ARTICLE 19

Kenya: Information and Communications (Broadcasting) Regulations and Programming Code

May 2015

Legal analysis

Executive summary

In May 2015, ARTICLE 19 analysed the Kenya Information and Communications (Broadcasting) Regulations and the Programming Code for Free-to-Air Radio and Television Services against international standards on freedom of expression. The Regulations and Code have been opened up for review with the aim of aligning them with the Constitution of Kenya, 2010 and latest amendments to the Kenya Information and Communications Act, 1998.

ARTICLE 19 finds that both instruments include a number of positive features. The Broadcasting Regulations set out a straightforward licensing procedure, in which community broadcasters benefit from simplified requirements. They encourage self-regulation of content issues by broadcasters, and put in place an innovative complaints system in which the aggrieved party first raises the issue with the broadcaster itself. Only if the response is unsatisfactory does the case go before the Communications Authority.

The Programming Code gives practical guidance to broadcasters on a range of issues, and in many respects corresponds to international good practice.

At the same time, significant areas for improvement remain. In particular, the frequency plan is not properly embedded into the licensing procedure, and is at risk of becoming a dead letter. Concentration of ownership remains a major issue in the Kenyan media landscape, yet the Programming Code proposes to increase the number of licences one person may hold concurrently. No attempt is made to rein in cross-ownership between print and broadcast media. The Broadcasting Regulations contain such extensive rules on content that in reality they leave little room for broadcasters to self-regulate. Non-compliance with any provision of the Regulations or the Programming Code may attract a severe three-year prison sentence.

ARTICLE 19 has previously expressed its concern at the level of government control over the Communications Authority, and in particular the role of the government in the appointment of the Authority's Board of Directors. Progressive amendments to the Broadcasting Regulations and Programming Code would be a welcome development, but ultimately the best safeguard for a vibrant and pluralistic broadcasting sector would be a genuinely independent regulator.

Key recommendations

1. Part II of the Broadcasting Regulations should start with delineation of the overall objectives of the licensing procedure.
2. The Communications Authority should be required to act in accordance with the foreseen frequency plan when making a frequency available.
3. The frequency plan should be drawn up through an open and participatory process.
4. When making a frequency available in which multiple operators are likely to be interested, the Communications Authority should be required to organise a public tender.
5. Broadcasters who wish to establish a service in an underserved area should be permitted to apply on a rolling basis for an unused frequency.
6. The Communications Authority should publish the applications it receives, then invite and receive public comments on them before it takes a decision on the awarding of the licence. Applications should be published on the Authority's website, not only in the Gazette.
7. Sections 4(1)(e) and 5(1)(e) of the Broadcasting Regulations should be deleted.
8. The Broadcasting Regulations should set out clear timelines for the Communications Authority's handling of an application for a broadcasting licence.

9. When it takes a decision in respect of an applicant or a licence holder, the Communications Authority should be under a general obligation to inform the party concerned promptly in writing and to state the reasons for the decision.
10. The Broadcasting Regulations should make it clear that one criterion the Communications Authority will apply when deciding on an application for a licence is whether the proposed service contributes to the realisation of the frequency plan.
11. The Broadcasting Regulations should contain a provision setting out, in a limitative manner, the conditions which the Communications Authority may attach to the grant of a licence.
12. The levels of the various fees levied by the Communications Authority should be set out in a schedule, whether in the Broadcasting Regulations or another implementing regulation. Differential fees should be charged, taking into account the varying financial capacities of different tiers and types of broadcasters. Exempting community broadcasters from fees should be considered.
13. The minimum local content requirements applicable to different types of broadcasters should be clearly set out in the Broadcasting Regulations, expressed for example as a percentage of overall airtime.
14. The requirement to carry news and information programmes, as well as discussion of "matters of national importance" (Section 6(3)(b)), should not apply uniformly to all broadcasters. In particular, local and community stations should be distinguished.
15. The duration of different types of licences should be set out in a schedule. Broadcasting services which require a greater level of investment should benefit from a longer licence term.
16. Licence holders should benefit from a presumption of licence renewal, which can be overcome in cases of poor performance or if renewal is clearly not in the public interest.
17. The Communications Authority should be required to respond to a request for renewal in writing within a defined timeframe, and to state reasons for its decision. The decision should be subject to appeal.
18. Further considerations should be given to whether the benefits of making KBC eligible for licences for commercial broadcasting outweigh the risks.
19. It should be made clear whether the requirements listed in Section 13 are to be understood as conditions to be included in licences for community broadcasting, or criteria for deciding between competing applications for such a licence.
20. Sections 24(b) and (c) and Section 5.6.4 of the Code, which guarantee a broad right of reply, should be deleted
21. It should not be required to show classification details throughout a programme.
22. Rather than requiring all broadcasters to carry five hours of child-friendly programming (Section 4.2.1 of the Code), the Communications Authority should reserve through the frequency plan a number of national, regional and local frequencies for broadcasting services geared to children.
23. Provisions requiring broadcasts to promote or correspond to "good taste", "morality", "fair criticism" or similar subjective qualities should be removed from the Programming Code.
24. The criteria on the use of hidden recording devices (Section 5.6.1) should be relaxed.
25. The Communications Authority should be entitled to reject a broadcaster's proposed complaints procedure only if it fails to meet a requirement set out in Section 35(2).
26. The standard by which complaints are judged should be identified.
27. Section 44 should be replaced with a provision requiring the Communications Authority to respond to any breaches of a broadcaster's obligations with proportionate sanctions, applied in a graduated manner, having regard to the seriousness of the breach and the broadcaster's overall compliance record.
28. Decisions to apply a sanction against a broadcaster should be presented in writing, accompanied by the reasons for the decision, and should be subject to judicial review.
29. Breach of the Broadcasting Regulations or the Programming Code should not constitute a criminal offence.

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Introduction

In May 2015, ARTICLE 19 analysed the Kenya Information and Communications (Broadcasting) Regulations (the Broadcasting Regulations) and the Programming Code for Free-to-Air Radio and Television Services ('the Programming Code), along with the proposed amendments to them. The analysis is based on international standards on freedom of expression.

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have previously provided legal analyses in the area of broadcasting law to government and civil society organisations in over 30 countries. In Kenya, ARTICLE 19's legal work has included the production of analyses of various existing and proposed pieces of legislation, including the Broadcasting Regulations prior to their adoption in 2009.[1]

The past few years have seen substantial revisions of Kenya's legal framework governing the media, including the broadcast media. Much of the impetus for these changes has come from the enactment of the Constitution of Kenya of 2010, which contains a strong guarantee of media freedom under Article 34.

In 2013, the Kenya Information and Communications Amendment Act was passed, with the stated aim of updating the 1998 Act of the same name and bringing it in line with the requirements of the new Constitution. Among the changes it brought was the replacement of the old broadcast regulator – the Communications Commission of Kenya – with a new body, the Communications Authority of Kenya (the Communications Authority). Many stakeholders and commentators – including ARTICLE 19 – were critical of the Amendment Act, on the grounds that in reality it fell short of the requirements of Article 34 of the Constitution, in particular by failing to safeguard the independence of the Communications Authority from government. A legal challenge against the Act's constitutionality is currently pending.[2]

Upon its establishment, the Communications Authority inherited a raft of regulations enacted by its predecessor body and the Ministry of Information Communications and Technology pursuant to the 1998 Kenya Information and Communications Act (KIC Act). The Communications Authority and the Ministry have now embarked on a review of the regulations, in order to align them with the amendments made to the KIC Act in 2013, as well as to the 2010 Constitution.

This analysis examines two of these instruments, the Broadcasting Regulations and the Programming Code, and comments on the extent to which they, in their amended form, would enhance the right of freedom of expression in Kenya. Our comments are based on general international standards regarding broadcast regulation. These standards are encapsulated in a separate ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles).[3]

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[1] See Memorandum on the Kenya Communications (Broadcasting) Regulations, November 2009; and Statement on the Kenya Communications (Broadcasting) Regulations, February 2010.

[2] *Nation Media Group Ltd, Standard Group Ltd, and Royal Media Services Ltd v. A.G, Speaker of the National Assembly, Speaker of the Senate, Cabinet Secretary Ministry of Information Communications and Technology and Communications Authority of Kenya*, High Court Petition No. 30 of 2014.

[3] ARTICLE 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, London, April 2002.

Legal analysis of the Broadcasting Regulation and the Code

The Broadcasting Regulations are divided into seven parts:

- Part I deals with preliminary issues such as definitions.
- Part II sets out the general licensing procedure.
- Part III prescribes additional rules for specific categories of broadcasters, such as the public service broadcaster and community broadcasters.
- Parts IV and V deal with content issues, while Part VI defines the right of the public to complain about content.
- Part VII, entitled 'General Provisions', in fact deals with two distinct topics, namely the requirement of broadcasters to carry notice of emergencies and the sanctions applicable in the event of a breach of the Regulations.
- Finally, Part VIII sets out a number of transitional provisions.

The present analysis will follow the same order. The Programming Code will be discussed in connection with Parts IV and V of the Broadcasting Regulations, on content issues.

The licensing procedure – structure of Part II

Part II contains many of the ingredients of a proper licensing regime, but the organisation of the provisions is not entirely logical and a few important elements are missing. The current review offers a good opportunity to resolve these issues.

One can distinguish six different sub-topics in Part II. ARTICLE 19 believes that a good way to structure this Part would be to deal with them in the following order:

1. Overarching objectives of the licensing procedure
2. Manner in which licences may become available
3. Procedure to apply for a licence
4. Criteria for the awarding of a licence
5. Conditions that may be attached to a licence
6. Safeguards against concentration of ownership

Recommendations

- The structure of Part II of the Broadcasting Regulations could be improved by distinguishing a number of sub-issues falling under the topic of licensing and dealing with them in order.

Overarching objectives of the licensing procedure

At present, the overarching objectives of the licensing process are not stated expressly. However, these objectives can be partially gleaned from Section 6, which is entitled "Obligations relating to broadcasting services".

According to subsection (1), the Communications Authority shall ensure that broadcasting services "reflect the national identity, needs and aspirations of Kenyans", are delivered using the best available technology, and that the available frequencies are "shared equitably and in the public interest among various tiers of broadcasting". It would make sense to extract these elements from Section 6(1) and bring them forward to a new, separate provision, which might be given the title "Objectives of broadcast licensing". Further elements for this provision could be drawn from

Section 46A of the KIC Act, which states that the Communications Authority is obliged, through its activities in relation to broadcasting services, to promote "a diverse range of broadcasting services in Kenya"; to stimulate the production of Kenyan programmes; and to ensure "diversity and plurality of views for a competitive marketplace of ideas."

Recommendations

- A new provision should be introduced at the start of Part II of the Broadcasting Regulations, setting out the overall objectives of the licensing procedure.

Manner in which licences may become available

The manner in which broadcasting licences may become available is currently dealt with in Section 3(2). This provision, as now proposed, simply states that the Communications Authority "may" announce the availability of a frequency, the application requirements and selection criteria. This provision raises two concerns.

- First, it remains unclear on what basis the Communications Authority should decide whether or not to make a licence available. This offers little guarantee of a clean break with the past, in which, as the Supreme Court puts it, "corruption, cronyism and State patronage... attended the licensing of frequencies for radio and TV broadcasting."[4] In ARTICLE 19's view, the key to avoiding arbitrary licence allocations is to draw up a blueprint of the desired broadcasting landscape in the form of a frequency plan and ensure adherence to this plan.

  Section 6(1)(c) indeed obliges the Communications Authority to "develop a frequency plan which sets out how the frequencies available for broadcasting services in Kenya will be shared equitably and in the public interest among various tiers of broadcasting." This is very positive, but the plan is at risk of remaining a dead letter unless the Communications Authority is expressly required to act on the basis of it when making a frequency available. Section 3(2) should be amended in this regard. We also believe the frequency plan should not be drawn up behind closed doors, but through an open process with possibilities for members of the public and representatives of the broadcasting sector to participate and comment. It should be reviewed periodically, following the same procedure.

- Second, the proposed wording of Section 3(2) is rather open-ended; the Communications Authority "may", but is not required to, make an announcement when a frequency is made available. In our opinion, there should be two routes by which a frequency can be obtained.

  Valuable frequencies in which multiple operators are likely to be interested (such as local frequencies in densely populated areas, or regional and national frequencies) should be awarded through a transparent tender procedure. The Communications Authority should issue a public call for applications and give sufficient publicity to this, for example on its website and through notices in relevant media. We note that this does appear to be the current procedure, but it should be expressly required by Section 3(2).[5]
  On the other hand, broadcasters who wish to establish a service in an underserved area – particularly community broadcasters – should be permitted to apply for an unused frequency *ad hoc*, without the need for a tender procedure.

[4] *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014], Judgment of 29 September 2014, para. 152.
[5] See the Procedure for Licensing of Broadcasting Service Providers under the New Regulatory Framework, p. 2.2

In all cases, the public should be afforded an opportunity to comment on the application(s) received by the Communications Authority before it takes a decision. Section 3(6) indeed states that the Communications Authority must publish applications in the Gazette; however, we note that the current practice is that the Communications Authority first selects its preferred application from amongst those received, and then publishes only that application.[6] This practice deprives the consultation of much of its usefulness, since the public is only able to comment once the decision has largely been taken, and is unable to compare the merits of the various applications.

ARTICLE 19 accordingly recommends amending Section 3(6) to make it clear that the applications received will be published, and public comments received before the Communications Authority takes a decision. We also believe that publication should take place on the Communications Authority's website as well as in the Gazette.

Recommendations

- Section 3(2) of the Broadcasting Regulations should require the Communications Authority to act in accordance with the frequency plan foreseen in Section 6(1)(c) when making a frequency available.
- Section 6(1)(c) should be amended to ensure that the frequency plan is drawn up through an open and participatory process.
- The Communications Authority should be required to organise a public tender when making a frequency available in which multiple operators are likely to be interested.
- Broadcasters who wish to establish a service in an underserved area should be permitted to apply for an unused frequency on a rolling basis.
- The Communications Authority should publish the applications it receives and invite and receive public comments on them before it takes a decision on the awarding of the licence. Applications should be published on the Communications Authority's website rather than only in the Gazette. Section 3(6) should be amended to this effect.

Procedure to apply for a licence

A person who wishes to provide broadcasting services must apply to the Communications Authority for a licence "through the prescribed procedure" (Section 3(1)). That procedure depends on the type of service; Sections 4 and 5 set out different rules for commercial and community broadcasters, respectively.

Commercial broadcasters must provide a business plan detailing their technical capacity, relevant expertise, ability to broadcast for at least eight continuous hours per day, and proposed programme schedule. The requirements for community broadcasters are simplified: they do not need to present a business plan, but must still demonstrate sources of sustainable funding and explain what they plan to broadcast.

These provisions are in line with international standards. However, ARTICLE 19 has some concerns about Sections 4(1)(e) and 5(1)(e), which apparently allow the Communications Authority full discretion to prescribe, from time to time, additional information or other requirements to be met by applicants for a licence. It makes sense that the Authority should have some flexibility to tailor the procedure according to the specifics of the frequency it is allocating, but this discretion should not be too broad. Otherwise, it could lead to onerous and unjustified requirements being imposed on less favoured applicants. Section 3(4) already allows the CA to

[6] *Ibid.*, point 3.7.

require "additional documentation or information which that [*sic*] is directly relevant to assessing whether the applicant meets the criteria established in the Act and regulations". This should be sufficient; we recommend deleting Sections 4(1)(e) and 5(1)(e).

We note that neither the Broadcasting Regulations, nor the Licensing and Quality of Service Regulations prescribe any timelines that the Communications Authority must respect when processing a licence application. This omission should be resolved. The Communications Authority should be required to acknowledge receipt of an application promptly in writing. Thereafter, separate deadlines could be set for:

- Confirmation as to whether the application is complete;
- Publication of the application (once a complete application has been received) and invitation to the public to comment;
- Closure of the public comment period;
- Decision whether to grant a licence;
- Issuance of the licence.

Differentiated timelines could be considered for commercial and community broadcasting, since the latter will generally involve less complicated decision-making.

We also believe the Communications Authority should be under a general obligation, when it takes a decision in respect of an applicant or a licence holder, to inform the party concerned promptly in writing and to state the reasons for the decision. During the licensing procedure, this would apply to a decision not to process the application because it is not yet complete, and to the final decision to grant or deny the application. This may already be done in practice, but should form part of the Broadcasting Regulations.

Recommendations

- Sections 4(1)(e) and 5(1)(e) of the Broadcasting Regulations, which grant the Communications Authority full discretion to request any information or impose any requirement on applicants for a broadcasting licence, are unnecessary and should be deleted.
- The Broadcasting Regulations should set out clear timelines for the Communications Authority's handling of an application for a broadcasting licence.
- The Communications Authority should be under a general obligation, when it takes a decision in respect of an applicant or a licence holder, promptly to inform the party concerned in writing and to state the reasons for the decision.

Criteria for the awarding of a licence

The Broadcasting Regulations do not expressly set out any criteria against which applications for a licence will be judged. Nor is this necessary, since Sections 46D(2) and 46F(2) of the KIC Act provide very useful guidance, which is in line with international standards. However, we suggest to incorporate one additional criterion into the Broadcasting Regulations, namely that the Communications Authority shall review whether the proposed broadcasting service contributes to the realisation of the frequency plan.

Recommendations

- The Broadcasting Regulations should make it clear that one criterion the Communications Authority will apply when deciding on an application for a licence is whether the proposed service contributes to the realisation of the frequency plan.

Conditions to be attached to a licence

Section 46C(3) of the KIC Act sets out the conditions that the Communications Authority may attach to a broadcasting licence. These include operating within defined geographical limits, carrying a minimum amount of local content, paying fees, and fulfilling "such other conditions as the Authority may require". Sections 46F(3) and 46G(2) list a number of additional terms that may be applied to community and commercial broadcasters, respectively.

The Broadcasting Regulations do not contain a dedicated section dealing with licence conditions; instead, provisions that touch on this issue can be found in various places. It would be a good idea to consolidate these into a single provision, for ease of reference.

A bigger concern, however, is that the Broadcasting Regulations fail to flesh out the relevant provisions of the KICA properly. For example, Section 7 states that the Communications Authority may prescribe various types of fees, including licence fees, or decide to exempt certain categories of broadcasters from these fees. In effect, this is little more than a restatement of Section 46C(3)(c) of the KIC Act ("A licence granted under this section may include conditions requiring the licensee to … pay such fees as the Commission may prescribe").

ARTICLE 19 believes the implementing regulations – either the Broadcasting Regulations or the Licensing and Quality of Service Regulations - should set out a transparent schedule of fees, which should take into account the differing financial capacities of different tiers and types of broadcasters. We note that an overview of fees which respects this principle can already be found on the CA website, so it should not be difficult to incorporate this into the Regulations.[7]

Similarly, Sections 6(3)(a) and 35 both refer to the fact that the Communications Authority may impose a minimum local content requirement on broadcasters as part of their licence terms. But this is already clear from KICA; the Broadcasting Regulations should instead specify *which* minimum percentage applies to each category of broadcaster. This would assist applicants for a licence to draw up an appropriate proposal, and would help prevent arbitrary differences between the requirements imposed on different broadcasters. We note that the Communications Authority's Programming Code does set out certain specific local content requirements. However, this Code is not a logical place to regulate this issue, since (as will be discussed below) it is only applicable to those free-to-air broadcasters who have not enacted their own, CA-approved Programming Code.

According to Section 6(3)(b), the Communications Authority shall ensure that broadcasters include news and information, as well as discussion of "matters of national importance" in their programming. The obligation to carry such programmes may be a suitable licence condition for national stations, but in our view it should not be an obligation for each and every broadcaster, in particular local and community stations. Of course, in its frequency plan, the Communications Authority could choose to reserve a certain number of frequencies in each area for broadcasters whose services include news and information, including national issues.

The Broadcasting Regulations do not say anything about the duration for which licences will be issued. This should probably not be the same for every category of licence; the key consideration is that the term should be long enough to make it worthwhile for the licence holder to invest in the staff and facilities needed to deliver a good service, yet short enough to allow reassignment of the frequency within a reasonable time frame, if the broadcaster is not performing up to standard. As a rule, therefore, smaller operations (such as community broadcasters) should be given a licence with a shorter duration. Of course, comparable licences for commercial broadcasting should have an equal duration to avoid unfair competition. We recommend setting out the length for which

[7] The Communications Authority, Fee Schedule for Broadcasting Services Licenses.

different licence types are issued out in a schedule, whether in the Broadcasting Regulations or one of the other implementing regulations.

Section 9 states that a licence holder may apply for renewal of the licence within 6 months of its expiry. It would be a good idea to introduce a presumption of licence renewal here, to encourage long-term investment by broadcasters and strengthen their editorial freedom. The presumption may be overcome if the licensee has substantially failed to comply with the licence conditions, or renewal is clearly not in the public interest. We also believe the CA should be required to respond to a request for renewal in writing within a defined timeframe, and to state reasons for its decision. The broadcaster should be able to appeal an adverse decision to the Tribunal.

Finally, we recommend inserting a new provision granting a licence holder the right to apply to the Communications Authority at any time to request an amendment of a licence condition.

Recommendations

- The Broadcasting Regulations should contain a provision setting out, in a limitative manner, the conditions which the Communications Authority may attach to the granting of a licence. Existing provisions touching on this issue should be subsumed into this provision.
- The levels of the various fees levied by the Communications Authority should be set out in a schedule, whether in the Broadcasting Regulations or another implementing regulation. Differential fees should be charged, taking into account the varying financial capacities of different tiers and types of broadcasters. Exempting community broadcasters from fees should be considered.
- The minimum local content requirements applicable to different types of broadcasters should be clearly set out in the Broadcasting Regulations, expressed for example as a percentage of overall airtime.
- The requirement under Section 6(3)(b) to carry news and information programmes, as well as discussion of "matters of national importance," should not apply uniformly to all broadcasters. In particular, local and community stations should be distinguished.
- The duration of different types of licences should be set out in a schedule. Broadcasting services which require a greater level of investment should benefit from a longer licence term.
- Licence holders should benefit from a presumption of licence renewal, which can be overcome in cases of poor performance or if renewal is clearly not in the public interest.
- The Communications Authority should be required to respond to a request for renewal in writing within a defined timeframe, and to state reasons for its decision. The decision should be subject to appeal.

Concentration of ownership and related transitional provisions

Section 10 of the Broadcasting Regulations, entitled "ownership and control", prescribes limits to the number of licences that can be held concurrently by one person, as well as setting out rules on the shareholding of a licensee.

Under the existing version of subsection 1, no person (with the exception of the public service broadcaster) may be assigned more than one broadcast frequency for radio or television in the same coverage area. It is now proposed to raise this limit to three frequencies for radio, and to do away with the limit for television entirely.

The current "one licence" rule is quite rigid, which may explain the desire to relax it. A 2007 survey of the regulatory approaches taken in different jurisdictions to combating excessive

concentration of ownership[8] shows that whilst some countries apply simple numerical caps of this kind (*e.g.* in Australia, a person may not control more than two radio licences in the same area), most look at multiple factors to determine whether a particular person or company has captured an excessive share of the market. For example, in France, which has a population of about 65 million, an owner may not be involved in more than two of the following at the national level:

- TV audience area of 4 million people
- Radio audience area of 30 million people
- Cable audience area of 6 million people
- Share exceeding 20% of the national circulation of daily newspapers.

ARTICLE 19 is quite concerned about the proposed amendment to Section 10. The revised rule would leave the blunt tool of a numerical cap in place, whilst watering it down to the point of irrelevance. We encourage the Ministry and the Communications Authority to formulate a strict but more nuanced rule which ensures that no player can capture an excessive market share (for example in terms of audience or advertising).

Holders of a national-level licence should face a stronger presumption against the issuance of further licences than those operating at the local or regional levels only. Moreover, and importantly, excessive cross-ownership – ownership of different types of media – should be prevented.[9] A company with a strong position in television should be restricted in its ability to obtain radio frequencies, and vice versa. Consideration should also be given to barring market players with substantial interests in the print media from acquiring broadcasting licences, or at least limiting their ability to do so.

Whatever the final rule looks like, its proper enforcement will depend on whether the Communications Authority has sufficient insight into the ownership of each broadcaster. Section 10(3) is an important provision in this regard; it requires licensees to inform the Communications Authority of any change in the ownership, control or proportion of shares in the broadcaster. Moreover, written permission from the Communications Authority is required for any changes in shareholding exceeding 15%, or the acquisition by an existing shareholder of a further 5% or more. These rules make sense as far as they go, but perhaps the requirement to seek permission should also be triggered if a smaller change in shareholding brings about a controlling stake (*e.g.* from 49% to 51%).

A thorny question is how to transition from the current situation – which is characterised by excessive concentration – to a broadcasting landscape with more diversity of ownership. Section 10(1) states in this regard that the Communications Authority shall prescribe a timeframe for existing stations to bring themselves into compliance with the limits on the number of licences that may be held concurrently. However, Section 46(3) in fact indicates such a timeframe, by stipulating that persons who hold more frequencies than the maximum permitted shall surrender these additional frequencies to the Communications Authority within a period not exceeding one licence term.

Subject to our comments above about the need for better rules against concentration of ownership, we believe this strikes a fair balance between protecting the legitimate expectations of current licence holders and ensuring the necessary transition.

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[8] See the survey of the Canadian Radio-television and Telecommunications Commission, July 2007.

[9] See the National Information & Communications Technology (ICT) Policy of January 2006, para 4.11: "In order to promote diversity of views and freedom of expression, concentration of ownership of print and electronic media in a few hands will be discouraged. Limits to cross-media ownership will be set through regulations to be issued from time to time and through competition laws."

The frequencies surrendered to the Communications Authority should be reallocated to new entrants according to the ordinary licensing procedure. This should contribute to the realisation of the frequency plan. When existing broadcasters apply for renewal of their remaining licences, the Communications Authority should take into account whether the service in question is compatible with the KIC Act, the Regulations and the frequency plan, and where appropriate, invite the broadcaster to propose ways to ensure proper alignment. Although we have argued above that broadcasters should benefit from a presumption of licence renewal, this presumption might be overcome during the transitional period if an existing service is clearly and irremediably an obstacle to the development of the desired diverse broadcasting landscape.

Recommendations

- If Section 10(1) is amended, it should be replaced with a more nuanced rule which limits the total market share that any person may control and restricts cross-ownership of different media. In any event, the current cap of one radio or TV licence per person per coverage area should not simply be watered down in the manner proposed.
- The requirement of written permission under Section 10(3) should also be triggered if a change in shareholding of less than 5% brings about a controlling stake in a broadcaster.
- Consideration should be given to the inclusion of a new provision in Part VIII (Transitional Provisions), stating that when an existing licensee applies for renewal of the licence, the Communications Authority will review whether the service provided remains compatible with the KICA, the Regulations and the frequency plan, and where appropriate, invite the broadcaster to propose measures to ensure proper alignment.

Rules applicable to specific types of broadcasters

Part III of the Broadcasting Regulations, entitled "Broadcasting Services", sets out a number of distinct rules for each type of broadcasting service. We limit our consideration here to public service broadcasting and community broadcasting.

Section 11(1) provides, briefly put, that the public broadcaster must provide information, education and entertainment programming in an impartial and independent manner, and must serve the different communities in Kenya, especially those not generally catered to by other broadcasting services. This description of the mandate of a public service broadcaster is perhaps superfluous here, since this issue is also dealt with in the Kenya Broadcasting Corporation Act.

According to subsections (3) – (5), the public broadcaster may not let its frequencies out to other operators; however, it is eligible to apply for commercial broadcasting licences, as long as it maintains separate accounts for its public service and commercial operations.

Allowing a public service broadcaster to engage in commercial broadcasting is not without risk. If not handled properly, this could lead to unfair competition with the private sector and a board which loses sight of its public service mandate. The private sector may also be better at delivering commercial broadcasting services than a public body. It is true that commercial operations could provide an independent source of funding for the Kenya Broadcasting Corporation (KBC), which would reinforce its independence from government. However, this could also be achieved by allocating part of the licence fees paid by private broadcasters to KBC, rather than letting KBC run its own commercial venture.

Section 13 lists a number of requirements which community broadcasters shall meet, including reflecting the needs and dealing with the issues of the people in the community, providing informational, educational and entertaining programming, and involving community members in

the running of the station. It is not clear whether these are conditions to be included in licences for community broadcasting, selection criteria, or both. This should be clarified.

Recommendations

- Consideration should be given to deleting Sections 11(1) and (2), since they pertain to matters that are properly dealt with in the Kenya Broadcasting Corporation Act.
- Further thought should be given to whether the benefits of making Kenya Broadcasting Corporation eligible for licences for commercial broadcasting outweigh the risks.
- It should be made clear whether the requirements listed in Section 13 are to be understood as conditions to be included in licences for community broadcasting, or as criteria for deciding between competing applications for such a licence.

Content issues under the Broadcasting Regulations

Section 46H(1) of the KICA vests the CA with the power to "set standards for the time and manner of programmes to be broadcast by licensees". Paragraph 2 of the same section mandates the CA to prescribe content rules, through the adoption of a programming code and a watershed period. The programming code shall not be applied, however, to a group of broadcasters which develops, adheres to and enforces a self-regulatory code which is accepted by the CA. Broadcasters thus have a choice between effectively regulating themselves or being regulated by the CA.

Turning to the Broadcasting Regulations, we find an extensive list of content-related provisions in Part IV. These include requirements of good taste and tolerance (Section 19); rules designed to protect minors (Sections 20 and 34); provisions relating to balance, fairness, accuracy, transparency and acceptable newsgathering techniques (Sections 21-24, 23 and 28); rules for election coverage (Section 21); requirements related to the protection of privacy and dignity (Sections 19, 26, 28 and 29); sponsorship and advertising rules (Sections 30, 31 and 33); and a requirement to provide content to the physically challenged (Section 36).

It is not very clear what the status of these content requirements is. Section 18, entitled "Minimum Standards", states that they "shall form the basis upon which the Authority or a recognized body of broadcasters shall prepare their respective programme codes", suggesting that these are not directly enforceable provisions, but elements to be elaborated through further (self-) regulation. However, Sections 19 – 36 are drafted in rather mandatory language, and cover certain topics which properly belong in the Broadcasting Regulations themselves rather than in a Programming Code, such as programme sponsorship (Section 30), infomercials (Section 31) and local content (Section 35).

Whatever its intended effect is, it is clear that Part IV goes against the spirit of the KIC Act. The content-related provisions in this Part are so detailed and extensive that they substantially pre-empt the Communications Authority's own Programming Code and render additional self-regulation by a group of broadcasters pointless. In our view, these provisions – with the exception of the above-mentioned ones on sponsorship, infomercials and local content – should be condensed into a single provision which simply identifies the topics to be addressed and developed in a Programming Code, such as protection of minors, balance, fairness, accuracy, transparency, appropriate newsgathering techniques and so on, without articulating the actual rules.

This is not to say that the provisions of Part IV are inherently problematic. Many, though not all, would be in line with international standards if contained in a Programming Code. A clear exception are Sections 24(b) and (c), which guarantee a broad "right of reply" when someone's opinions are criticised on air. Allowing persons and organisations to demand airtime whenever

someone has expressed a view contrary to their own would represent a severe and unjustified interference in editorial freedom. Instead, it should be left to the editorial judgment of the broadcaster as to whether granting the right of reply is necessary to ensure balance in the concrete circumstances of the case.

Recommendations

- Sections 19-29 and 32-34 should be condensed into a single provision which simply identifies the topics to be addressed and developed in a Programming Code, rather than articulating actual content rules.
- Sections 24(b) and (c), which guarantee a broad "right of reply", should be deleted.

The Programming Code

The Programming Code consists of 23 Sections, which together cover 16 distinct content-related topics. As one would expect, these partly coincide with the issues dealt with in Part IV of the Broadcasting Regulations, but the Code goes well beyond Part IV, laying down rules on such subjects as personal attacks, religious programmes and occultism and superstition. At the same time, not every topic covered in Part IV is also addressed in the Code; an example of this is the duty promptly to correct errors, mentioned in Section 23 of the Broadcasting Regulations but not in the Code.

It is beyond the scope of the present analysis to comment on each of the Programming Code's sections separately; nor is this necessary, since large parts of it are in line with international good practice. Instead, we highlight a number of specific problematic areas in the Code.

- First, while we welcome the significant attention devoted to the welfare of minors, the Code perhaps goes over the top in some places. The requirement under Section 3.2.2 to show classification details not just at the start, but also throughout a programme seems excessive. Section 4.2.1 requires all broadcasters to ensure that five hours of their programming is devoted to programmes suitable for children. It is not clear whether this is a daily or (more reasonably) a weekly requirement, but in any event it would make more sense to reserve a number of licences at the national, regional and local levels for broadcasting services geared particularly to children, rather than requiring each and every station to cater to them. Sections 4.2.2 and 4.2.13 require broadcasters to promote "good social and moral values", "positive moral character" and "religious upbringing" in children; these are responsibilities that are better left to parents, schools and religious institutions.

- Second, a tendency towards excessive paternalism is also evident in Section 5, for example in the statement that an interviewer bears "primary responsibility" for his questions and that these must be determined "primarily by the public interest" (see 5.5.3), or that news and commentaries must be presented "in good taste" and avoid "morbid, violent, sensational or alarming details" (5.8.1). We agree with the sentiment, but the requirement is too subjective for inclusion in a legally binding Code. Furthermore, whilst we would agree that journalists should not resort to the use of hidden cameras or microphones lightly, Section 5.6.1 goes too far in the other direction by requiring "extreme circumstances" and a "vitally important" interest.

- Further, as stated above with regard to the Broadcasting Regulations, the right to reply guaranteed in Section 5.6.4 of the Code is not justified and should be deleted.

A number of provisions in the Code seek to prevent broadcasts that could fan ethnic, religious or political disputes. Given Kenya's recent past, this concern is understandable; but in some instances the impact on legitimate speech is too great. This is the case in Section 8.2, which

prohibits "attacks on the character of an individual" or "unfairly criticising a person"; these are highly subjective standards. Section 9.2.9 similarly prohibits attacks on individuals in political messages, even though robust (but lawful) debate is an essential element of election campaigns.

The Communications Authority may soon find itself adjudicating theological disputes, since Section 12.2.6 requires broadcasters to avoid "misinterpreting" religion. Or it may be called to rule whether a joke is a good one or not, since Section 15.2.3 prohibits "humour which offends good taste". These sections should be deleted.

Recommendations

- It should not be required to show classification details throughout a programme; Section 3.2.2 of the Programming Code should be amended in this regard.
- Rather than requiring all broadcasters to carry five hours of child-friendly programming under Section 4.2.1, the Communications Authority should reserve a number of national, regional and local frequencies for broadcasting services geared to children through the frequency plan.
- Provisions requiring broadcasts to promote or correspond to "good taste", "morality", "fair criticism" or similar subjective qualities should be removed from the Programming Code.
- The criteria for when a hidden recording device may be used pursuant to Section 5.6.1 should be somewhat relaxed.
- The right to reply guaranteed in Section 5.6.4 of the Programming Code is not justified. This provision should be deleted.

Complaints handling procedure

Part VI of Broadcasting Regulations and Section 21 of the Programming Code require licensees to set up a complaints procedure which can be used by members of the public who feel aggrieved by a broadcast. A complainant who has exhausted the broadcaster's procedure and remains unsatisfied can bring the case to the Communications Authority. Overall these provisions are very positive, but improvement is possible in some areas.

First, Section 41 states that every broadcaster must submit its Complaints Handling Procedure to the Communications Authority for approval. The Communications Authority appears to enjoy discretion to reject the proposal on any grounds, or to impose additional requirements not foreseen by the KIC Act or the Regulations. We recommend stipulating that the Communications Authority may reject a procedure only if it fails to respond to the requirements of Section 39(2).

A more fundamental issue is that the standard by which broadcasters or the Communications Authority should judge whether a complaint is or is not well founded is not stated anywhere. We would assume that the question to be answered is whether the broadcaster has violated the KIC Act, the Regulations, the Programming Code or, alternatively, its self-regulatory code. This should be made explicit.

Recommendations

- The Communications Authority should be entitled to reject a broadcaster's proposed complaints procedure only if it fails to meet a requirement set out in Section 35(2).
- The standard by which complaints are judged should be identified. Presumably, complaints may allege a violation of the KIC Act, the Regulations, the Programming Code or, alternatively, a broadcaster's self-regulatory code.

Sanctions

Section 44 of the Broadcasting Regulations provides that contravention of any provision of the Regulations constitutes a criminal offence, which is punishable by a maximum fine of one million

shillings or a prison sentence of up to three years. Section 23 of the Programming Code provides that violations of the Code attract the same penalty.

ARTICLE 19 finds these to be very problematic provisions. The Broadcasting Regulations and Programming Code form an administrative regime, which is simply not suited to enforcement through criminal sanctions such as imprisonment. If taken literally, Section 44 would allow persons to be jailed for all manner of trivial errors, such as failing to submit a required document as part of a licence application, or for non-compliance with rather vague requirements, such as the duty to provide "entertaining" programmes or to "represent a wide range of opinions".

We strongly urge replacing Section 44 with a regime of graduated administrative sanctions. Where the Communications Authority finds that a licensee has violated the KIC Act, the Regulations, the Programming Code or its licence terms, it should impose a proportionate sanction, having regard to the broadcaster's overall record of compliance. Minor breaches of the rules should give rise to a warning or, in more serious cases, the imposition of a requirement to carry a statement by the regulator identifying the breach. Only where these sanctions fail to remedy the problem should more serious sanctions, such as a fine, come into play. Licence suspension or revocation, the most serious administrative sanctions possible, should be applied only in cases of gross and repeated breach of the rules, which other sanctions have failed to redress. There should be no criminal sanctions at all.

Whenever the Communications Authority opens an investigation against a broadcaster, whether in response to a complaint or on its own initiative, it should give the broadcaster concerned an opportunity to put forward its views. A decision to apply a sanction should be presented in writing and state the reasons. The broadcaster should then have an opportunity to challenge the decision before the Tribunal.

Recommendations

- Section 44 of the Broadcasting Regulations should be replaced with a provision requiring the Communications Authority to respond to any breaches of a broadcaster's obligations with proportionate sanctions, applied in a graduated manner, having regard to the seriousness of the breach and the broadcaster's overall compliance record.
- Decisions to apply a sanction against a broadcaster should be presented in writing, accompanied by the reasons for the decision, and should be subject to judicial review.
- Breach of the Broadcasting Regulations or the Programming Code should not constitute a criminal offence.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the ARTICLE 19's work in Kenya and East Africa, please contact Henry Maina, Director of ARTICLE 19 Kenya and East Africa, at henry@article19.org.

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