



# Statement

on the

## Kenya Communications (Broadcasting) Regulations, 2009

February 2010

## **Key Recommendations**

- The frequency plan should be integrated fully into the licensing regime so as to give full effect to it.
- More detail should be provided regarding the manner in which licence applications are processed, including in relation to due process guarantees, the duration of licences and fees.
- Comprehensive legislative reform should be introduced to transform the Kenya Broadcasting Corporation into an independent public service broadcaster.
- The rules limiting concentration of ownership of broadcast media should be extended to cover cross-ownership between the broadcasting and print media sectors.
- More developed rules should be put in place to ensure that the transition to a less concentrated, more diverse broadcasting sector takes place in a manner that is fair and that respects the right to freedom of expression.
- The rules governing the regulation of content should be significantly reworked to put in place a fair and democratic system, as envisaged in the Kenya Communications Act, 1998, including by leaving it to the Communications Commission of Kenya and bodies of broadcasters to develop detailed programme codes and to apply them through a complaints system.

## 1. INTRODUCTION

This Statement outlines ARTICLE 19's key concerns with the Kenya Communications (Broadcasting) Regulations, adopted on 31 December 2009 (the Regulations),<sup>1</sup> based on international standards on freedom of expression. It is intended to be read in conjunction with our Memorandum of November 2009 analysing the Regulations when they were still in draft form.<sup>2</sup> The Regulations, adopted by the Minister of Information and Communications after consultation with the Communications Commission of Kenya (the Commission), are part of the effort to implement the Kenya Communications Act, 1998, as amended in 2009 (the Communications Act).

ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the *Universal Declaration of Human Rights*, which guarantees free speech. We have published numerous legal analyses of broadcasting and other rules affecting freedom of expression.<sup>3</sup> Our legal work in Kenya has included, in addition to our previous analysis of the Regulations, analyses of the Media Council Bill,<sup>4</sup> Freedom of Information Bill,<sup>5</sup> and the Kenyan Constitution's provisions on freedom of expression.<sup>6</sup>

The Regulations have a number of positive features. They represent an attempt to address the high degree of media concentration that currently prevails in the broadcasting market in Kenya, and they seek to put in place a progressive co-regulatory regime in relation to broadcasting content. We note that a number of changes were made to the draft Regulations before they were adopted, many in apparent response to our earlier comments.

At the same time, areas for improvement remain, including the following:

- Integration of the frequency plan into the licensing system so as to give proper effect to it.
- Clearer rules on processing of licence applications, including as to the duration of licences and applicable fees.
- More developed and fair rules to address the situation of concentration of ownership among current broadcasters, as well as the need to promote a broadcasting system which reflects wider public interests.
- Fundamental revision of the rules on content, as well as the system for developing programme codes and complaints systems.

We note, as a general point, that the Commission, and in particular the Board of Directors, provided for in section 6 of the Communications Act, lacks the independence required under international law of a body exercising regulatory powers over the media. Several of our

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<sup>1</sup> Legal Notice No. 187. The Regulations were adopted pursuant to Article 46K of the Kenya Communications Act, 1998, Cap 411.

<sup>2</sup> Available at: <http://www.article19.org/pdfs/analysis/memorandum-on-the-kenya-communications-broadcasting-regulations-2009.pdf>.

<sup>3</sup> An overview of these analyses can be found on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

<sup>4</sup> See <http://www.article19.org/pdfs/analysis/kenya-media-council-bill.pdf>.

<sup>5</sup> See <http://www.article19.org/pdfs/analysis/kenya-foi.pdf>.

<sup>6</sup> See <http://www.article19.org/pdfs/analysis/note-on-the-existing-kenyan-constitutional-provisions-on-freedom-of-expressi.pdf>.

recommendations involve vesting important powers in the Commission. We note that unless the independence of the Commission is secured, giving it these powers could simply lead to greater political control over, and interference in, broadcasting.

## **2. ANALYSIS OF THE REGULATIONS**

This section of the Statement follows the same headings as the earlier Memorandum which, for its part, was organised along the lines of the Regulations. The Statement identifies the concerns from the Memorandum that have been addressed in the final version of the Regulations, as well as key persisting concerns. The Statement does not repeat the description of the substance of the Regulations, which can be found in the Memorandum.

### **2.1. Licensing Procedures**

The Regulations include a lot of useful detail on licensing procedures. At the same time, more could be done to bring the Regulations into line with better international practice in this area.

In our earlier Memorandum, we noted that the draft Regulations failed to require the Commission to create a blueprint for broadcasting in Kenya, to serve as a longer term plan to ensure diversity of broadcasting services and that the system as a whole operates in the public interest. In many countries, the broadcast regulator is required to do this through the adoption of a frequency plan, setting out the overall framework for allocating licences among the various broadcasting uses.

This has now been partly addressed, through paragraph 6(1)(c), which requires the Commission to develop a frequency plan, setting out how broadcasting frequencies will “be shared equitably and in the public interest among various tiers of broadcasting”. Furthermore, paragraph 13(2) provides that the plan shall ensure that an equitable number of frequencies are reserved for community broadcasting.

This is an excellent first step but more is needed to integrate the plan into the broadcasting system so that it can be effective. First, as we noted in our earlier Memorandum, the Commission should be required to draw up the frequency plan through an open and participatory process involving all interested stakeholders. Second, and even more important, the plan has not been incorporated into the licensing process in a manner that would ensure that it is implemented. This should be done, for example, by requiring the Commission to issue new licenses only in accordance with the plan and by integrating the plan into the system of regularising existing licences (see below).

Our earlier Memorandum noted three problems with the process for applying for a licence. First, the draft Regulations failed to specify when applications might be made. This has been partly addressed through paragraph 3(2), which indicates that the Commission shall provide information regarding broadcasting frequency availability (this is an example of a place where the frequency plan should be integrated into the licensing system, by requiring this information to be based on the plan). It would still be useful to further specify that over-subscribed areas will be licensed through a tender process, whereas applications in under-served areas (i.e. rural areas) may be made on an *ad hoc* basis.

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Second, we expressed concern at the unfettered ability of the Commission to require further documentation from applicants. This has been partly addressed by paragraph 3(4), which limits such additional information to matters which are “directly relevant” to the licensing criteria established in the Act and Regulations, and paragraph 3(2), which requires the Commission to publish the application requirements at the time of announcing that a frequency is available. However, paragraphs 4(1)(e) and 5(1)(e) still allow the Commission (apparently unrestricted) power to require additional information to be provided. It should be made clear that these are subject to the paragraph 3(4) rule.

Third, we called for licence applications to be published and for the public to have an opportunity to comment on them, as well as for procedural rules relating to the licensing process – such as clear timelines and a requirement of written decisions – to be added. The first of these has been addressed in paragraph 3(5). The latter remains to be addressed and the Regulations are still very weak on the manner in which licence applications are to be processed.

Another problem identified in the earlier Memorandum was the lack of a clear distinction between the criteria for assessing licence applications and the conditions imposed on licensees. This remains a problem in the Regulations, in particular in paragraph 6, entitled “Obligations relating to broadcasting services”, which is largely unchanged from the previous paragraph 4.

We note that the ban on trade unions obtaining licences has been removed, in accordance with our recommendations.

Our earlier Memorandum also noted problems with licence conditions in the draft Regulations. First, all free-to-air broadcasters were required to carry news and information, as well as discussion of matters of national importance, as prescribed by the Commission, in their programming. These obligations have been retained, in paragraph 6(3)(c) of the Regulations, although the Commission is no longer empowered to prescribe what constitutes a matter of national importance. We note that the requirement to carry matters of national importance is unreasonable for community and local broadcasters.

Second, the draft Regulations failed to stipulate the duration of licences or to create a presumption in favour of licence renewal. The Regulations also fail to stipulate this.

Third, the draft Regulations were somewhat obscure as to the powers of the Commission in relation to fees. This has been addressed in paragraph 7, which allows the Commission to prescribe various types of fees. This is useful but we repeat our earlier recommendation that the Commission be required to publish a uniform schedule of fees in advance.

### **Recommendations:**

- The frequency plan should be integrated more fully into the licensing framework.
- Licenses should be issued by tender in more heavily-subscribed areas and on an *ad hoc* basis in underserved areas.
- It should be made quite clear that the Commission’s power to require further documentation is subject to the relevance of that documentation to the licensing criteria.

- Due process rules should be imposed on the Commission in relation to licensing, including clear time limits, a requirement for decisions to be in writing and accompanied by reasons, and the right to judicial review of Commission decisions.
- A clear distinction should be made between the criteria for assessing licence applications and the conditions subject to which licences are granted.
- Section 4(3)(b), requiring all broadcasters to carry national news, should be deleted or at least restricted to national broadcasters.
- Clear time limits on the duration of different types of licences and a requirement for the Commission to adopt a clear schedule of fees in advance should be added to the Regulation.
- Licence holders should benefit from a presumption of renewal at the end of the licence term.

## **2.2. Rules Applicable to Specific Types of Broadcasters**

In our earlier Memorandum, we noted that the draft Regulations provided a very general overview of the obligations of public broadcasters but that they failed to provide a proper legal framework for the Kenya Broadcasting Corporation (KBC) as a public service broadcaster. This remains essentially the same in the Regulations. We reiterate our observation that there is very little point in including such a brief overview of public broadcasters' obligations in these Regulations and that, instead, a full legal regime to transform KBC into a public service broadcaster should be developed.

In terms of community broadcasters, we recommended that instead of being required to broadcast a minimum of eight hours per day, they should be required to provide a reasonable weekly programme. This idea has been incorporated into paragraph 5(1)(d). Other licence requirements have also been relaxed for community broadcasters (see the whole of paragraph 5). Furthermore, the Commission is given the power to exempt any class of licensees from paying licence fees (paragraph 7(b)). It would, however, be useful to make it explicit in the Regulations that community broadcasters will not be required to pay fees, or will be required to pay only very small fees.

We note one new concern with the Regulations which we believe conflicts with the definition of a community broadcaster in section 2 of the Communications Act. Paragraph 5(1)(b) of the Regulations requires an applicant for a community broadcasting licence to provide the "minutes of the meeting where it was resolved to establish a community broadcasting station". The Communications Act, however, only requires that the broadcaster be a not-for-profit organisation and that the majority of the community 'consent' to the application (section 46F(2)(b)). The latter may be shown in many ways, including outside of a formal meeting at which minutes are taken.

### **Recommendations:**

- Consideration should be given to amending or replacing the KBC Act to transform KBC into an independent public service broadcaster.
- It should be made clear that community broadcasting licences will be made available for free or at very low cost.
- Community broadcasting applicants should be given some latitude as to how

they demonstrate support from the community.

### **2.3. Ownership Concentration and Regularisation of Existing Broadcasters**

As noted in our earlier Memorandum, we welcome the attempts in the Regulations to address the problem of a high degree of concentration of ownership of the broadcast media in Kenya. We note that the Regulations incorporate our recommendation that the rule on not holding more than one overlapping licence should be applicable to any person exercising control, directly or indirectly, over a licence, instead of to any particular licensee (see paragraph 10(1) of the Regulations).

We note that our recommendation that the rules on concentration of ownership be extended to cross-media ownership, for example of both newspapers and broadcasters, has not been addressed. We also reiterate our concern about licensees being required to comply with the Government's "Communications Sector Policy" (see paragraph 10(2) of the Regulations), due to the fact that this opens up a possibility of undue government control.

The timeframe for broadcasters to bring themselves into compliance is a key element of the 'one-licence' rule. In the draft Regulations, broadcasters were to be given five years to do this. While a relatively lengthy period, we felt that this could be justified. The Regulations are somewhat contradictory on this point. Paragraph 10(1) gives the Commission the power to set, apparently in its sole discretion, this timeframe. Paragraph 46(3), on the other hand, requires this to be done within the timeframe of the existing licence.

Allowing the Commission to set the timeframe is not appropriate since all broadcasters should benefit from fair and equitable rules in this regard. Setting a five-year timeframe, on the other hand, might place the government in a breach of contract situation, for example where a permit it has previously issued had a remaining duration of longer than five years. A solution might be to require the change within five years, or at the end of the existing permit period, if that is later.

Addressing problems with the current licensing system goes beyond simply addressing ownership issues. Section 46D of the Act establishes clear criteria for issuing licences, including the overall public interest and promoting diversity and plurality of views in broadcasting. The frequency plan, noted above, should address this in part, through allocating frequencies to different types of broadcasters.

It may not be enough, to move the broadcasting system towards the frequency plan, as well as towards the overall public interest, including in diversity, to simply restrict ownership to one licence. For example, if the radio frequencies are dominated by music stations, it may be necessary to require existing broadcasters to incorporate new types of programming into their schedule, or risk losing their licences. This can be done through the renewal process, but it needs to be done in a fair manner which allows existing players sufficient opportunity to make the necessary changes.

In our earlier Memorandum, as noted above, we called for a presumption in favour of licence renewal. Such a presumption should be created but, at the same time, it should not be absolute, otherwise control over frequencies, a public resource, becomes an entitlement, and a

tool for promoting the public interest is lost. It should be possible to refuse to renew a licence where the broadcaster fails to make such changes as may be necessary to give effect to the frequency plan or wider public interest considerations, such as diversity.

**Recommendations:**

- Rules on permissible levels of cross-ownership between newspapers and broadcasters should be introduced.
- Licensees should not be required generally to comply with the Government's "Communications Sector Policy".
- The timeframe for bringing licensees into compliance with the one-licence rule should be set at five years, or longer where necessary to avoid breach of contract.
- It should be made clear that the criteria of the overall public interest and diversity will be introduced into the broadcasting sector both through the issuance of new licences and, where necessary, by requiring changes to existing licences through the renewal process.

## 2.4. Content Issues

Our earlier Memorandum noted that the rules on content in the draft Regulations were the most problematical aspect of it. Although some changes have been made, this remains a problematical part of the Regulations as well.

**The Programme Code and Self-regulation**

Our earlier Memorandum noted that the draft Regulations undermined the whole content regulation scheme envisaged in the Act by directly imposing detailed, and often illegitimate, content obligations. The Regulations have attempted to address this in part by introducing a new rule, in paragraph 18, stating that the content obligations in Part IV, which deals with content, shall "form the basis upon which the Commission or a recognized body of broadcasters shall prepare their respective programme codes".

This is helpful but ultimately insufficient for a number of reasons. First, the rules imposed in the Regulations are very detailed, instead of leaving the detail to the codes. These latter should be developed in close consultation with, or indeed directly by, broadcasters, and should be flexible enough to accommodate changes in attitudes or values over time. The rules in the Regulations fail to accommodate these needs. The Regulations should be limited to listing key categories of rules that the codes should address, such as protection of children, appropriate newsgathering, corrections, violence and so on, leaving the detail to be developed in the codes.

Second, the substance of at least some of the rules in the Regulations is not consistent with constitutional and international guarantees of freedom of expression. For example, they grant anyone whose views on a controversial matter "have been criticised" a right to reply to such criticism (paragraph 24(b)). This will exert a massive and unwarranted chilling effect on frank criticism by broadcasters, which is something they are supposed to engage in, and virtually hand politicians a free platform to expound upon their views. Furthermore, many of the rules should be subject to overriding public interest considerations, but this is incorporated into only one of the rules in the Regulations.

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Third, the system is not properly developed in terms of sanctions. The only sanctions envisaged in the Regulations are fines and imprisonment, after conviction, presumably before a court (paragraph 44). In stark contrast, remedies for breach of programme codes should be mild and graduated, and include such things as warnings and requirements to broadcast statements acknowledging the breach. In line with this, these remedies should be imposed by the oversight body (either the Commission or the approved body of broadcasters), not a court.

Fourth, several of the paragraphs in Part IV contain rules that are not appropriate for inclusion in a programme code and that should be primary rules to be imposed directly by Regulation. Perhaps paragraph 18, stating that the content rules in this part are to be included in programme codes, was introduced without a full appreciation of its implications. For example, paragraph 30, setting out rules on sponsorship, paragraph 31, setting out rules on infomercials, and paragraph 35, on local content, are all matters which need to be addressed directly through regulation, and not simply in a code.

### Other Concerns

Our earlier Memorandum expresses concern about the ‘must-carry’ rule in relation to public notices regarding emergencies or disasters. This rule has been retained in the Regulations (paragraph 43). We also questioned the idea of imposing local content obligations on foreign broadcasters. This rule has also been retained (paragraph 35(2)). Finally, we note with concern that broadcasters which are unable to comply with local content standards will be required to pay money into the Universal Service Fund. Where such failure is due to insufficient effort or attention on the part of the broadcaster, this may be appropriate. Where it is due, in contrast, to the type of programming the broadcaster offers, and the lack of availability of such programming locally, then this rule is not fair.

### Recommendations:

- The system for regulating content should be substantially revised to bring it into line with the scheme contemplated in the Act, as well as constitutional and international guarantees of freedom of expression, as described above.
- Broadcasters should not be required to carry public notices issued by public bodies relating to emergencies.
- Foreign broadcasters should be exempted from the duty to carry local content.
- Fines should not be imposed on broadcasters for failing to meet blanket local content rules unless this failure is due to a lack of effort on their part.

## 2.5. Complaints Procedures

As noted in our earlier Memorandum, the approach of allowing broadcasting bodies to develop their own programme codes and systems for dealing with complaints is a very positive and forward-looking aspect of the Regulations. At the same time, we reiterate two concerns expressed in that Memorandum. First, there is no clear link between the complaints procedures and the codes, which are presumably the standards against which complaints are to be assessed. This concern has not been addressed in the Regulations.

Related to this is the dichotomy between responsibility for developing programme codes, which rests with registered bodies of broadcasters, and for developing complaints procedures, which rests with individual broadcasters. It is, perhaps, not a bad idea for broadcasters to develop internal complaints systems, so that they give both viewers/listeners and themselves a

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chance to sort out problems before involving an external body. But making this mandatory is not something that is common in broadcast regulatory systems. If, however, it is deemed necessary, the rules should at least be simplified considerably.

The main self-regulatory approach should still focus on approved bodies of broadcasters, which can provide a relatively independent assessment of complaints. It would, as a result, be more appropriate to require the complaints procedure to be part of the primary programme codes, and to be approved as a package by the Commission.

Second, the Commission enjoys apparently unfettered discretion to approve or reject both programme codes and complaints handling procedures (paragraphs 38(4) and 41(2)). At a minimum, any rejection should be required to be relevant and appropriate, and it would be useful to set up a system for assessing these (for example, through the prior publication by the Commission of the standards that these documents are expected to respect).

### **Recommendations:**

- The standard by which complaints are judged should be identified, presumably the relevant programme code.
- The primary formal complaints system should be vested in approved bodies of broadcasters, and become part and parcel of the programme code. Individual broadcasters should either not formally be required to handle complaints or the rules in relation to these should be relaxed considerably.
- Conditions should be placed on the Commission's powers to reject a programme code or complaints handling procedure, preferably of both a substantive and procedural nature.