Comment on the draft Georgian Broadcasting Code of Conduct

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This Comment is based on an English translation of the draft Code of Conduct for Georgian broadcasters (the draft Code), received by ARTICLE 19 in July 2006.[1] Rather than providing detailed observations on its substance, this Comment contains recommendations on the format and structure of the Code, intended to improve its user-friendliness for broadcasters and its suitability for enforcement by the Georgian National Communications Commission (the Commission). We intend the substance of the Code to be the subject of a later analysis, once a subsequent draft has been prepared.

Introduction: Background of the draft Code

The adoption of a Code of Conduct governing broadcasting in Georgia is contemplated by the Georgian Law on Broadcasting, which defines the Code as "a normative act, passed by the Commission … determining the rules of conduct for license holders."[2] Adoption of the Code must be completed by 31 December 2006.[3] The Law on Broadcasting does not lay down any requirements as to the contents of the Code, although it does stipulate that the Code should be drawn up "on the basis of consultations with license holders and public representatives."[4] After its adoption, citizens will be able to complain to the Commission about any breach of the Code;[5] if a violation is found, the broadcaster in question is required to broadcast the Commission's findings within 5 days.[6] The Commission will also be able to initiate its own investigations, which can lead to the imposition of fines or the suspension or revocation of a

[1] ARTICLE 19 takes no responsibility for the accuracy of these translations or for comments based on mistaken or misleading translation. The text on which this analysis is based can be downloaded at http://www.article19.org/pdfs/laws/georgia.bro.code.06.pdf.
[2] Article 2(h).
[3] Article 76(2).
[4] Article 50.
[5] Article 14(2).
[6] Article 14(5).

licence.[7] Finally, broadcasters will be required to produce an annual report outlining their compliance with the Code.[8]

Comments

Structure of the draft Code

The draft Code consists of nine chapters. The opening chapter is general in nature and is entitled 'Legislative Framework'; the last chapter deals with the complaints mechanisms to be established by broadcasters; while the body of the Code deals very broadly with the content of broadcasts and the manner of their production.

It is unfortunate that the Law on Broadcasting fails to provide any guidance on what the scope of the Code of Conduct should be, and which subjects it should address. Chapters II-VIII of the draft Code are quite detailed, however, and appear to cover all the major subjects which should be addressed in a code of this kind.

Our main concern on the structure of the draft Code relates to Chapter I. Its purpose is not entirely clear: some parts of it (in particular sections 1 and 4-11) appear to summarise the general legal framework for media freedom in Georgia; other parts contain general reflections on the role of broadcasting in society (sections 2-3); and some parts are written as if they provide specific rules with which broadcasters should comply (sections 12-13), although it is possible that these are again summaries of existing, external pieces of legislation.

We suspect that Chapter I is, in fact, in its entirety intended as an introductory summary of Georgian media law relevant to broadcasters, and not as a normative part of the code. Such a summary, while an unusual element in a broadcasting code, is not unwelcome. It is vital, however, that the legal nature of Chapter I be cleared up: at the moment the impression is created that the National Communications Commission will be empowered to enforce Chapter I on an equal footing with other parts of the draft Code. Enforcement of all the legal provisions summarised in Chapter I is presumably already entrusted to other bodies, while large parts of the Chapter would, in principle, not be suited to oversight by the Commission. These include, for example, the provisions on the rights of journalists to observe the voting process during elections and to access information held by public bodies: the Commission is not equipped to enforce journalists' rights against the State and these are anyway matters that fall beyond its remit of regulating the broadcast sector in Georgia.

In order to create a clear division between Chapter I and the remaining, legally enforceable parts of the Code, we recommend placing Chapter I outside the body of the Code and transforming it into a separate introduction or annex. A paragraph should also be added, making it clear that Chapter I is not part of the normative body of the Code and intended purely as a reference.

Recommendation:

- Chapter I should be placed outside the body of the draft Code as a preface or

[7] Article 71.
[8] Article 70(3).

annex, and a statement should be added to it making it clear that no part of (the present) Chapter I is enforceable by the Commission.

Binding nature of the draft Code

It is apparent from the Law on Broadcasting that the Code of Conduct will be a legally binding instrument. It is described as a 'normative act' and the Commission will be empowered to impose sanctions for its breach (see the discussion above).

Its binding nature means that the Code will have the effect of restricting broadcasters' right to freedom of expression in significant ways; the many detailed provisions are likely to have a bearing on virtually every programme produced in the future, constraining editors' choice of how to gather and present information and opinions. While we believe that the Code's rules are largely defensible, it is important that every provision be screened for its compatibility with the internationally protected right to freedom of expression.

International law, as reflected for example in Article 10(2) of the *European Convention on Human Rights* (ECHR), permits restrictions on freedom of expression, but subject to certain conditions, including that any restriction must be 'provided by law'. This requirement goes beyond the mere existence of a legal rule. Binding rules which restrict freedom of expression must be framed in clear, precise language which enables citizens, including broadcast journalists, to regulate their conduct. The European Court of Human Rights has often stated:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[9]

It appears to us that the draft Code contains two types of provisions. The first are hard-and-fast rules, which are intended to be directly enforced. An example is section IV.8, which states that "[b]efore interviewing a politician, the broadcaster shall provide the respondent with full information on the content and context of the programme…" The second are good practice principles, which are supposed to guide the work of journalists but would probably not be the basis of a decision to impose a sanction. Section IV.8 also provides an example of this, stating that "journalists shall not think that experts, specialists or journalists from other organisations are impartial".

In principle, it is a good idea to include guidance on good practice in the Code of Conduct. Such guidance should however be clearly distinguished from rules intended to be directly enforceable. Most practice guidance is formulated as general principles, and is therefore insufficiently precise to meet the requirement of being 'provided by law', as that term is understood in international law. It is important both for viewers and for broadcasters that the Code is clear about which rules can form the basis of a complaint, and which cannot. Those which can should be formulated with precision, so that broadcasters are able to anticipate the consequences of their actions and are not encouraged to self-censor to avoid the possibility of censure by the Commission.

[9] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49 (European Court of Human Rights).

An example of how this might work can be found in the UK Office of Communications (Ofcom) Broadcasting Code,[10] which is frequently referenced in the draft Georgian Code. The Ofcom code distinguishes between 'rules', which are binding on broadcasters, 'principles', which are intended to help readers understand how to apply the code, and 'meanings', which explain the meaning of certain terms and concepts.

Recommendation:

- The Code of Conduct should distinguish clearly between rules intended to be directly enforceable by the Commission and statements intended as general guidance for journalists.

Coherence and user-friendliness of the draft Code

Rather than developing the Code of Conduct from scratch, its authors have decided to collate material from a wide range of existing, comparable instruments from various countries, supplemented by some new material. The draft Code clearly indicates the source for each particular provision. In principle, we support this approach, since there is no need to reinvent the wheel and the sources on which the draft Code draws are generally highly regarded. At the same time, we believe a much larger effort is necessary to integrate the various sources into a coherent and user-friendly document. In its current form, the draft Code is a patchwork of loosely connected excerpts which would be difficult, if not impossible, to apply in practice.

One very obvious problem resulting from the current format of the draft Code is the scattering of subject-matter across different sections. While the Code's authors have designed a clear structure, their efforts to fit the source material into it have been only partially successful, mainly due to the fact that much of the material was written according to very different organisational principles. Many excerpts are not capable of slotting neatly into the draft Code's structure without substantial editing. A typical example of this can be found in section II.4, whose subject is supposed to be "Integrity and Fairness". The fragments quoted under this heading range widely, covering not just matters of integrity and fairness but also (especially in the "UNESCO, RTNDA; OFCOM" section) the duty of journalists to protect their sources, the use of surreptitious newsgathering techniques, the protection of intellectual property, and so on. These are all matters which are also covered elsewhere in the Code.

A related issue are the frequent repetitions, gaps and contradictions between different sources quoted alongside one another in a particular section. Section II.3.2 on "Balance in a Single Programme and in a Programme Series" provides an example. The opening paragraph of this section states that balance must be achieved in a single programme if it touches "important controversial issues". The second fragment (from the European Institute for the Media) repeats this same point, and adds that individual programmes should also be balanced when "it is not likely that the licensee will soon return to the subject." The third fragment (from the BBC) states that in achieving impartiality, "a series of programmes on the same service may be considered as a whole." It is not clear whether this is intended as an exception to the rule in the first paragraph, or the other way round. Then, the fourth fragment (from CBC) appears to

[10] Available online at http://www.ofcom.org.uk/tv/ifi/codes/bcode/ofcom-broadcasting-code.pdf.

repeat the third, stating that "individual programmes within the series may reflect a particular view, [but] the series itself must give adequate consideration to differing views…"

Section II.3.2 could easily be summarised in one concise and clear provision, for example as follows:

1. Broadcasters shall ensure that their programming, when considered overall, is balanced.
2. A series is a set of two or more programmes broadcast by the same service, each one clearly connected to the previous one and dealing with the same or related issues. Broadcasters shall ensure that series are balanced, when considered as a whole.
3. By way of exception, broadcasters shall ensure that individual programmes, whether part of a series or not, are balanced, if:
    a. They address important, current controversies; or
    b. The broadcaster is unlikely to return to the same subject in the near future.

In this way, the essence of section II.3.is reflected in substantially less words (99 versus 249) while removing the scope for confusion about how to treat series of programmes when they cover controversial or infrequent subjects.

We believe the draft Code as a whole would benefit greatly if it were transformed into a more traditional legal form, and were organised into chapters, articles and sub-clauses, along the lines of the example above. The process of summarising the various sources currently excerpted in the draft Code in legal form would help expose contradictions, duplications and gaps; it would reduce the Code's length significantly; and it would introduce a system of numbering which would make referencing specific parts of the Code easier. Most importantly, however, it would make the Code easier to use for both broadcasters and the Commission.

Recommendation:

- The Code of Conduct should be redrafted into a more traditional legal format, including chapters, articles and sub-clauses, in order to improve its coherence and user-friendliness.

Scope of the draft Code

The draft Code makes frequent references to 'broadcasters', but it does not explicitly limit its field of application to broadcasters or define what that term means. We note that the Law on Broadcasting stipulates that the Code is supposed to determine "the rules of conduct for *license holders*" (emphasis added).[11] We believe the draft Code should reaffirm this grant of authority through a provision, early on, defining the Code's scope. Without such a provision, citizens may be tempted to make complaints under the Code against non-licence holders, such as Internet broadcasters, foreign broadcasters operating out of Georgia or even other media, such as newspapers.

An important concern is that the draft Code appears to exceed its permitted scope in some areas. It is true that the Law on Broadcasting does not specify any limits on the Code's mandate to regulate licence holders; however, it stands to reason that this does not imply a *carte blanche* to regulate any and all aspects of licensees' activities. The Code should confine

[11] Article 2(h).

itself to matters which are substantially connected to the actual use of the licence; it would clearly be unreasonable, for example, to prescribe rules for the content of newspapers issued by companies which happen also to be a broadcast licence holder.

We consider that Chapter VI ('Online Policies'), in particular, should be revised to eliminate any provisions which seek to regulate websites maintained by licence holders (or others). There is a fundamental distinction between the regulation of broadcasting and the regulation of the Internet. The holder of a broadcast licence has been granted a special facility by the State – the right to exploit part of the electromagnetic spectrum, a limited public resource – and it is consequently justifiable to require this licence to be used in the public interest, even though that implies fairly far-reaching limits on the broadcaster's editorial freedom. By contrast, virtually anyone who wants to can start a website; there is no practical need, and hence no justification, for prescribing special rules regarding the content of online publications.

Parts of Chapter VI are concerned with how licence holders use content found or generated on the Internet in their broadcasts. We find these provisions to be justifiable in principle, as they are closely related to the actual use of the broadcast licence. But the majority of the Chapter is concerned purely with the content of websites maintained by broadcasters; material on these websites is supposed to be "balanced" and "avoid the reality or appearance of promoting particular opinion" (section VI.1); broadcasters must censor their chat forums to remove any material that is defamatory, insulting, hostile, constitutes propaganda for hatred or war, etcetera (section VI.3); they must include the date of last revision on news items (section VI.4); they must ensure their hyperlinks are "clear, responsible and reflect journalistic values"; (section VI.5) and so on. These provisions are illegitimate because they seek to regulate an area of broadcasters' activities that is clearly separable from the use of the licence that they have been granted to use in the public interest. Moreover, even if it were in principle legitimate to impose restrictions on the contents of broadcasters' websites, many of the provisions found in Chapter VI would fail the test for limitations on freedom of expression provided in Article 10(2) of the ECHR (discussed above). Requirements for online material to, for example, be 'responsible' or 'reflect journalistic values' are impermissibly vague, while a requirement to censor 'insulting' or 'hostile' chat entries goes far beyond what is necessary in a democratic society.

Provisions can also be found in other parts of the Code which, in our opinion, go further than can be justified under the grant of authority in the Law on Broadcasting. Among the more obvious examples are provisions which seek to guarantee rights of journalists against the State or against other non-licence holding parties. Chapter IV.10.2, for instance, states that the confidentiality of sources is "absolutely protected and nobody, including the courts, may request disclosure…" While we support the principle that journalists should be able to protect their sources, the Code, which is to be enforced by the Commission, is not an effective or appropriate place to codify such a right.

More difficult issues are raised by the Code's many provisions which deal with the internal practices of broadcasters. On the one hand, a certain degree of regulation may be necessary to ensure that programming truly serves the public interest, by presenting reliable information and ensuring that the public is not discouraged from contributing to programmes by unethical newsgathering techniques. Yet this should be balanced against the need to allow broadcasters freedom of choice in the way they run their stations, especially when doing so will not be likely to result in poor use of the licence. In some instances, we believe the Code does not

give enough consideration to this latter point. Section IV.6.2, for example, requires journalists to "receive a prior consent from the manager of the relevant unit" for making a secret recording; section IV.6.3 states that "investigation of any crime or anti-social matter shall be agreed with the Editor-in-Chief." The following sections contain several further requirements to seek prior permission from management.

It is significant that these fragments are taken from the internal codes of the BBC and CBC. An internal code is quite different from a code enforced by an administrative body; furthermore, these are both public service broadcasters, which are generally expected to observe higher standards than are imposed on all broadcasters. In our view, while it is appropriate for the draft Code to offer certain protection against invasion of individuals' privacy through unauthorised recording or unwarranted journalistic investigations, this should not take the form of prescribing how decision-making processes within broadcasters must work. In general, those sections of the draft Code that are borrowed from internal practice rules of broadcasters should be reviewed for their suitability to be imposed through an external Code of Conduct. Particular attention should be devoted to Chapter VII ('Personnel Standards'), much of which consists of internal practice rules to be applied by media outlets to their employees. It is certainly to be hoped that licence holders will adopt rules to prevent conflicts of interest arising amongst their staff; however, entrusting responsibility to the Commission to review hiring decisions, gifts accepted by journalists and so on will likely lead to complaints on petty issues, undue interference in the internal workings of licensees to little benefit, and a serious diversion of the Commission's resources.

Recommendations:

- A provision should be added to the draft Code, early on, defining its scope of application as being limited to licence holders.
- All provisions which seek to regulate the way licence holders manage their websites should be removed from the draft Code.
- All provisions which seek to regulate the rights and obligations of non-licence holders should be removed from the draft Code.
- All provisions taken from internal practice codes of media outlets should be reviewed for their suitability for enforcement by the Commission. This applies particularly to Chapter VII.

Distinguishing between different types of broadcasters

We note that the draft Code would apparently apply in full to all kinds of licence holders – whether commercial, public or community broadcasters. While this approach is not necessarily unjustifiable, it is likely that many rules will impose a relatively heavy burden on small local or community broadcasters. Consideration should be given to adopting the model followed in some countries, such as Australia, whereby these broadcasters are subject to less stringent rules and are exempted from less vital parts of the Code. An example of this might be the duty, under Chapter IX, to set up a complaints procedure, which may be unduly onerous for a small local or community broadcaster. Individuals with a grievance against a local or community broadcaster would still be able to address themselves to the Commission.

Recommendation:

- Consideration should be given to exempting smaller licence holders, such as local and community broadcasters, from less vital parts of the Code.