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Digital terrestrial television licensing in Greece: Curiouser and curiouser

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I. Introduction

Since their launching 25 years ago, private television stations in Greece have operated under ‘temporary’ licences. Laws 1730/1987 and 1866/1989 paved the way for the liberalisation of the Greek broadcasting landscape, allowing for the operation of the first local radio and television stations respectively. Individual licences would be awarded subject to a check of legal requirements without a competitive process. Around 230 local radio licences, valid for two years each, were issued on the basis of Law 1730/1987. From 1989 onwards many private radio stations started operating illegally. Delays in the implementation of Law 1866/1989 also led to the illegal operation of numerous private television stations. The first television licences were only issued four years later, in 1993 (Anagnostou et al. 2010: 17). The Council of State, the Supreme Administrative Court of Greece, held that the unlicensed operation of a station did not justify the award of a licence (Council of State 1997). The administration, however, tolerated or even abetted the operation of stations without a licence (Council of State 2010). This uncontrolled introduction of commercial broadcasting in Greece, aptly characterised as ‘savage deregulation’, left an indelible mark on the Greek media scene (Hallin and Mancini 2004: 125; Leandros 2010: 891).

Law 2328/1995 constituted the first serious attempt to regulate the commercial broadcasting market effectively (Hellenic Parliament 1995; Iosifidis and Katsirea 2014)). The Ministry of Press and Mass Media would award four year licences by way of competitive tendering, while the National Council for Radio and Television (*Ethniko Symvoulío Radiotileorasis*, ESR), the Greek broadcasting authority, was entrusted with tender evaluation. Indeed the tendering procedure was opened in 1998, but was subsequently annulled as no operator was found to satisfy the tender conditions. However, Laws 2644/1998 and 3051/2002 provided that regional and local stations that had applied for a licence within the deadline were deemed to be operating legally. Further calls for tender, issued in 2003 by the ESR, which had in the meantime been put in charge of licensing, were cancelled by the Council of State on account of the complexity of the procedure involved (Council of State 2005). In 2007, Law 3592/2007 extended the duration of the legal fiction of ‘lawful operation’ that had been created by Law 2644/1988 (Hellenic Parliament 2007). The Council of State ruled, however, that the indefinite toleration of illegal TV stations contravened the Greek Constitution (Council of State 2010). The procrastination of successive Greek governments with the legalisation of the stations’ operation has not merely been caused by inefficiency or inertia. It is well-documented that it has been symptomatic of

* All websites referred to in this paper were accessed on 21 July 2016. The author thanks Professor Jackie Harrison, Dr. Paul Wragg and the anonymous reviewers for their thoughtful comments.

the clientelistic relations the Greek state has cultivated with the media, the former aspiring for a favourable media coverage, especially at election time, in exchange for public work contracts, subsidies and other concessions including broadcasting licenses (Papathanassopoulos 1997; Hallin and Mancini 2004). In other words, the promise of licensing was used as a pawn in the domestic political game with little consideration for the 'common good'.

A law, which was passed by the Greek Parliament on 24 October 2015, promised to put an end to this state of disorder by finally licensing digital terrestrial television (DTT) providers. However, once more, the new legislation proved extremely controversial, dividing government and opposition parties, and attracting strong criticism from commercial broadcasters, the Association of Commercial Television in Europe (ACT), the International and European Federations of Journalists (IFJ and EFJ) and their Greek affiliates. It was planned that only four ten-year licences would be granted through an auction held by the Secretariat General of Information and Communication. The main criticisms voiced against this arrangement were the following: firstly, that it bypassed the independent regulatory authority, ESR, and secondly, that the arbitrary limitation of the number of licences placed commercial television under the tutelage of the state and reduced pluralism. The Greek government, on the other hand, contended that it was solely competent to regulate DTT licensing, that the Greek audiovisual market could not sustain more channels, and that the new regime would put an end to corruption in the sector. Furthermore, they argued that the magical number of licences, four, was based on a study conducted by the European University Institute (EUI) in Florence, and that the commitment for an international tender was part of the third EU bailout for Greece, signed in 2015 by the Greek Prime Minister (Skarlatos 2016; European University Institute 2016).

The general outcry against the new licensing framework did not deter the government from conducting a public auction of just four licenses, which raised the amount of €246m (£206m). The government pledged to spend this amount on welfare policies. Only two of the existing broadcasters, Skai and Antenna, succeeded in obtaining a licence after a controversial procedure, which forced the representatives of the eight rival bidders to stay in isolation in a government building for 65 hours. Alpha TV, Star and two new bidders failed in their bids. A number of private broadcasters as well as the TV Station Owners' Association applied to the Council of State, Greece's supreme administrative court, requesting the suspension of the licensing procedure. The Council of State turned down the request. However, on 26 October 2016, the plenary session of the court decided that the new licensing law was unconstitutional given that the ESR, not the government, should have been in charge of the licensing procedure. At the time of writing, the court's reasoning, which does not deal with the issue of the number of licenses, has not yet been published. The ruling, by annulling the outcome of the recent auction, means that the defeated existing national network will not need to go off air and raises questions about possible compensation claims by the auction winners. The government, in a gesture of defiance, refused to repeal its licensing law, but merely suspended its operation, shattering hopes of an end to the stalemate and of a consensus on the regulation of the broadcasting landscape.

The allocation of DTT licences in Greece is of great interest not only as a curiosity, as the unique example of an anarchic deregulation of the audiovisual sector, but also because it raises a question mark over the received wisdom that spectrum is unlimited in the digital age. This article examines, first, the compatibility of the new licensing regime with the European Convention on Human Rights (ECHR). Licensing is not a purely technocratic exercise but involves considerations related to pluralism, competition and the balance between platforms

(Starks 2007:169). It can bring in new players and enhance the attractiveness of the DTT platform or act as a catalyst for its demise. The article focuses next on the role of the ESR and analyses whether its exclusion from the licensing procedure is in line with the Greek Constitution and with Council of Europe and EU law imperatives on independent regulatory authorities. It begins by outlining the case law of the European Court of Human Rights (ECtHR) on the licensing of broadcasting stations.

II. The case law of the European Court of Human Rights on TV licensing

Art. 10 ECHR specifically refers in the third sentence of paragraph 1 to the right of states to require ‘the licensing of broadcasting, television or cinema enterprises’. The positioning of the caveat as to the licensing of broadcasting in the first paragraph could be taken to imply that such licensing does not interfere with freedom of expression and hence does not need to be justified under Art. 10 (2) (Janis et al. 2010:301; Engel 1993: 54). The relationship of Article 10 (1) 3 ECHR with Article 10 (2) ECHR has been very contentious in legal writing in the past (Katsirea 2008: 252). Some authors required that the conditions of this provision also be satisfied (Engel 1993: 54), while others attached to Article 10 (1) 3 an independent significance (Hoffmann-Riem 1991: 186).

The ECtHR addressed these questions in a series of landmark judgements. In *Groppera Radio*, a case concerning a Swiss company which broadcast radio programmes from Italy targeting listeners in Switzerland before the latter’s accession to the EU single market in 1992, the ECtHR held that the exception in Art. 10 (1) 3 is of limited scope (European Court of Human Rights 1990: 321), that its aim was solely to organise broadcasting in its technical aspects and that it was subject to the requirements of Art. 10 (2). In the case at hand the Court held that the ban on the retransmission of Groppera’s radio programmes by cable was necessary so as to prevent the evasion of the Swiss telecommunications system and to secure pluralism by way of a fair allocation of frequencies. The interference with Groppera’s freedom of expression was hence a fair price to pay so as to safeguard the rights of other broadcasters operating in Switzerland.

The Court confirmed its reasoning concerning the relationship between these two provisions in *Autronic* and developed it further in *Informationsverein Lentia* (European Court of Human Rights 1990a: 485; 1993: 93). In the latter of these cases the Court attached greater importance to Article (1) 3 ECHR. It held that a licensing system not only aimed to safeguard the organization of a broadcasting system in its technical aspects, but also to regulate other issues such as the nature and objectives of the proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. Moreover, it recognised that Article 10 (1) 3 ECHR has an independent meaning so that it can justify restrictions not corresponding to any of the objectives laid down in the second paragraph of Article 10. Nonetheless, these restrictions would have to be gauged in the light of the other requirements of Article 10 (2), that is, they would have to be prescribed by law and to be necessary in a democratic society.

Informationsverein Lentia concerned a challenge to the monopoly of the Austrian Broadcasting Corporation. The applicants, aggrieved because they had been unable to set up private stations, complained that the said monopoly was incompatible with Art. 10. The Government argued that the monopoly of the public broadcaster (*Österreichischer Rundfunk, ORF*) was an indispensable safeguard of internal pluralism. The Court agreed that member States are free to regulate the organisation of broadcasting in their territories. Nonetheless, the chosen system would need to comply with Art. 10 (2). The Court held that a public monopoly was the most restrictive means of protecting the values in question. Technological developments meant that the scarcity of frequencies could no longer justify such a system. Nor was the Court convinced by the economic argument as regards the small size of the Austrian market and its alleged propensity for the development of private monopolies. In short, the Court instructed Austria to liberalise its broadcasting market and to introduce external pluralism.

The ECtHR did not only deal with questions of licensing in the framework of the abovementioned case that was brought so as to change Austria's broadcasting system. It also gave its verdict on the grounds that can justify the refusal of a broadcasting licence and on the characteristics of a certain licensing system. The case *Demuth v Switzerland* concerned the Swiss Federal Council's (*Bundesrat*) refusal to grant a broadcasting licence to Car TV AG for the transmission by cable of a television programme specialised in automobiles (European Court of Human Rights 2002a). The Federal Council stressed that there was no right under Swiss law nor under Art. 10 to obtain a broadcasting licence. It argued that a licence could exceptionally be granted to a specialised programme if it offered valuable contents, especially in the areas of culture or the formation of political opinions. Given that the programme in question was oriented towards entertainment, it did not meet the requirements for a licence under the Radio and Television Act. The ECtHR held that the interference with Art. 10 resulting from the Swiss licensing system satisfied the conditions of para. 2 by contributing to the quality and balance of programmes. These criteria were, in the Court's view, of particular sensitivity in view of Switzerland's distinct political and cultural structure. The Court also paid attention to the fact that the Council's refusal was not categorical but would be revisited if Car TV AG enriched its programme with cultural elements.

Further, the Court also passed verdict on the lawfulness of a licensing procedure in a case concerning the repeated refusal by the Armenian regulatory authority to grant a licence to the Meltex television company (European Court of Human Rights 2008). The Court held that the application of the licensing criteria in the licensing process must 'provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence' (European Court of Human Rights 2008: para. 81). The Court took the Committee of Ministers Recommendation Rec (2000) 23 into account according to which, first, the granting of broadcasting licences is normally one of the essential tasks of regulatory authorities in the broadcasting sector; secondly, the law should define the basic conditions and criteria for the granting and renewal of broadcasting licences; and, finally, the regulations governing the licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The Broadcasting Act of Armenia contained sufficiently precise criteria governing the granting of licences but did not explicitly require the licensing authority to provide reasons for its decision to grant or refuse a licence. As a result, Meltex was never informed why it did not satisfy the relevant criteria in the law and why a competitor was always deemed more suitable.

The Court held that a similar lack of protection against arbitrariness was also experienced by Centro Europa 7, an Italian broadcasting company, which had obtained a broadcasting licence but was prevented from using it for over ten years due to the Italian government's

failure to allocate it any frequencies for analogue terrestrial television broadcasting. The Court observed that the existence of several channels or the theoretical possibility of access to the market did not suffice. What was needed was effective access to the market that guaranteed diversity of overall programme content. This led the Court to conclude once again that the state not only had a negative duty of non-interference but also a positive obligation to put in place ‘an appropriate legislative and administrative framework to guarantee effective pluralism’ (European Court of Human Rights 2012: para. 134). This was especially needed in the context of Italy’s problematic duopoly between RAI, the public service broadcaster, and the Berlusconi owned Mediaset.

In conclusion, the ECtHR has developed a substantial body of case law in which it scrutinised both the allocation of programme licences as well as the allocation of frequencies with the aim of introducing effective internal and external pluralism in the legal orders of the states in question. The following section will discuss the aims pursued by the new law regulating the licensing of DTT providers in Greece and the extent to which this law is compatible with Art. 10 ECHR.

III. The compatibility of the new licensing regime with Art. 10 ECHR

In considering whether the new licensing regime violates Art. 10 ECHR, it is necessary to note at the outset that the protection afforded under the Convention is subsidiary to that afforded under the domestic legal systems (European Court of Human Rights 2009: para. 83). Applicants need to exhaust national remedies as a matter of procedure before applying to the ECtHR. If the government continues to hold on to its controversial licensing scheme, commercial television stations may well decide to seek recourse to the ECtHR.

In order for Law 4339/2015 and the implementing decisions, in particular Decision 4297/2016 of the Minister of State, to violate Art. 10 ECHR, it would be necessary to establish that there has been an interference with freedom of expression, first, of the owners of those private television stations who would not be able to obtain a licence and would hence be forced to shut down, and secondly, of the viewing public who would be deprived of their programmes. As discussed above, even though member States are free to organise broadcasting in their territories by way a licensing system of their choice, a restrictive licensing system will need to be justified under Art. 10 (2) ECHR.

It is therefore necessary to consider whether the new licensing regime could be justified under Art. 10 (2) ECHR. As explained in the previous section, the aims pursued by the Greek licensing system do not need to correspond with those listed in Art. 10 (2) ECHR as long as they meet the other requirements of this provision, i.e. if they are prescribed by law and necessary in a democratic society. The goals pursued by licensing DTT providers in Greece have been the subject of contentious debate. The government claims that the new law intends to bring order in the chaotic Greek broadcasting landscape, to clear it of corruption and vested interests. Opposition parties and journalists accuse the government of attempting to bring private media under state tutelage, and even of using the controversial law so as to divert attention away from the Greek migrant and financial crisis (Tsihlias 2016; Mandravelis 2016; To Vima 2016).

A more precise insight into the stated aims of the new law can be gained from its Explanatory Memorandum (Hellenic Parliament 2015). According to the Memorandum, Law 4339/2015 pursues the following objectives: first, to legalise the operation of free to air DTT providers; second, to safeguard pluralism; third, to develop healthy competition and the

operation of financially sound undertakings in the field of media; fourth, to simplify and speed up the licensing procedure and, finally, to provide qualitative broadcasting services. In the following, we will consider whether the chosen licensing regime is apt to meet these aims and whether there is a less restrictive way of doing so.

The first objective, the legalisation of free to air DTT providers in a manner that simplifies and speeds up the licensing procedure, is a noble one. The anarchy that has prevailed in the Greek broadcasting landscape since the genesis of private television needs to come to an end. However, as the ESR observed, ‘the governmental choice to conduct an auction could have been in the right direction of a quick completion of the licensing procedure if it was not accompanied by rules unsuitable for the regulation of the market in question...’ (National Council for Radio and Television 2015). The decision to license only four nationwide channels for high definition transmission could be justified if there was no more spectrum available. DIGEA, the DTT network provider for the main nationwide free-to-air commercial channels owns six digital multiplexes, four of which are composed of nationwide stations, and two of regional stations (European University Institute 2016: 8; European Commission 2016: 27).

The number of programmes that each of these multiplexes can carry has been controversial. While the EUI study contends that each multiplex can carry only two programmes, an MIT study commissioned by DIGEA concludes that each multiplex can carry four to five HD programmes (Bletsas 2016). The current capacity of each of these multiplexes for fixed reception amounts to 24.88 Mbps (European University Institute 2016:8; Bletsas 2016: 7). Given that an HD programme requires between six and ten Mbps,¹ while the amount recommended by the European Broadcasting Union (EBU) in 2012 was 8.35 Mbps, it follows that each multiplex should be able to carry three HD programmes, but arguably four if a statistical multiplexing gain is factored in (Bletsas 2016: 7). This capacity will rise to six or seven HD programmes with the impending adoption of the DVB-T2 standard, while HEVC coding, if adopted, will bring about a further increase to ten or eleven programmes depending on the intended coverage and network scenario (Bletsas 2016: 2; European Broadcasting Union 2016:3). There should hence be available capacity on the four multiplexes for at least 16 HD programmes. Even when the government dedicates the 700 MHz band to mobile communications, as advised in the abovementioned EUI study in line with the decision of the 2015 World Radiocommunication Conference (see Voice of the Listener and Viewer (2016); Harvey (2016)), so that only two multiplexes remain available, there should still be space for at least eight HD programmes. The government’s argument that there is only space for four nationwide channels is therefore not convincing.

What is more, the narrow focus of Ministerial Decision 4297/2016 on nationwide general interest TV programmes of informative content has raised criticisms of ‘regulatory asymmetry’. The argument has been put forward that it does not make sense to license domestic channels when international media conglomerates such as Netflix do not require a licence (Papathanassopoulos 2016). Indeed, the new framework chooses to license a particular type of providers while leaving others unlicensed, at least for the time being. It is unclear for instance if and when regional, thematic and pay TV channels will be licensed. There are two forms of pay services in Greece, satellite and IPTV, while there are no cable services. As far as satellite TV is concerned, some countries, such as the UK and Germany, require a licence while in others, such as Finland and Sweden, notification is sufficient (Schweizer 2014: 516). The UK, in particular, distinguishes between three categories of licences: for Local TV; for linear TV channels provided on cable, satellite and the internet; and for DTT-Freeview services including teletext services and EPGs (Ofcom 2016). A non-

¹ Telephone interview with National Telecommunications and Post Commission (EETT) engineer, 13 July 2016.

linear service such as Netflix does not require a UK licence. This does not mean that Netflix is unregulated. Being based and regulated in the Netherlands, it can broadcast to the UK over the internet, bypassing UK rules. This comparative perspective shows that the disparate treatment of non-linear IPTV is not unique to Greece but an implication of the freedom of cross-border broadcasting, while the silence of the Greek law as regards satellite TV is at variance from the UK model but by no means unprecedented across the EU. It seems therefore excessive to talk about ‘regulatory asymmetry’ in this context. However, the absence of clarity as regards the licensing or not of these services gives rise to regulatory uncertainty and is detrimental to investment decisions in this area.

The broader argument has also been made that the Greek law is obsolete as it ignores the rapid transformation of the broadcasting sector due to expansion of non-linear TV and the gradual marginalisation and eventual eradication of traditional television (National Council for Radio and Television 2015). This argument seems premature. Even in the UK, with an internet penetration of 92% and with the uptake of subscription video on demand services on the rise, these services appear to be complementing rather than replacing traditional TV (Broadcasters’ Audience Research Board 2015; Analysys Mason 2014). As regards news consumption in particular, TV is still the medium of preference for older generations (Reuters Institute 2016: 27). As has astutely been remarked, it is still only the broadcast model that can ‘deal with something such as a World Cup final or news of a major terrorist attack – when the attention of the world is focused on a single event or a single place’ (Naughton 2006: 45).

The death of traditional TV is even more unlikely in Greece, which, notwithstanding the high adoption of social media as the main source of news, only has an internet penetration of 63% (Naughton 2006:6). The free DTT platform is the primary means of delivering broadcasting services (Council of Europe 2016). It has therefore a significant role in fulfilling the obligation of universal coverage (European Broadcasting Union 2010: 5). Consequently, the operation of DTT providers needs to be legalised in a manner that preserves the attractiveness of this platform for the audiences and stimulates competition with other platforms.

This brings us to the second objective pursued by the new licensing framework, namely the fostering of pluralism and the provision of qualitative broadcasting services. It seems paradoxical at first sight that a law which proposes to reduce the number of the existing eight nationwide free-to-air commercial channels – MEGA, ANT1, Alpha TV, Star, Makedonia TV, SKAI TV, Epsilon TV and ART - by half is conducive to pluralism. It is accepted that the existence of a variety of independent media outlets at national, regional and local levels generally strengthens pluralism and democracy (Council of Europe 1999). Analyses in media economics have time and again shown that a small number of competing broadcasters renders a diversification strategy with regard to programming very unlikely. Instead, all efforts are directed towards the maximisation of audience share and the delivery of a programme that is particularly appealing to the advertising industry (Hoffmann-Riem 1996:102; Noll et al. 1973:269).

On the other hand, a plethora of providers also poses risks. As the High Level Group for Media Freedom and Pluralism, established by the European Commission in 2011, recognised, ‘while competition can contribute to pluralism, it does not necessarily do so, for it may well lead to a more uniform, homogenised offering in terms of content’ (High Level Group 2013). Curiously, the new law does not attempt to fight these risks by means of competition policy but by way of a restrictive licensing regime. This leads to a curtailing of the ‘externally pluralistic’ structure that is common in the area of commercial broadcasting, and which aims to express the variety of opinion in the overall offering of domestic programming. This raises

the question whether the proposed licensing regime counterbalances this by providing adequate guarantees of ‘internal pluralism’ whereby social and political diversity are reflected in media content.

This is questionable in view of the fact that the Greek government has chosen to license commercial channels by way of an auction. Two different systems for the award of licences can be distinguished: auctions and beauty contests. In the case of auctions, licences are awarded to the highest bidder, whereas in the case of beauty contests, applications are assessed on the basis of their fulfilment of licence conditions. Countries are free to choose a beauty contest, an auction system or a mixture of both. The problem with an auction system is that the principle on the basis of which licences are awarded is profit instead of programme quality. So as to deal with this problem, governments often opt for a mixed system whereby applicants need to satisfy certain programme requirements as in the case of UK local TV licensing in 2012 (Ofcom 2012). However, such mixed systems do not always get the mix right. The notorious award of ITV licenses under the 1990 Broadcasting Act where applicants were compelled to devote as much funding as possible to their bid rather than to programme quality is a case in point (Smith 1991:166).

Law 4339/2015 also includes certain programming commitments that applicants need to make. In the case of nationwide providers, these consist in three daily news programmes of a total duration of at least 90 minutes; cultural programmes with a duration of at least ten hours per month; and at least four of the following categories: informative programmes, popular programmes, light entertainment (games, shows, events etc.), Greek and foreign series, children’s programmes, documentaries and sports programmes, each of them with a duration of at least ten hours per month. This indiscriminate listing would allow a bidder to opt for the most popular and inexpensive types of programmes such as entertainment programmes and series while neglecting educational or children’s programmes. Consequently, Law 4339/2015 does not adequately counterbalance the loss of pluralism due to the reduction of the number of channels and does not provide sufficient guarantees of qualitative broadcasting services.

This brings us to the last objective pursued by the proposed licensing regime, namely the development of healthy competition and the operation of financially sound media undertakings. The governmental spokesperson stated in October 2015 that ‘the number of TV licences would be small, as befits the Greek market’ (Efimerida ton Syntakton 2015). Certainly, a small number of licensees means that each of them can have a greater share of the advertising pie. It is not uncommon to examine the financial viability of a broadcaster before awarding a licence (see Ofcom 2016: para. 1.44). However, in the case at hand, the Greek law does not just seek to secure the financial viability of a licensed station but to circumscribe the breadth of the Greek DTT market. Such state interventionism does not agree with a liberal market economy and is unprecedented in the EU context. The Greek government’s argument is that it aims to fight corruption given that a small number of financially stable TV companies would not need to resort to it to sustain themselves. However, corruption has multiple causes, and it is simplistic to say that a shrunk media market would be the cure-all against it.

Curiously, Law 4339/2015 also attempts to breathe new life into earlier legislation, which aimed to curb the alleged illicit interweaving between political and media interests (*diaploki*) (Hellenic Parliament 2015a: Art. 6 (4)). First, Law 3021/2002, and subsequently Laws 3310/2005 and 3414/2005 placed restrictions on the conclusion of public work contracts by persons actively involved or having interests in media undertakings (‘main shareholder’ laws). The fact that Law 4339/2015 seeks to resurrect these previous laws is puzzling given that they proved to be unenforceable and also incompatible with EU Law (European Court of

Justice 2007). Consequently, the contraction of the media market is not a suitable means to achieve healthy competition or to fight corruption. It might lead to a small number of financially robust licensees but only at the expense of other competitors who have been eliminated, not by market forces but by state intervention.

In conclusion, the new licensing regime envisaged in Law 4339/2015 interferes with freedom of expression without contributing to the envisaged aims. It therefore violates Art. 10 ECHR.

IV. The role of the National Council for Radio and Television (ESR)

A major bone of contention as regards the new licensing framework has been the licensing procedure and the role to be reserved for the ESR. Law 4339/2015 reduced the ESR to a largely consultative role, which consists of issuing a reasoned opinion on the number of licences to be auctioned and on the starting price for each category of auctioned licences, while the Minister of Information and Communication in tandem with the Minister of Finance have the say (Hellenic Parliament 2015a: Art. 2 (4)). The ESR's role was diminished even further by way of Ministerial Decision 4297/2016, which assigns the entire competitive procedure, including the publication of the call for tender, to the Secretariat General of Information and Communication (Hellenic Government 2016: Art. 1).

The reason put forward by the government for usurping the power to determine the number of available licences and to conduct the auction was ESR's inability to act. ESR is headed by a board of seven members, consisting of a president, a vice-president and five members, nominated by the parliamentary parties and appointed by unanimous decision of the Conference of Presidents of Parliament (Hellenic Parliament 2008: Art. 101A). If unanimity is not feasible, they are appointed by a qualified majority of four fifths of its members (Hellenic Parliament 2008: Art. 101 A (2) 3). Their term of office lasts four years and it can only be renewed once (Hellenic Parliament 2002: Art. 3(2)). At the time of the adoption of Law 4339/2015 and of Ministerial Decision 4297/2016, the term of office of the president and of two members had ended so that ESR only consisted of its vice-president and of three members. This meant that the Conference of Presidents of Parliament, a collective all-party institution aimed to better organise parliamentary work, would have needed to elect a new president and two members for the ESR to be able to fulfil its role.

The Conference of the Presidents of Parliament was unable to agree on the new ESR composition. This was not least due to the fact that the governmental majority refused to accept the opposition's view that the number of licences should be decided by the ESR, not by the Parliament (Tsichlias 2016). In a very recent development, the Conference of Presidents of Parliament, under pressure from the Council of State's ruling, agreed on a new ESR composition. In this section we will consider, first, whether the sidestepping of ESR has been in accordance with the Greek Constitution, and, secondly, whether it conformed to EU requirements concerning the role to be performed by independent regulatory authorities in the field of media.

1. The role of the ESR under the Greek Constitution

The ESR exercises the constitutionally prescribed direct state control over television. ESR is not responsible for the telecommunications sector, which is regulated by the National Telecommunications and Post Commission (EETT). Prior to the 2001 constitutional revision the ESR's independence had been jeopardized in manifold ways (Papatheodorou and Machin 2003: 50; Oikonomou 2004: 185). It lacked regulatory powers given that, under Laws 2328/95 and 2644/98, licences were granted by the Minister of Press and Mass Media after merely consulting the ESR.

Law 2863/2000 upgraded the role of the ESR significantly by rendering it solely responsible for radio and television matters, including the granting of licences, and by abolishing the control of legality exercised hitherto by the Minister of Press and Mass Media (Hellenic Parliament 2000: Art. 4; Kiki 2003: 166; Chrysogonos 2002: 299). Still, this law also denied ESR such fully-fledged regulatory powers as would befit an independent authority. The regulation of the wider field of mass media was declared as being within the purview of the Ministry of Press and Mass Media. The revision of the Greek Constitution in 2001 consolidated ESR's independence and removed any doubts as to its democratic legitimacy, rendering it the only independent authority that is expressly mentioned in the Constitution (Karakostas 2003:91). The legislator added flesh to this constitutional imperative by adopting Law 3051/2002 on the independent authorities, thus enabling ESR to publish its own internal regulation and to announce the allocation of licences to private stations.

In the words of Art. 15 (2) of the Greek Constitution 'Radio and television shall be under the direct control of the State. The control and imposition of administrative sanctions belong to the exclusive competence of the National Radio and Television Council, which is an independent authority, as specified by law. The direct control of the State, which may also assume the form of a prior permission status, shall aim at the objective and on equal terms transmission of information and news reports, as well as of works of literature and art...'. Art. 15 (2) has been craftily drafted in a way that leaves some uncertainty concerning the extent of ESR's regulatory powers, *inter alia* as regards the granting of licences. The Constitution states explicitly that the ESR is exclusively competent only as regards 'the control and imposition of administrative sanctions'. It does not clarify the extent to which the competence of the state as regards the audiovisual field has been transferred to the ESR. This constitutional vacuum has been filled by legislation, which initially entrusted the award of licences to the ESR (Hellenic Parliament 2002: Art. 19 (2), (3)), but later declared the competent Minister as solely responsible to determine the number and type of licences, and to define the licensing procedure after consulting the ESR and the EETT (Hellenic Parliament 2007: Art. 13 (3), (5)). The intricate phrasing of the constitutional provision has led some commentators to conclude that the exclusive competence of the ESR is narrower than the totality of powers falling under the 'control of the State' (Tsevas 209: 790; Drosos 2016). Others have, however, convincingly argued that the ESR now has exclusive competence as regards all aspects of audiovisual regulation including the granting of licences (Manitakis 2003: 573). A third line of thinking is that a line needs to be drawn between the decision on the number of licences, which can be met by the Parliament or even the competent Minister after extensive consultation with the ESR and the EETT, and the actual licensing procedure, which falls within the exclusive competence of the ESR (Sotirelis 2016).

The Council of State, Greece's Supreme Administrative Court, has ruled that the ESR is exclusively competent to exercise the direct control of the State over radio and television (Council of State 2003; 2004). Also, in a recent decision on the closure of ERT, the Council

of State stated that ‘the award of licences, the control that the abovementioned public interest purposes have been met and the imposition of fines have been entrusted to an independent authority, the “National Council for Radio and Television”’ (Council of State 2014: para. 16). These decisions signify a shift in the Council of State’s attitude, which was initially characterised by mistrust towards the non-democratically legitimised independent authorities. The long history of governmental interferences into the television landscape in Greece, not least by refusing to properly license commercial stations so as to keep them hostage to political influence, militates in favour of the assignment of the entire licensing procedure – inclusive of the determination of the number of licences- to the independent authority. This requires that the ESR is properly constituted and armoured with the necessary independence from the State. We will examine in the following section whether this finding is supported by the standards set by the Council of Europe and the EU concerning the role of independent regulatory authorities with regard to licensing.

2. The Council of Europe and EU requirements on independent regulatory authorities in the context of licensing

The already discussed ECtHR case law on the licensing of broadcasters is supplemented by ‘soft law’ instruments on the independence and functions of regulatory authorities developed by the Committee of Ministers, namely Recommendation (2000) 23 of 20 December 2000 and Declaration of 26 March 2008 (Council of Europe 2000; 2008; Valcke et al. 2013:55). These instruments consider that the granting and renewal of broadcasting licences is one of the essential tasks of regulatory authorities in the broadcasting sector. The Recommendation also states that these authorities should also be involved in the process of planning the range of national frequencies allocated to broadcasting services. Nonetheless, in at least one fifth of all Council of Europe member States, a body other than a broadcasting regulator awards broadcasting licences (Council of Europe 2008: para. 27). Also, in some member States responsibilities are shared between the government and the regulator for different types of broadcasters. For example, in Italy, the government awards licences for terrestrial and cable broadcasting, whereas the regulator is in charge of licensing satellite channels (Schweizer 2014: 518). Consequently, the decision to transfer to the government the power to conduct the licensing procedure and to award the licences may not be in contrast to the practice of some member States but is at odds with the Council of Europe’s vision on the powers of independent regulatory authorities in the broadcasting sector. More significantly, the fact that the ESR had been rendered defunct as a result of the political deadlock concerning the nomination of its members was wholly incompatible with the Council of Europe’s exhortation that ‘member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector’ and that ‘rules should guarantee that the members of these authorities are appointed in a democratic and transparent manner’ (Council of Europe 2000: Appendix paras 1, 5).

The impairment of the independence and of the effective functioning of the ESR is also a matter of concern for the European Regulators Group for Audiovisual Media Services (ERGA), which brings together the heads or high level representatives of the Member States’ independent regulatory bodies in this field so as to advise the Commission on the implementation of the Audiovisual Media Services Directive (AVMSD) (European Regulators Group 2016). Whereas the abovementioned Council of Europe instruments are not directly enforceable, the AVMSD rules are binding on the Member States. The AVMSD

statements on the independence of regulatory authorities have been the result of a politically sensitive compromise between the European Parliament and the Commission on the one hand, and the Council on the other, the former aspiring to stricter rules on institutional design, the latter being cautious not to compromise national sovereignty. The relevant provisions, recitals 94, 95 and Art. 30 AVMSD, envisage a close cooperation between independent regulatory bodies and the Commission in the implementation of the Directive, but leave it to the Member States to choose the form of these bodies. The dominant interpretation is that the Directive does not contain an explicit obligation on Member States to establish independent regulatory bodies. However, if such bodies are already in place, as is the case in most Member States with the exception of Estonia, they should be independent (Hans Bredow 2011: 7; Stevens 2013: 83; Lavrijsen and Ottow 2012: 419; Sommer 2014:58). As regards licensing, a recent ERGA study noted that ‘there is a long-standing tradition in almost all Member States to have specialised media authorities in place which are responsible, as the case may be, for licensing and monitoring the providers of (television) broadcasting or other (audiovisual) media services’ (European Regulators Group 2015: 27).

A new legislative proposal amending the AVMSD so as to bring it in line with new market realities further strengthens the role of independent regulatory bodies (European Parliament and Council 2016). It imposes in Art. 30 an obligation on Member States to designate one or more independent national regulatory authorities, which are legally distinct and functionally independent of any other public or private body. It further provides that their competences and powers as well as the ways of making them accountable shall be clearly defined in law, and that they have adequate financial and human resources to enable them to carry out the tasks assigned to them. In a considerable number of states national regulatory bodies are financed from licence and authorisation fees paid by broadcasters (European Regulators Group 2015: fn. 162). Allowing the fees from a future auction to flow into the ESR budget would greatly alleviate its perennial problems of underfunding. The adoption of the draft AVMSD provisions will also increase the pressure on Greece to guarantee the independence and effective functioning of the ESR.

V. Conclusion

The new Greek law on the licensing of DTT could have brought a glimmer of hope that the much needed order would finally be restored in the country’s troubled audiovisual landscape. Alas, it has sparked off immense controversy, laying bare the instability of the Greek institutions in the field of audiovisual media, a field so crucial for the functioning of democracy.

The inconspicuous reference in Art. 10 (1) 3 ECHR to the right of States to license broadcasting enterprises has led to the formation of a substantial body of case law, which paved the way for the liberalisation of national broadcasting markets and castigated the authorities’ arbitrariness or inactivity with the aim of introducing effective pluralism. It also sanctioned the use of licensing mechanisms to shape media systems in the public interest. This important function of licensing as the traditional market entry regulation for commercial broadcasting is by no means obsolete in the digital age. The end of spectrum scarcity is often invoked by commercial broadcasters to fend off demands to commit themselves to public interest goals. It is perhaps ironic that the Greek government relies on the exact opposite argument, the scarcity of the available spectrum, so as to decimate the audiovisual offering while making no serious attempts to enhance the quality of programming. The arguments

advanced in defence of the controversial law are not convincing. Least plausible of all is the assertion that the reduction of the available nationwide free-to-air channels would strengthen pluralism and promote healthy competition.

The same applies to the supposed contribution of the new regime to the fight against corruption, a laudable aim that has sadly inspired excessively restrictive measures against the Greek media already in the past. The new licensing regime is paradigmatic of a series of attempts made by successive Greek governments to utilise the spectre of uncontrollable and unaccountable media interests, a perception widely shared by the public, so as to resort to draconian, knee-jerk reactions: from the passage of the ill-fated 'main shareholder' laws to the dramatic closure of the public service broadcaster, ERT, in 2013. Such 'curiouser and curiouser' attempts, possibly inspired by the political elite's desire to mask its own lack of vision and fledgling legitimacy, remain ultimately unenforceable. They offer the vague promise of an escape route out of an unsatisfactory love hate relationship with the media, but only at a very high price: the destruction of trust in public life and the erosion of the country's political fabric. If Greece is to prevent a further descend into this rabbit hole, a reconsideration and sincere articulation of the aims pursued by media regulation are urgently needed. Vesting the newly constituted, fragile independent regulatory authority with the necessary personnel and powers in accordance with EU and Council of Europe imperatives would be a start in the right direction.

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