[CY] Media Law amendments in breach of the European Treaty and the Constitution of Cyprus

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Provisions of the Law on Radio and Television Organisations of 2016 violate Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) and they do not come under any allowed exception. The law is in conflict with European Law, which is superior to the Constitution of Cyprus, decided the plenary of the Supreme Court on a reference by the President of the Republic. The decision followed an intermediary verdict in which the Supreme Court rejected an application by the House of Representatives that the case be referred directly to the Court of Justice of the European Union (CJEU) (see IRIS 2017-6/9).

In April 2016, the House of Representatives voted an amendment to Article 12 of the law, making the granting of a new broadcasting licence or the transmission of new programmes conditional. The Authority was given the power to reject the granting of a new licence or the transmission of new programmes on the basis of a justified decision in cases where a study by an accredited audit house finds that a new licence would endanger the financial viability of the existing licensed television organisations. In the same spirit, the House added a new Article 32E which stipulated that audiovisual media services originating from other EU or third countries should be (re)transmitted as per se without “including advertising or/and audiovisual commercial announcements addressed to the territory of the Republic”.

The President of the Republic referred the voted law to the Supreme Court in accordance with Articles 140 and 141 of the Constitution. The President requested the Court's opinion on whether the law was in conflict and/or in disagreement with Articles 49 (right to establishment) and 56 (freedom to offer services) of the TFEU; with Articles 15 (freedom to choose an occupation and right to engage in work) and 16 (freedom to conduct a business) of the European Charter of Fundamental Rights; and Articles 25, 28 and 179 of the Constitution of the Republic of Cyprus.

In its verdict, the Court noted that according to the interpretation of Article 49 of the TFEU, even in a case where measures do not introduce discrimination between nationals of a member state and other member states, such measures should not impede or make less attractive the exercise of the right to establishment. It was also decided, according to the Court, that any provision that subjects the pursuance of any activity on conditions that are connected to

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economic or social needs to such an activity constitutes a limitation of the right to establishment if these conditions tend to limit the number of service providers, who, under different conditions, could come from other member states. Such a limitation, the Court stressed, should meet the pre-requisites of proportionality and should be justified on the basis of imperative/overriding reasons of public interest. The verdict underlines that the limitations that Article 12 imposes were judged as violating Article 49 of the TFEU, which is a primary law of the Union and cannot be justified on the basis of serving an overriding public interest.

In examining the provision of the new Article 32E, the Court mentioned its decision of April 2017 and noted that imposing the re-transmission of programmes originating from other EU or third countries without the insertion of advertising or/and audiovisual commercial announcements is in breach of Article 56 of the TFEU. The Court recalls that the treaty does not allow limitations that are of a purely economic nature unless they are justified by overriding reasons of public interests, public order, security and health or the exercise of public office. Also, any limitation of the right to provide services is only justified when the national law is based on reasons of imperative public interests, is enforced on all individuals and businesses active on the territory of the member state imposing the constraints, and is necessary to achieve the sought goals without violating the principle of proportionality.

The provision in Article 32E is in breach of Article 56 of the Treaty as it imposes limitations based on economic reasons and cannot be justified in terms of serving overriding public interests, concluded the Court.

In the light of these conclusions, the Court cancelled the amending law without examining an eventual conflict and/or disagreement with articles of the European Charter of Fundamental Rights or of the Constitution of Cyprus.

ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ ΚΥΠΡΟΥ (ΑΝΑΦΟΡΑ ΑΡ. 5/2016) Αναφορικά με τα Άρθρα 52 και 140 του Συντάγματος. 6 Σεπτεμβρίου, 2017

http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_3/2017/3-201709-5-16anafapof.htm

Supreme Court, Case 5/2016, President of the Republic vs The House of Representatives, 6 September 2017

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