies. [41] In this regard, it is worth reiterating the earlier remarks by the OSCE Representative on Freedom of the Media Miklos Haraszti on 26 July 2006 that the Council of Public TV and Radio Company "should not be selected by one political force or by political forces alone".

[41] See, e.g., point 7 of the Recommendation 1641 (2004) of the Parliamentary Assembly of the Council of Europe "Public Broadcasting".

Recommendations:

- *Reform the system of selecting and appointing members of the Council for Public Television and Radio in order to provide for a possibility of a pluralistic public broadcasting and freedom of expression and information.*
- *The Council should not be selected by one political force or by a political force alone.*

As part of recommendations on this matter here let us point to the law and practice of a relevant body that controls public broadcasting in another post-Soviet country – Lithuania.

Lithuanian *National Radio and Television* (LRT) is run by its Council, which represents the interests of the public. Like in Armenia it has a six-year term of office, although it comprises 12 persons – public, academic and cultural figures. The President and Parliament appoint four members each. Out of those appointed by Parliament, two persons must represent opposition factions. Another four members represent the following public organizations (one from each): the Council of Scholars of Lithuania, the Lithuanian Council for Education, the Lithuanian Association of Cultural Workers and the Lithuanian Episcopal Conference. Members of Parliament, the government or the Radio and Television Commission[42], and civil servants, people employed at radio and television companies including at LRT, and also proprietors and co-proprietors of radio and television stations may not sit on the Council. Among the Council's powers, the following should be highlighted: it shapes the state's strategy with regard to broadcasting, the structure and the duration for LRT's broadcasting; it annually approves the line-up of and changes to LRT programmes; it approves the charter; it oversees compliance with LRT's purpose; it examines and approves long-term and annual plans; it approves yearly revenue and spending plans as submitted by the management and reports on their fulfilment; it examines and approves the yearly accounts; it approves the duties of LRT creative staff; it approves the results of tenders for programme production; it establishes an Administrative Commission to run the company's business activities and approves its regulations and members; it draws up a procedure for competitive selection of the general director, declares the selection process open, appoints the general director for a five-year term and decides his remuneration; and it decides on the number of deputy general directors and appoints and dismisses them on the advice of the general director. The Council's decisions are binding on LRT.

This example is not an exception. Law and practice in Estonia, Moldova and Georgia – to name just the post-Soviet states – point to different possible safeguards in selection and appointment of the members of the governing body in public broadcasting that aim at pluralism and democracy of public broadcasters.

2.5 Election of members of the National Commission on Television and Radio

This issue is regulated both in the bill "On amending and supplementing the Republic of Armenia law on television and the radio" (Art. 22 and 24 of the bill) and in the bill "On Amending the Republic of Armenia Law "On Regulations of the National Assembly". Most of the norms of the

[42] The Commission is an independent institution accountable to the Seimas (parliament), which regulates and controls the activities of commercial radio and television broadcasters and re-broadcasters falling under the jurisdiction of Lithuania.

two bills replicate one another, which not only contradicts the law-making traditions in Armenia and elsewhere, but also results in confusion as to discrepancies in the parallel norms.

The bill "On amending and supplementing the Republic of Armenia law on television and the radio" stipulates that half of the eight members of the National Commission on Television and Radio are elected by the simple majority of Parliament. The Parliament votes on the basis of selection made by its own competition committee. The bill (Art. 2 part b) reads: **"**In the competition commission the parliamentary opposition faction or factions shall nominate two candidates and the other factions four candidates".

The winners of the selection process are the candidates who get a simple majority of the competition commission votes. It seems from the text, although the translation is not entirely clear, that Parliament decides by a simple majority who among the winners are actually elected to the NTRC. Thus the provision on the two candidates from the opposition does not make a difference in determining the winners and pays only lip service to the rights of the opposition. If the opinion of the opposition is to be considered as important, similar quota for the NTRC itself could be introduced.

As to the two-test system introduced for the candidates to the NTRC by the bill "On Amending the Republic of Armenia Law "On Regulations of the National Assembly", reservations similar to the above exist, which are related to an almost identical procedure for the candidates to the Council on Public Television and Radio. The basic flaw is that none of the tests demands integrity of the candidates, their high moral standing, or the understanding of their mission.

Recommendations:

- *Change the system of selecting and appointing members of the National Commission on Television and Radio to provide for a possibility of its pluralistic composition aimed at pluralism of broadcasting and freedom of expression and information.*
- *Keep the provisions on procedures to select and elect members of the National Commission on Television and Radio in one statute, preferably in the Law "On Television and Radio Broadcasting".*

As far as possible changes are concerned, note should be taken of positive examples in other post-1989 democracies. *Lietuvos radio ir televizjos komisija*, the Radio and Television Commission of Lithuania, can be considered the best model. The Lithuanian Commission regulates, licenses and controls commercial broadcasters. It also plays a role in formulating state policy on the audiovisual media. Its 13 members are appointed as follows: one by the president, three by parliament (following nominations by its education, science and culture committee); in addition, one member is appointed by each of the following bodies: the Artists', Cinematographers', Composers', Writers', Theatres' and Journalists' Unions, the Society of Journalists, the Bishops' Conference and the Periodical Publishers' Association.

The term of office for each member should not exceed two terms of office of the appointing state institution or the double (continuous) term of powers of the appointing organisation's management body. Members of the Commission may not be members of parliament, the government, the Council of the National Radio and Television, or senior civil servants; they and their families are barred from

holding shares in broadcasting companies, as well as from any form of employment with broadcasters. They elect their chairman by a simple majority for a two-year term. The Commission's chairman delivers an annual report to a plenary session of the Seimas, including on its financial activities. The financial report is published in the official publication.[43]

2.6 Financial independence of broadcast regulators

Articles 18 and 21 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" stipulate for mechanisms of financing activities of the Public Television and Radio Company, the Council for Public Television and Radio and the National Commission on Television and Radio from the state budget. They both state that the allocations shall ensure the functioning of the Council and the Commission. They provide for allocations for the Public Television and Radio Company and the Commission in an amount increasing at a rate at least equal to the increase of the revenue side of the state budget over the previous year – granted growth of the budget.

At the same time, there is no mention in the bill as to whether or when the allocations will decrease and under what circumstances. There is no guarantee, especially today, that the revenue side of the budget will be growing. If it does not, will the public broadcaster and NTRC suffer? Why would funding of the public broadcasting and independent regulatory body be dependent on the revenues of the state and to what degree? It is clear that the proposed scheme provides for the majority in the parliament to sanction or support the NTRC at ease, thus making the NTRC dependent on such a majority. This way, instead of fulfilling their public duty, the "independent public broadcaster" and the "independent regulator" will exercise self-censorship. This is in contradiction with the explanatory note to the bills that states as their aim the establishment of "mechanisms ensuring their financial independence, as well as provisions on pluralism".

In this context it seems also contradictory that provisions of the current law on broadcasting (Art. 40) were amended to omit the stipulation for the NTRC to provide to the National Assembly and publish in the mass media its Financial Report. The National Assembly, in order to verify the report, may conduct an audit of the National Commission's activities through the Chamber of Control. Art. 23 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" amends this norm so as to delete this obligation completely.

Given the economic situation in Armenia, it is probably not advisable to introduce licence fees incurred on TV set owners to fund public broadcasting. This is not the only method to financially support its independence from the government.

In Lithuania, for example, the Commission is funded by a monthly levy on all broadcasters that earn money from advertising (apart from the public broadcasting company LRT), set at 0.8 percent of their income from advertising and other commercial activities to do with transmission and (or) retransmission. It is also important to prevent the state from directly controlling public service television and from directly or indirectly impinging on its editorial independence and institutional autonomy. To this end, in Latvia state funding may not be reduced to below the level of the preceding year, and in Georgia it may not fall below 0.15 per cent of GDP.

[43] Richter, Andrei. Post-soviet perspective on Licensing Television and Radio. – IRIS, Legal Observations of the European Audiovisual Observatory. Strasbourg, 2007. See: http://medialaw.ru/e_pages/publications/iplus8_2007.pdf.

Recommendation:

- *Change the system of financing Public Television and Radio and that of the National Commission on Television and Radio from the state budget to provide for a possibility of a pluralistic public broadcasting and freedom of expression and information in a civil society. Provide for automatic guarantee of their financial independence from the state.*

2.7 Potential conflict of the two regulators over activities of the public broadcaster

The bill "On amending and supplementing the Republic of Armenia law on television and the radio" in a number of articles puts public broadcasting under control of the National Commission on Television and Radio. For example, the NTRC shall oversee activities of the Public Television and Radio Company (Art. 20 of the bill). Intrusion of the NTRC into programming of public broadcasting would result in a number of problems.

It would make the broadcaster dependent on two overseeing bodies – the Council and the Commission – appointed (elected) differently and as a result possibly issuing different or even conflicting orders.

There is no clear division of the two bodies' competences with regard to public broadcasting, thus leading to further conflicts over boundaries of such a division. For example, in the amendment to Article 37 subparagraph 2 (h) the NTRC is allowed to warn and suspend functioning of any TV programme, while Article 58 subparagraph 1 (b) forbids the NTRC to suspend public broadcasting. It is not clear whether the NTRC will issue and revoke licences to the public broadcasters along the rules of licensing accepted by the law.

The above refers not only to the bill "On amending and supplementing the Republic of Armenia law on television and the radio", but also the bill that amends the law "On Regulations of the National Commission on Television and Radio" (e.g. Art. 1 subparagraph 1(b), Art. 12 of the bill).

Recommendation:

- *Remove Public Television and Radio from the competence of the National Commission on Television and Radio, and place it under the sole authority of the Council for Public Television and Radio.*

2.8 Dissemination of secrets by broadcasters

Art. 4 of the bill "On amending and supplementing the Republic of Armenia law on television and the radio" limits "rights of journalists and other professionals... to prepare TV and radio programmes" by the exception of "dissemination of information deemed secret…" (amendment to Art. 8 of the law on broadcasting.

In this regard, it should be noted that the Law of Republic of Armenia "On Mass Media" in Art. 9 para 3 clearly stipulates that:

> *"The implementer of media activity is not liable for dissemination of secret information as stipulated by law, provided the information in question was lawfully obtained, or it was not apparent that the information was secret according to the law.*
>
> *If the implementer of media activity has disseminated information the secret nature of which has been evident, it will be exempt from liability if dissemination of information was done for the sake of protecting public interest."*[44]

These exceptions stated in the law "On the Mass Media" in conformity with the international standards will thus be violated by the amendments under review.

In this context let us note that the OSCE Representative on Freedom of the Media has recommended that whistleblowers of all forms should not be prosecuted: Whistleblowers who disclose secret information of public interest to the media should not be subject to legal, administrative or employment-related sanctions.

The CoE Parliamentary Assembly has also recommended that secrets laws should ensure that whistleblowers are protected. The 2007 PA Resolution states that member states should:

> *[L]ook into ways and means of enhancing the protection of whistle-blowers and journalists, who expose corruption, human rights violations, environmental destruction or other abuses of public authority, in all Council of Europe member states.*[45]

Recommendation:

- *Eliminate changes to the bill "On amending and supplementing the Republic of Armenia law on television and the radio" that violate international standards and national legislation of Armenia regarding exceptions to freedom of information.*

2.9 Digital switchover moratorium

The bills ignore an acute problem of the moratorium introduced in 2008 by amendments to the law on broadcasting already adopted by the National Assembly.

A **moratorium** on issuing licenses for broadcasting may be a necessary step in the digital switchover. It allows the regulatory authorities to make plans and efficiently use the frequency spectrum while preparing to start licensing digital broadcasters. It also makes broadcasters take practical steps to switch their signal from analogue to digital.

At the same time, the Office of the Representative on Freedom of the Media of the OSCE is concerned with attempts to use such a moratorium for political purposes, for example to shun independent stations from the air.

[44] See http://www.parliament.am/legislation.php?sel=show&ID=1890&lang=eng.
[45] Recommendation 1792 (2007) Fair trial issues in criminal cases concerning espionage or divulging state secrets, §1.2.

On 19 September 2008, the Representative on Freedom of the Media asked the Government of Armenia to review the adopted amendments to the TV and radio law that introduced a moratorium on issuing new broadcasting licenses until the planned digital switchover of 20 July 2010. It is likely that this moratorium will make it practically impossible for Armenia to comply with the June 2008 decision of the European Court of Human Rights (ECHR), which found that denials of licenses for television station *A1+* violated Article 10 of the European Convention on Human Rights, and urged the state to allow the station to apply for a new license.

The moratorium effectively contravenes the decision of the ECHR. While the digital broadcasting switchover is cited by the Armenian authorities as the reason for the amendment, a moratorium on tenders for broadcasting licenses should not be the first step in the digitalization process. Digitalization should not be allowed to reduce diversity and plurality and should never be used as an excuse to limit free and independent broadcasting. If the broadcasting landscape in a country is not pluralistic and diverse, it would be better to delay digitalization and undertake other reforms first.[46] As has been reported, the ban on broadcast licensing competitions caused serious concerns of both the journalistic community and international organizations.[47]

In this regard, it is worth referring to an earlier analysis of the draft law on broadcasting regarding the moratorium on licensing prepared by the OSCE expert Prof. Katrin Nyman-Metcalf.

Recommendation:

- *Review the adopted amendments that introduce a moratorium on issuing new broadcasting licenses until the planned digital switchover, scheduled to start in 2010.*

CONCLUSION

In a number of its resolutions, the Parliamentary Assembly of the Council of Europe (PACE) has called upon the authorities of Armenia to guarantee the independence from any political interest of both the National Commission on Television and Radio and the Council of Public Television and Radio and take steps to ensure freedom and pluralism of public television and radio.

The Office of the OSCE Representative on Freedom of the Media has consistently come out in support of preparing a more liberal law on broadcasting in Armenia, which would envisage participation of non-governmental organizations in its drafting and would facilitate the promotion of freedom of expression and freedom of the media in Armenia.

The proposed version of the Draft Law, however, raises doubts that PACE resolutions, as well as the numerous appeals of the OSCE Representative on Freedom of the Media concerning the legislation on broadcasting, have been adequately reflected in the draft law proposed for discussion. Besides, all recommendations on cancelling tenders for broadcasting frequencies until 20 July 2010 have been completely ignored.

[46] Organization for Security and Co-operation in Europe. The Representative on Freedom of the Media Miklós Haraszti. Regular Report to the Permanent Council. 27 November 2008. FOM.GAL/5/08/Rev.1. See: http://www.osce.org/documents/html/pdftohtml/35149_en.pdf.html.

[47] See Yerevan Press Club Weekly Newsletter, 5-11 September 2008, 26 September – 2 October 2008, 3-9 October 2008.

Under these circumstances, the Office of the OSCE Representative on Freedom of the Media urges the deputies of the National Assembly to convene a working group that includes representatives of journalistic non-governmental organizations, opposition parliamentarians and other stakeholders, and work on a fundamental revision of the bills, fully taking into account the remarks and suggestions of the working group members, as well as the recommendations of international organizations and their experts.