

# Digital Television: Technological Progress, Set-back in Freedom?

**The approval of this bill will entail a big technological progress. However, the bill, with its multiple amendments, includes important risks, while granting powers to the State to influence on the programming and its contents, thus affecting the freedom of speech and the right of TV viewers to choose.**

The legislative discussion on digital television came to an end after a long discussion of almost five years. Although the approval of this bill will imply a relevant technological progress for our country, we believe that this initiative contains a series of constitutional irregularities, which mean major risks for the freedom of programming in particular, and the freedom of speech and autonomy of intermediate companies, in general.

Among the initiative's complex items, the most relevant are: (a) the pluralism concept; (b) the obligation to broadcast public campaigns; (c) the second concession awarded to state-broadcaster TVN (*Televisión Nacional de Chile*); (d) the obligation for cable TV operators to broadcast regional, local or community channels (must-carry); (e) the obligation to broadcast the games of the national soccer team; and (f) the compliance with special laws as a requirement for license applications. In the following lines we will analyze each one of these points.

## **The Concept of Pluralism**

The following definition of pluralism is included in the proper operation of television: "for the purpose of this law, pluralism shall be understood as the respect for social, cultural, ethnical, political, religious diversity, and

diversity of gender, sexual orientation, and gender identity, and the licensees and permit holders of television services, regulated by this law, shall be required to promote the observance of this concept in the contents delivered, excluding those which are contrary to them”.

In this respect, if the law stipulates what you should understand by pluralism, you reduce the concept instead of extending it, because it is obvious that some aspects are going to be left out of the definition. It is very complex to define a concept like this and it seems that the aim is to introduce indeterminate juridical concepts that are hard to define, like “social diversity” or “gender identity”, which contribute to weaken a broad notion of pluralism, and on the contrary, it concentrates on promoting certain specific groups of individuals or communities.

A relevant complexity in this matter concerns the duty imposed on licensees and permit holders of television services to “promote” the observance of these principles in the contents. Still more complicated is that the National Television Council (CNTV, *Consejo Nacional de Televisión*) may sanction them if they do not promote a certain type of view of society. One thing is to respect the principles and another quite different is to promote them through a positive action.

All the above does not only contradict the idea of pluralism itself, but it also disagrees with one of the main objectives of digital TV, that is, having a wide variety of channels and programs, which allows reinforcing the diversity of contents and programmatic proposals. The editorial freedom of television channels could be affected and along with it the opportunity of people to obtain different points of view in the communications media.

### **Public Campaigns**

The bill approves the obligation to free broadcasting of public campaigns or services. The General Secretariat of Government (Segegob) defines the campaigns and the CNTV approves them (with a quorum of 7 out of 11 members). The obligation regards the transmission of campaigns with subtitles and sign language, which are limited to 60 seconds per broadcast with a maximum of 21 minutes per week. Moreover, the campaigns’ duration is limited to five weeks per year. This obligation applies to permit holders of limited television services (cable operators), who must comply with this obligation in the signals where they are allowed to show domestic advertisement. In the case of campaign renewals, the CNTV has to approve them and they shall be paid at business rates.

First, TV channels are currently not compelled to transmit these campaigns (although in practice they do), a situation that will totally change with this bill. Consequently, channels could be forced to broadcast messages that are clearly incompatible with their editorial line (we all recall the negative of MEGA and Canal 13 to transmit the AIDS campaign). The State's interference in their programming freedom affects the right to express opinions and to inform and the proper autonomy that is guaranteed to intermediate companies.

Furthermore, it is a discriminatory public burden that affects only a subgroup of social communications media, and it is endorsed by an anachronic conception about the role and influence of the over-the-air TV in the society.

On the other hand, this imposition steps over the autonomy of broadcast television channels as intermediate companies protected by the Constitution; besides, the Constitutional Court has recently strengthened this autonomy in its decisions on the people meter.

Finally, the Mixed Commission rejected the idea of the Chamber of Deputies to give channels the opportunity to propose a different spot, within the same thematic of the public service campaign, which aimed at protecting somehow the editorial freedom.

### **Second Concession to TVN**

The bill stipulates the general principle that no new licenses requiring own media shall be awarded to juridical persons who (i) already have a license, or (ii) control or manage other licensees (media's non-concentration principle). However, the exception is TVN, which could create a sort of digital highway while being holder of a second license, to include its own regional channels and those of the licensees without media of their own.

It is a clear arbitrary discrimination in favor of TVN, justified by its "public channel" condition, in spite of the fact of being in the same concession condition as the others. Thus, the principle of equality before the law, stating that all (natural or juridical) persons who find themselves in the same situation should receive the same treatment, is being violated.

### **Must-Carry**

The bill stipulates the obligation for permit holders of limited television services to broadcast, in the region or place in which they operate, and inasmuch as it is technically feasible, at least four

regional, local or community channels in their respective programmatic schedules. The CNTV shall decide through public bidding which channels are to be broadcasted by these permit holders.

In practice, with this regulation it will matter whether there is a local licensee and local permit holder. The local licensee is not compelled to carry a local cable signal, while the local permit holder is compelled to carry the signal of the local licensee, which constitutes an arbitrary discrimination.

Furthermore, if there is going to be a coverage condition for licensees, why will cable operators also be forced to carry regional or local channels? It is argued that the idea is to increase the broadcasting of regional or local channels; however, it seems too much of a burden to require cable operators to carry channels, which people are going to be able to see anyway, for the sole purpose of increasing broadcasting. Nevertheless, this implies a disproportionate burden for cable operators, since they will have to carry the regional or local channels, even if they can be seen in over-the-air television, just so they can increase their broadcasting.

### **Transmission of the Games of the National Soccer Team**

The bill stipulates that the transmission of official-natured games of the national professional soccer team shall be made through free-reception television signals, notwithstanding the transmissions that permit holders of limited television services may broadcast.

At the beginning of the discussion in the Senate's mixed commissions, the bill stipulated that all national-interest sport events should be transmitted through free-reception television channels. However, the Senate changed this point, indicating eventually that the games of the national professional soccer team, in case of being transmitted, shall be made through free-reception television. This means that all soccer games, of an official nature, played by the national team shall be necessarily transmitted through over-the-air television. It is not clear who will assume the cost, and although permit holders of television services (cable operators) are allowed to transmit the games, in practice the licensees are being forced to incur in a cost for the rights of those games.

### **Compliance with Special Laws**

The bill refers to the compliance with special laws in several aspects. Maybe the most questionable includes, as part of the proper

operation of television, the full compliance by licensees and permit holders of laws Nr 17,336 (intellectual property) and Nr 20,243 (moral rights and ownership of rights of artistic work performers in audiovisual format), and the Labor Code. The incorporation in the proper TV operation of the compliance with other laws that are not related to television is an inadequate protection, which ends up distorting the concept of proper operation. Additionally, the CNTV is the institution in charge of monitoring the proper operation of television and, therefore, according to the bill, it should supervise the full compliance with special laws as part of this operation. How will the CNTV supervise the full compliance with these laws? In view of the rule's wording, we could even consider that the CNTV will have supervising powers in the compliance with the Labor Code, which would certainly be inadequate.

On the other hand, those participating in license public biddings would be compelled to present a full range of data, for example: (a) a statement regarding the trend of the programmatic contents that applicants wish to broadcast in their signals; and (b) a sworn statement of the applicant stipulating that he has not been convicted under the terms of the laws Nr 17,336 (intellectual property law), Nr 19,889 (regulates the work and hiring conditions of arts and performance workers) and Nr 20,243 (rules on moral rights and ownership of rights of artistic work performers in audiovisual format).

The statement regarding the trend of the programmatic contents is concerning, since it goes from a concession statute based exclusively on technical reasons, to another one where the contents' excellence will also be considered, which could lend itself to a very risky discretion in such sensible sphere as freedom of speech, particularly, the freedom of television channels to define their editorial line.

As for the sworn statement, a sort of double sanction is being established, because if a licensee has been sanctioned for not complying with the special laws, it does not seem fair to also establish this disqualification in the public bidding.

### **Conclusion**

In brief, although this initiative will entail significant technological progress for our country, it contains a series of aspects that, besides being unconstitutional, represent important risks to the editorial freedom, granting powers to the State to influence on the programming and its contents, thereby affecting the freedom of speech and the right of viewers to choose. In fact, the arrival of digital

television should serve the people to give them more freedom; unfortunately, some aspects of this bill go in the opposite direction, taking the state interference to dimensions that are hard to reconcile with a free society.

### In brief...

- The duty imposed on licensees and permit holders of television services to “promote” the observance of the principle of pluralism in their contents is a complex matter. It is going to be complicated for the National Television Council (CNTV) to apply sanctions if a certain type of view of society is not promoted.
- It is a clear arbitrary discrimination in favor of TVN, justified by its “public channel” condition, in spite of the fact of being in the same concession condition as the others.
- The arrival of digital television should serve the people to give them more freedom; unfortunately, some aspects of this bill go in the opposite direction, taking the state interference to dimensions that are hard to reconcile with a free society.