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

ANALYSIS AND ASSESSMENT OF THE DRAFT LAW ON AMENDMENTS AND ADDENDA TO THE LAW OF GEORGIA ON BROADCASTING RELATED TO MEDIA OWNERSHIP TRANSPARENCY

Prepared by Dr Katrin Nyman-Metcalf,
Commissioned by the Office of the OSCE Representative on Freedom of the Media

Tallinn, Estonia, December 2010

Dr. Katrin Nyman-Metcalf
Tallinn 8 December 2010

Comments on the Draft Law on Amendments and Addenda to the Law of Georgia on Broadcasting, related to transparency in media

Introduction

This analysis looks at the draft Law on Amendments and Addenda to the Law of Georgia on Broadcasting. The amendments relate to transparency of media ownership. The main aim of the amendments is to obtain correct information about the real owners of media enterprises and to avoid a lack of transparency, e.g. caused by ownership held by off-shore entities.
The analysis includes the proposed amendments as well as the explanatory notes to these. No full analysis of the Law on Broadcasting has been made, but only of the amendments and the parts of the Law to which these amendments relate.

Summary of the conclusions

The aim to increase transparency of media ownership is positive. It is good to attempt to obtain information on the real ownership as rules to avoid concentration and to increase plurality would be pointless if they could be circumvented by hiding the real owners behind a façade of other owners.
However, even if it is positive to request as exact information as possible for licence applications or when there are some changes to licensees (like change of ownership), caution should be applied as concerns new requirements for existing licence holders during an ongoing licence period. Such new requirements can violate general legal principles of legitimate expectations and legal certainty.
It is important that the new provisions, especially the new term introduced, are clear. It may be necessary to have a fuller look at the Law on Broadcasting and related laws so that the same concept is not called by different terms or in other ways addressed differently in different places. The definition of beneficiary owner may not be totally clear (depending on whether the concepts used have an established meaning in Georgian law) and the way the new concept fits with the other amendments suggested also raises some question marks.

Analysis

The reason for the changes

To decide whether the proposed amendments are necessary it must be determined if there is a problem with circumventing existing rules mainly through establishing off-shore companies, as this appears to be the primary reason for the proposed changes. In the explanatory note it is stated that strict confidentiality rules in off-shore zones have meant that there are problems of a lack of transparency. This analysis does not include a broader look on possibilities in Georgia to establish and trade through off-shore companies, but it is presumed that the existing legal situation has lead to problems in the media ownership sphere and in that case it is obviously motivated to rectify this. If there is a *general* problem with off-shore firms (because of the lack of transparency), it would be better if this was addressed as such and not just issue by issue, but it is outside of this analysis to look at the question in such a broad fashion.

Freedom of expression as the paramount principle

The Georgian Law on Broadcasting[1] clearly states that the principle of freedom of expression shall guide broadcasting in Georgia. The amendments to the Law must also be read in this light and the principle of supporting freedom of expression shall determine the application and interpretation of the new provisions. New requirements shall not reduce the freedom of expression and put burdens on broadcasters, prospective broadcasters or others that disturb this principle. If the process of applying for licences and the conditions for being allowed to broadcast become so burdensome that they reach the point of having a chilling effect on freedom of expression, requirements of ownership disclosure and similar would have to stand back for the paramount principle of freedom of expression.

Beneficiary owner

One amendment/addition is to add the definition of beneficiary owner.[2] This is a definition that is important in different legal contexts, not least in the combat against money laundering or in any other context where it is important to know who it really is who gets the benefit and makes profit from a certain situation.[3] It is correct that it is important to define and determine this role here as the reasons for rules on media ownership could easily be circumvented if there is no provision to ensure that there are not other "real" owners behind the official owners. The reason for ownership rules is to ensure plurality and diversity of opinion and if a person could just form different entities that he/she still controls, it would be clear that the purpose of rules would be lost.

The proposed definition is not very detailed and may lead to questions of interpretation. It is not proposed here to have a definition that is as detailed as that in the EU Directive 2005/60/EC but it should be considered if for example the mention of having a beneficiary

---

[1] The comments on the Law on Broadcasting are made with the reservation that there may have been amendments to the Law after the translated version that was made available to this expert. However, it has been confirmed that the most relevant provisions have not been amended or the new versions have been made available.

[2] The draft Law on Amendments puts this in Article 1 although in the version of the Law on Broadcasting that this expert received, definitions are in Article 2. This may have been changed later and it is presumed the new definition will be in the Article containing all definitions.

[3] The definition in Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing is: *'beneficial owner' means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted. The beneficial owner shall at least include:*
(a) in the case of corporate entities:
(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Community legislation or subject to equivalent international standards; a percentage of 25 % plus one share shall be deemed sufficient to meet this criterion;
(ii) the natural person(s) who otherwise exercises control over the management of a legal entity:
(b) in the case of legal entities, such as foundations, and legal arrangements, such as trusts, which administer and distribute funds:
(i) where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25 % or more of the property of a legal arrangement or entity;
(ii) where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;
(iii) the natural person(s) who exercises control over 25 % or more of the property of a legal arrangement or entity.

owner set up for "ideal purposes" is clear enough and if the expression "significant share" is understandable in the Georgian legal context. The definition and its relationship with the specified criteria in Article 37 is not evident (especially point d and e). It appears that although the term beneficiary owner is introduced, it is later on not used everywhere where such a concept actually could be useful.

Existing definitions and use of terms in the Law

One question is where in the Law the term beneficiary owner will be used. The idea of adding it is that it should fit with the Law as a whole but the amendments only make use of it in a few places. Article 37 as amended does not use the newly introduced concept. Perhaps it would also be useful in conflict of interest provisions in the Law on Broadcasting.

The Law on Broadcasting refers to the Law on Independent Regulatory Authorities for definition of family members. The Law on Broadcasting itself includes a definition of interdependence as well as of interested entity. Both these concepts appear to be close to the definition of beneficiary owner. The relationship of these respective terms must be clear as the way they are used and the reason they are included in the law is all for the same purpose – namely that restrictions and rules are really applied to the person concerned in practice and not to facades.

Furthermore, the way the new provisions relate to Article 60 regarding ownership concentration should be clear. Should also the interpretation of possession for this Article take the concept of beneficiary owner into account or is the possessor here something different?

Off-shore entities

For the provisions in the Law on Broadcasting to be properly applicable it is important to have a clear idea of how an off-shore entity is generally seen in Georgian law. It can be inferred from the proposed amendments that it is seen as a Georgian legal entity but of a special status. Even so, there is a contradiction in the proposed amended Article 37.

For there to be any meaning to the addition of Article 37 e ("*Legal entity registered in off-shore zone")* in an Article that states in its first point that the licence holder must be a physical or legal entity resident in Georgia, it presupposes that such off-shore companies are regarded as resident in Georgia, which appears to be a contradiction in terms.

The added point h to Article 37 on the other hand is understandable as this is a way to address Georgian entities with an off-shore element.

It is noteworthy that foreigners and stateless persons explicitly have the same rights under the Broadcasting Law as nationals unless stipulated otherwise (Article 3). If an off-shore entity is to be seen as a foreign entity all places in the Law where there are to be special rules must be identified so as to lift the general presumption of Article 3.

The eligibility declaration

When 37^1 makes reference to presenting documents, it must be clear what these are. Extracts from some registry or just statements, in that case in what form? Here it may be mentioned that in money laundering contexts it varies: As a very general rule it could be mentioned that if it is possible to find some information from official registries this should be used but if this is not possible a statement may have to suffice. As long as the Law is clear enough, detail can be in guidelines and explanatory notes, but for legal certainty the Law cannot be too vague.

The placement of the new Article 37^1 appears not to be the best one, as the criteria for applying for a licence and the documents to be submitted follow later (Article 41). The requirement in the new Article 37^1 is of the character to be an addition to the procedure as is

shown by the addition of a point to Article 41. This is however not a major issue as the placement of Articles is less important provided their content is still clear.

Changes to ongoing legal relationships: legal certainty and legitimate expectations

If there is a need also for existing licence holders to give information regularly under the new provisions this is an amendment to the existing licence conditions and must be made in accordance with law. The Law on Broadcasting provides for prolongation of existing licences and also there, if new conditions are introduced, the way this is done must be in accordance with law.

It is relevant that Article 37[1] paragraph 2 states that: "*The eligibility declaration is submitted to the Commission by a license holder in cases envisaged by this Law"*. Article 61 is amended so that the eligibility declaration shall be submitted annually instead of the formerly required specified information on shareholders. The question here is how different the new requirement is, if it is just a clarification and a slightly different form of information to be submitted or something substantially new. If it is a clarification, it is not a problem to introduce it also for existing licence holders but if it amounts to substantially new information, it may violate legitimate expectations to oblige it during the running licence period – especially if the use of the information may lead to the situation that a licence that was legally obtained under the law then in force can be prematurely terminated because of the change to the law.

As opposed to adding the requirement to the application procedure, which is no problem from the legal viewpoint (as long as the requirement is clear as well as objectively applied) to add a new requirement to existing licence holders may pose problems. It is a general principle of law that legal changes that have a negative effect on individual subjects should normally not be applied retroactively. There may be certain exceptions to the principle but the general rule is still important: that an ongoing legal situation is not made worse, but changes of conditions happen at some point where there is in any case a change (like typically, at licence renewal rather than during the ongoing licence period). If someone legally got a licence in accordance with the criteria then in force, they cannot be deprived of that licence during its validity because of new rules introduced. [4]

The requirement in Article 62 is at the occasion of a change and to amend this requirement is less problematic than that of a change for ongoing licences, even if also here the principle of legitimate expectations plays a part as there is a presumption of renewal. If the new or changed requirements are not very different than previous ones and if there is a legitimate reason for them, such new conditions per se do not violate legitimate expectations and legal certainty.

It is important not to be tempted to introduce negative changes to ongoing legal relationships for subjects that have acted fully in accordance with the law when the legal relationship was created, just because it has been discovered that the law at the time was not optimal. In such a case the change should be introduced gradually, for new applicants and at renewals. If the change is very small and more that of procedure than substance, it is possible to introduce it also for the ongoing situations. In such a case it is still important to ensure that the new information is not used to terminate a legally obtained licence.

[4] These comments apply also to Article 76 as it sets out that every licence holder has to submit the declaration.

Recommendations

- The legislator should ensure that the amendments are drafted in such a manner so as not to stipulate new requirements for existing licence holders during an ongoing licence period, as this could violate the principle of legal certainty.

- New requirements should only be applied for new applications although smaller modifications may also be applied for licence renewals and only if the real change is minor for ongoing licences.

- The use of the new term beneficiary owner must be clearly defined as well as the requirements for submitting information.

- The new term introduced should be used at all places in the Law where the concept is relevant and different ways of expressing the same situation should be avoided through a review of all related matters in the Law.

- Inconsistencies in drafting in the new Article 37 should be cleared up.