



STATEMENT

on Re-Broadcasting of Foreign Programmes in Ukraine

ARTICLE 19 Global Campaign for Free Expression

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The right of broadcasters to re-broadcast foreign programmes has recently become an issue in Ukraine due to a recent warning issued to the radio station *Dovira* by the Ukrainian National Television and Radio Council for re-broadcasting *Radio Free Europe* (RFE), *Radio Liberty* (RL) and other foreign programmes. This Statement addresses the question of the right of broadcasters to re-broadcast foreign programmes and the extent to which restrictions on this right are legitimate under international law, including the right to freedom of expression.

Two provisions in the Ukrainian Law on Radio on Television and Broadcasting are relevant to the question of re-broadcasting foreign programmes, namely Articles 49 and 13. Article 49 states:

Relations between TV and Radio companies and foreign partners shall be based on international agreements ratified by Ukraine or on direct agreements. If an international agreement to which Ukraine is a party establishes norms inconsistent with this Law, the norms of the international agreement shall apply.

It is not entirely clear what a direct agreement means in this context, but presumably it refers to private agreements between Ukrainian and foreign broadcasters.¹ Article 13(6) of the same law states:

Broadcasts by foreign TV and Radio Companies in Ukraine using broadcasting channels of Ukraine shall be carried out on the basis of intergovernmental or international agreements.

It would appear that this is the provision applied by the National Television and Radio Council as the basis for the warning against *Dovira*. This interpretation means that broadcasters can only

¹ Since the Article refers separately to international agreements, the only other possible meaning would be direct agreements between the Ukrainian government and foreign broadcasters, a highly improbable interpretation.

re-broadcast programmes where this is permitted by a specific intergovernmental or international agreement. ARTICLE 19 is of the opinion that this breaches international guarantees of freedom of expression, including Article 10 of the European Convention on Human Rights, which is binding on Ukraine.

Article 10 guarantees freedom of expression “regardless of frontiers” so any limitations on re-broadcasting need to be justified as restrictions on freedom of expression under Article 10. This is clear from the *Groppera Radio AG v. Switzerland* case decided by the European Court of Human Rights. Switzerland argued that retransmission of programmes did not raise a freedom of expression issue. The Court was clear on this matter, holding:

[B]oth broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right [to freedom of expression]....²

Paragraph 2 of Article 10 does envisage restrictions on freedom of expression but only where they meet a strict three-part test.³ The jurisprudence of the European Court of Human Rights makes it clear that this test presents a high standard which any interference must overcome. The Court has repeatedly stated:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.⁴

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁵ Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR and Article 10(2) of the ECHR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.⁶

The “rights of others”, one of the legitimate aims for restricting freedom of expression listed in Article 10, is widely understood as including a right to access a diversity of information and ideas. Domination of the airwaves by foreign broadcasters or programmes would undermine diversity and so, particularly in less developed media markets, certain measures to protect local media, as long as they are intended to promote diversity and actually achieve this goal, are justified. However, any such measures must restrict the right to freedom of expression as little as possible, in particular by minimising the potential for government or political interference with broadcasting.

Three types of measures are commonly employed to protect and promote local broadcasting. First, many countries impose minimum local content quotas to ensure that the airwaves are not totally dominated by foreign programming. An example of this is the 1989 European Convention on Transfrontier Television (ECTT), which provides for at least 50% European sourced

² *Groppera Radio AG v Switzerland*, 28 March 1990, Application No. 10890/84, para. 55.

³ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 49.

⁴ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

⁵ *The Sunday Times v. United Kingdom*, *op cit.*, para. 49.

⁶ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).

programming. Second, many countries impose restrictions on the level of foreign ownership in broadcasting. Article 13(6) includes a limit of this sort, restricting foreign investment to 30% of the capital stock of a registered broadcaster. Third, promotional measures may be employed, such as subsidies or tax breaks for local producers. A more general form of this, which is being employed more and more frequently, is to require the public broadcaster to purchase at least some of its programming from local independent producers.

Restricting the right to re-broadcast to circumstances where this is specifically allowed by an intergovernmental or international agreement goes well beyond these measures and, in ARTICLE 19's assessment, cannot be justified as a restriction on freedom of expression. In essence, this interpretation means that broadcasters need to get government approval each time they want to re-broadcast foreign programmes. The potential for political interference in the grant of such approval is obvious. Furthermore, it cannot be shown that this restriction is necessary, over and above the measures noted above, to promote local programming. The fact that such a draconian measure is rarely employed in other countries, which still manage to promote local programming, proves it is not necessary to achieve this end.

The illegitimacy of a requirement of this sort is highlighted by the fact that broadcasters registered in the Ukraine can purchase programmes from foreign broadcasters without requiring prior government approval. Although there are differences between re-broadcasting and purchasing transmission rights, the impact is very similar; foreign programmes are broadcast over the airwaves. It makes no sense to apply vastly more draconian rules to re-broadcasting than to purchasing relationships.

Some international agreements deal specifically with the issue of re-broadcasting. The ECTT, which Ukraine has signed but not yet ratified, reaffirms in its Preamble a commitment to "the principles of the free flow of information and the independence of broadcasters" and the conviction that "communication technology should serve to further the right, regardless of frontiers, to express, to seek, to receive and to impart information and ideas whatever their source." Article 4 deals specifically with re-broadcasting, stating:

The Parties shall ... guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.

As a signatory to the ECTT, Ukraine should endeavour to respect, at least in principle, its provisions. Draconian restrictions on retransmission, such as permitting it only in the context of a specific enabling intergovernmental or international agreement, are hardly in accordance with the spirit of the ECTT.

The second paragraph of Article 49 of the Law on Radio on Television and Broadcasting provides that in case of a conflict between domestic and international law, including international human rights treaties, the latter should prevail. The question of re-broadcasting should, therefore, be considered in light of Article 10 of the European Convention on Human Rights and the measures taken by other European States to protect and promote local programming. In the view of ARTICLE 19, the measures noted above – namely local content requirements, restrictions on foreign ownership and promoting local programme production – are sufficient to protect any legitimate interests which might be affected by re-broadcasting foreign programmes. Permitting re-broadcasting only where this is covered by a specific intergovernmental or international agreement cannot, therefore, be justified.