



**The Representative  
on Freedom of the Media**

## **Comments on the draft Audiovisual Code of the Republic of Moldova**

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### **Introduction**

Moldova is in the process of making new legislation for the communications sector as well as reforming communications and broadcasting as such. There are and have been in recent years a number of proposed new laws and amendments to laws. The aim appears to be to meet European standards for a free and pluralistic media operating in a democratic state ruled by the rule of law. For free and democratic media to be able to exist there should be a minimum of legal restrictions while laws should guarantee good conditions for free media. This means e.g. that there should be no laws on press, which can be free, regulated only by self-regulation and applicable general laws including defamation legislation, access to information legislation and provisions in the Criminal Code on matters related to content such as incitement to violence or child pornography. Because of the use by broadcast media of a limited natural resource – the radio frequency spectrum – and the ensuing system for use of this resource – licences – legal regulation of broadcast media is needed. Also for such media however, legal restriction should be kept to a minimum and be proportional with the object of the regulation. The independence of the regulatory agency for broadcast media should be guaranteed.

In addition to the great importance of freedom of expression as a fundamental right, other rights such as those of minorities to their language and culture must also be reflected in broadcasting legislation. This is especially true to the extent that such legislation creates a broadcasting entity, the public service broadcaster, and sets conditions for programmes.

Several areas of legislation linked with but not related only to broadcasting are also important for a good media situation. Access to information legislation is very relevant to allow free media to operate. This legislation should be separate from media legislation as access to information should not just exist for journalists and media but for everybody. It is understood

that there is access to information legislation in Moldova in which case there is no need for special provisions in the Audiovisual Code. If there were no such legislation, provisions in this area could be included in this draft Code. It is understood that recent drafts on information and state secrets legislation in Moldova may not meet modern European standards, but as there is specific legislation this issue should be dealt with in connection with those specific laws and consequently it falls outside of this analysis. Copyright legislation is another issue of importance regarding which the main substance of the rules should be in a separate law, with some references in the broadcasting legislation. Frequency matters are often regulated in telecommunications legislation and there is a need for close cooperation between regulatory authorities in the telecommunications and the broadcasting field.

In Moldova several different draft laws on media related matters have been prepared in recent years, including drafts covering special issues such as local and regional public broadcasting. Although it varies from country to country if there is one more encompassing broadcasting law or several more specialised ones, in a time of important reform it may be better for the sake of overview and consistency to have one main law, setting the basic rules for broadcasting, with more specific rules mainly in regulations issued by the regulatory agency.

The basis for this analysis is an English translation of the draft Audiovisual Code from the very end of March, which according to information from the local OSCE office was passed in a first reading by Parliament on 6 April 2006. The draft Code that was first given to this consultant for review in early March was rewritten during the period of the review work. The process for adoption of the draft in parliament was also altered and speeded up. The analysis is based on the translation of what has been said to be the version delivered to Parliament and passed without amendments in a first reading. Other draft broadcasting laws also passed in a first reading on 6 April are not included in this analysis.

The draft law is analysed from the viewpoint of best European practice for broadcasting legislation as reflected in Council of Europe recommendations, the European Convention on Transfrontier Television, OSCE principles including the Guidelines on the Use of Minority Languages in the Broadcast Media by the High Commissioner on National Minorities and the Representative on Freedom of the Media and any other applicable instruments, also including case law of the European Court on Human Rights interpreting the European Convention on Human Rights, especially in this context Article 10 in that Convention on the freedom of expression.

### **Summary of main concerns**

Please observe that this list of main concerns is a very brief summary of the main issues only. There are several other important issues pointed out in the article-by-article analysis below, but if they are of a more specific and detailed nature they are not referred to in this summary.

- The independence of the regulatory agency, the Coordinating Council of the Audiovisual, should be strengthened in relation to its appointment and financing
- The Public Service Broadcaster is dependent on and in many ways managed by the regulatory agency, the Coordinating Council of the Audiovisual, in a manner which is not consistent with the regulatory role of this Council
- The Public Service Broadcaster lacks a proper independent board
- The systems for the technical and programming parts of broadcasting licences should be coordinated better in a one-stop-shop procedure for applicants

- Clearer rules on ownership including prevention of concentration should be included
- Guarantees for minority language broadcasting should be strengthened and/or clarified
- Provisions on licence fees for broadcasters are lacking
- There is no subscription fee for the public service broadcasting
- Provisions on appeals should be strengthened and/or clarified
- Certain unclear formulations in the draft that purport to guarantee freedoms may be interpreted as instead limiting such freedoms, as they deal with matters where constitutional guarantees and freedoms should be sufficient - any specialised legislation may lead to the impression that the freedoms are not general and absolute, furthermore they include provisions that are not properly normative and enforceable

### **Comments on the draft law – General issues**

The draft law aims to protect freedom of expression, prevent censorship and support a pluralistic media market. Problems in the draft related to these fundamental principles are mainly due to unclear formulations and provisions that are difficult to apply in a normative manner as well as to insufficient guarantees in certain cases. A number of articles should be deleted as they may otherwise be construed as limitations even if the intention may be increased freedom. Provisions in the draft law on use of language in broadcasting were amended during the process and generally improved. To fully implement the Guidelines on Broadcasting in Minority languages and the principles these guidelines set out, it needs to be made clearer that even if there are provisions for the protection of the official language of Moldova, there must also be opportunities for minority broadcasts. Such opportunities do exist in the draft but may need to be further emphasised or clarified.

The main problem with the draft law is the relationship between the regulatory agency and the public service broadcaster. This latter is not independent but would be more or less run by the regulatory agency, which is difficult to combine with the regulatory function of the agency. The public service broadcaster should have its own independent board.

As for the licensing procedure and the link between the broadcasting licence and the technical licence, there should be a one-stop-shop for the applicant in the sense that the applicant should only have to submit one application to one place. The application may consist of different parts and different authorities may look at it, but this should be a matter for the authorities of which the applicant does not have to concern itself. The authorities must have a good system for smooth cooperation so that the best interests for use of the frequency spectrum are taken into account, with regard to convergence of technologies.

The order of the different sections of the law is a bit confusing as the section on control and sanctions (Chapter V), which is one of the main tasks of the Coordinating Council, comes before the section on establishment of this Council (Chapter VII in Part Two). The licensing chapter should deal with criteria for licences whereas procedures for getting a licence should be in the section on the Council. The division into Parts One and Two is not motivated as Part Two contains not just the establishment of the Council but also sections on the public as well as on private broadcasters. As this, especially the section on private broadcasters, is linked to licensing it would be more logical to have such provisions in proximity to the licensing section.

It is proposed to take out the headings “Part One” and “Part Two” and maintain only the chapters, having them in the following order:

Chapter I	General Provisions
Chapter II	Audiovisual Communication Principles
Chapter III	Advertising, Teleshopping and Sponsorship
Chapter IV	Private Broadcasters
Chapter V	Public Broadcaster
Chapter VI	Licences
Chapter VII	Coordinating Council of the Audiovisual
Chapter VIII	Control and Sanctions
Chapter IX	Final and Transitory Provisions

There are certain question-marks regarding the law that may be due to translation. Translation issues are not commented upon in this analysis unless they are relevant for the substantive understanding of the draft. One such matter is that the draft in many places talks about *radio* broadcasters (Article 2 in definitions, Article 5 on classification, Article 13 on access to events, Article 16 on right to response are just a few examples). It is presumed that both television and radio broadcasters are intended and in any case that *should* be the content of these provisions. In some contexts the term “broadcasting” may be more appropriate than “audiovisual”. However, as the original language of the draft is not English, these remarks are only relevant to the extent – if any – that the terms used in the original could also be misunderstood.

## **Analysis Chapter by Chapter**

### General Provisions

Regarding **Article 2**, accepted definitions for standard terms exist in international documents, often taken more or less verbatim into national legislation in different countries. It is useful to use such commonly accepted definitions to avoid confusion about what is covered. The European Convention on Transfrontier Television as well as a number of Council of Europe recommendations, EBU documents and similar contain useful definitions. The Coordinating Council of the Audiovisual should be included in the definitions in Article 2; it is not good to have “hereinafter referred to...” (Article 39) in the text when there is a section with definitions.

**Article 3** on European audiovisual works stipulates 10% for such works. The Transfrontier Television Convention sets out that where practical and by appropriate means a majority of transmission time should be reserved for such works. 10% is thus a very low proportion. This was lowered from 15% in the initial draft version. It is also unclear how this Article relates to Article 11 (7) on own production for broadcasters with national coverage (it is presumed not only radio). If Article 3 with its 10% intends European non-Moldovan broadcasts, it is in conflict with the definition in Article 2 (w). The use of the word “local” for the audiovisual service intended in this Article is also not clear concerning whether it refers to local production, in which case again the question is raised if local, i.e. Moldovan, production is not European.

**Article 4** is in line with the Transfrontier Television Convention as far as the provisions on which broadcasters fall under Moldovan jurisdiction are concerned. However, in the most recent amendments, some confusing additions were made. There is an attempt to introduce provisions against concentration of ownership, which is good, but the way the provisions are formulated renders the meaning difficult to understand. It is not evident what is meant with that a legal or physical person can only hold a majority of shares when founding a broadcaster

or service provider: if this is limited in time to the period of founding it is not known what this period is and what shall happen later. The very purpose of such a rule is also unclear as it does not appear to prevent concentration. Point 7 on limits for foreign ownership may also be difficult to apply as the provision that the percentage has to be less than that required to block decisions is an uncertain criteria depending on how the rest of shares are distributed, especially if there is more than one foreign owner. A set percentage would be better.

It would be preferable to have a separate article with rules on ownership. Such an article should contain rules on how many broadcasting outlets an entity can own (to what percentage) as well as if there are any restrictions on cross-ownership of different media. If the share of foreign ownership of media is to be limited, a set percentage for such ownership should also be in such an article.<sup>1</sup>

**Article 5** should include all broadcasters and not just radio. The initial analysed draft contained definitions of different types of broadcasters based on coverage. The elimination of this means that provisions later on regarding different obligations for different types of broadcasters become unclear. Apart from stating that broadcasters can be private or public it is good to define different types based on coverage as nation-wide broadcasters may have different obligations than local ones.

#### Audiovisual communication principles

The principles contained in **Article 6** are acceptable but the manner of presenting them is somewhat confusing. Point 2 prohibits certain programmes but point 3 allows these same programmes under certain conditions. It is better to make this distinction marked, e.g. by having a prohibition of certain programmes that are never allowed (such as in point 1) in one part of the Article, and restrictions on sending times and conditions in another part or another article. Also, it is not possible to have a visual warning sign for radio broadcasts.

Programme principles in more detail should be set out in a broadcasting code of conduct, elaborated by the regulatory agency. Reference should be made to such a code in this law and it should be one of the main first tasks of the agency to elaborate and issue it. The principle of freedom of expression and the provision that limitations on content can only be made in exceptional cases for specifically stated reasons could be made more prominent in the law. The important ban on censorship now in Article 8 (2) could be made more visible perhaps by making it the first article in this chapter.

Coverage of elections should be set out in more detail in a separate law or regulation. The reference made in **Article 7 (3)** is fine but detail is needed on what this means in the terms of guaranteeing equitable coverage, so it would be good to make some reference to such more detailed rules. These can be issued by the regulatory agency or be stipulated in the election law or other special election related regulation.

**Article 8 (4)** when it talks of the interference presumably refers to individuals outside of the broadcaster, which could be stated. Generally Article 8 is good.

The purpose of **Article 9** on the other hand is not easy to see. It is good that there are no restrictions on the right to receive broadcasting but it is not clear if and why it is necessary to

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<sup>1</sup> See in this context the Council of Europe Recommendation Rec(99)3 on measures to promote media pluralism.

set this out in law. The very basic right for everyone to receive and impart any information is not something that should be set out in detail in law as this may give the impression that the specific conditions in the law are the only ones on which such freedom of information is available. The right to receive broadcasts of one's choice should be evident enough based on constitutional principles so that no specific stipulation in any law is needed. Furthermore, paragraph 2 is unclear on what option it is that cannot be communicated and why there is a need to have such a provision. In the later amendments to the draft, several additions were made to Article 9 including e.g. rules on the duty of various providers of accommodation to ensure possibility for access to broadcasting services. This is highly unusual in a broadcasting law and appears strange in a modern European society with a market economy. People should be able to decide if they want a certain broadcasting service and on what basis just as landlords should be free as a commercial decision to decide what they offer on what conditions. If there should be special rules for publicly owned property or similar, these would fit better in a law regarding obligation of public landlords or something related to that and not be set out as principles of broadcasting. Another comment is that there may be cases when local administrations may charge for planning permissions or similar, this must be on the basis of law so it does not conflict with the ban in point 4, but this means that there is little relevance to this point. Further, although the substance of the provisions on payment for services (point 7) is OK, nevertheless rules on when and how payment may be collected for repairs should not be in a broadcasting law but in general consumer protection legislation or similar – if it is not sufficient that it is dealt with by contracts including standard contract terms.

**Article 10** on the rights of the programme consumer is equally confusing. If there is a feeling of a need to stress the right to receive and impart information in accordance with Article 10 of the European Convention on Human Rights because of the fact that Moldova is a new democracy with a precarious history for the freedom of expression, this is best done as a general – preferably opening – article of the law and by stipulating the duty of the regulatory agency to ensure this freedom (what is now Article 10(2)) in the duties of the agency generally. As it now stands, Article 10(3) is not clear as to what violations consumers can bring to the courts and how this fits with the work of the regulatory agency in maintaining broadcasting standards. It is very hard to see how an individual in the capacity of programme consumer can start a judicial process regarding the right to comprehensive, objective and accurate information in broadcasting. What there is a need for – in addition to the work of an independent regulatory agency - in order to create an optimal broadcasting sector, is a broadcasting policy (an elaboration of what is now in Article 35). Such a policy would normally be developed by the government through the responsible ministry, in cooperation with the regulatory agency. Rights of programme consumers should be taken into account in such a policy as the individual suitability for legal claims regarding such rights is difficult to see. It may be best to delete both Articles 9 and 10 and move a few parts of them – mainly the general principles pronounced – to a general article on communication principles in the beginning of the law or the beginning of the current chapter.

In **Article 11** on the language, it is presumed that the broadcasting in local language includes programmes that have another original language but where subtitles or voice-over is used into the official language (see Article 11(6)). If not, the percentage in point 1 is too high even if there is a period of time for adjustment. Provided there is also local production, it is good to encourage broadcasts from different countries with subtitles or voice-overs to ensure plurality

of programming. The Guidelines on Minority Broadcasting<sup>2</sup> require that undue or disproportionate requirements of dubbing, subtitling or other translation are not made on minority language broadcasting. This is reflected in the draft but must be clear. The priority intended in Article 11(3) is also vague. If the rules on language as well as other programming conditions are followed, it is not evident what other priority can or should be given. Point 8 on own production should be easier to apply and the staged approach is good. The only unclear issue here is if and how this applies to minority area broadcasters and Teleradio Gagauzia. Promotion of any one language should not impair enjoyment of persons belonging to national minorities of their own language.

Teleradio Gagauzia that is mentioned as a special case in Article 11(2) is not defined or explained in this law, nor is there a reference to any other law about this entity. It is important that minorities can have broadcasting in their own language, the draft law (after the last amendments presented) does make provisions for this but as the Teleradio Gagauzia is not elaborated, the entire provision remains somewhat vague. What is also unclear is what applies in areas where there are large national minorities but they are not in majority in that area. The difference between Article 11(1) and Article 11(2) is very important even if the percentage difference between groups may only be small in the respective areas covered by the different paragraphs.

Local production share in Article 11(7) is rather high and as pointed out, the relationship to Article 3 is unclear. It is also not evident if local production without any own production in point 7 would be sufficient – in that case, why is own production mentioned (as it would in any case also be part of local production).

**Article 12** on protection of national information space is in a confusing place in the law and has a confusing title. This general provision on the use of frequency spectrum could either be a general opening principle but fits even better in the section on licences for use of frequency spectrum. It is not really a broadcasting principle as these would be seen normally to relate to content.

**Article 13** is in line with the Transfrontier Television Convention.

**Article 14** is good and in line with international standards including Council of Europe recommendations.<sup>3</sup> As this principle does not apply only to broadcast journalists it is important that it is reflected also in other legislation (like access to information legislation). This does not prevent that it may be reflected here as well, underlining the importance of the principle. As always, if the same principle is found in different places (in different laws) it is important that the provisions are set out in the same or at least not conflicting manner.

The reasons for **Article 15** are difficult to understand. Competent authorities are responsible to protect all persons in the territory of the country and their legal exercising of their activities, professional or other. Journalists must have the same protection and need special protection only in especially dangerous situations, as war correspondents, or similar. Searches of any business or private premises must be only on the basis of law and decided in the legally prescribed manner – not just for journalists. There is no reason to have any special provisions

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<sup>2</sup> OSCE Guidelines on the Use of Minority Languages in the Broadcast Media by the High Commissioner on National Minorities and the Representative on Freedom of the Media, October 2003.

<sup>3</sup> Council of Europe Recommendation Rec(2000)7 on the right of journalists not to disclose their sources of information.

for journalists. Even if the intention of the Article may be good as it prohibits excessive limitations, no such Article should be needed and its insertion may lead to the interpretation that there are some possibilities for special “protection” which may be open to abuse. This Article should be deleted.

The right to reply in **Article 16** is good and generally in line with international instruments such as the Transfrontier Television Convention and Council of Europe Recommendation Rec(2004)16, but the provision on compensation according to the civil code may be confusing in the sense that normally there is no right to compensation only for a false statement in case there is proper right of reply and/or rectification. There may indeed be instances where there is a right to compensation related to defamation or similar but the express reference to this gives the impression this is a normal remedy, which it should not be. Media should only have to pay compensation when they really have seriously transgressed the border for what is appropriate. It is correct that a right of reply does not take away the right to go to court even if a defamation process should take the provision of right of reply into consideration. Although not necessary, it may be a good idea to point this out here. It is not always possible to give right of reply in the same programme (if no more such programme is broadcast) but it should be made at a similar time and context and given the same prominence as the statement it refers to. To point 4 on rejecting the right of reply may be added that a reply can be shortened or in special circumstances altered before the broadcasting of it.

Recordings should be kept for longer in any case of ongoing examination (e.g. by the regulatory agency of licence violations) and not just in relation to the right of reply. It would be better to have provisions on keeping recordings in a separate article as it does not just refer to right of reply.

In **Article 17 (1)** it may be added *serious* threat to public security or constitutional order and in 17 (2) who the information requests may come from.

**Article 18** mentions copyright obligations with reference to special legislation on this, which is good. There should be no instances when the Audiovisual Code contravenes copyright legislation so the reference to that in point 1 should be unnecessary. Point 5 is unclear as no recipient of a legal broadcasting service has to pay for copyright, but this may be only a confusing formulation or translation and refer to something else than just playing broadcasts. Point 7 also appears unnecessary. It is part of normal regulatory activity to monitor adherence to copyright obligations and not something that should require special registers. It appears overly bureaucratic to have to register all agreements and similar. Such agreements can be kept by the broadcaster and must be submitted on request.

#### Advertising, teleshopping and sponsorship

**Article 19 (1)** is unclear (“represents their commercial product”) but this may be a translation error. Otherwise the content of Article 19 appears to be in line with European standards.<sup>4</sup>

In **Article 20** the provision on showing the name and trademark of the sponsor during the entire programme appears excessive, it should be enough to show this before and after as well as in any commercial breaks. In any case the provision cannot fit radio broadcasts. The definition “news programmes on political issues” may not be entirely clear (Article 20(4)).

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<sup>4</sup> See e.g. Council of Europe Recommendation Rec(84)3 on principles of television advertising.



**Article 21 (2)** is also not applicable to radio as it refers to visual signs. The provision actually *only* mentions radio broadcasters but as said above presumably this refers to both radio and television, in which case this should be made clear and what applies to radio also set out. Otherwise the content of Article 21 is mainly good and in line with European standards and the Transfrontier Television Convention. Point (6) may be a bit unclear as far as the bracket (“except serials, documentaries and entertaining programmes”) is concerned, as it is not clear if these types of programmes can be interrupted more often or not at all. **Article 22** is also in line with European standards.

### Licences

The distinction made in **Article 23** between individual licences and general authorisations (Article 23(1) and (2)) is good. The decision in Article 23(3) should be made public which can be stated explicitly. It should be widely publicised and accessible. The words “legal entities that meet the conditions of radio broadcasters” in Article 23(4) may be confusing, as part of the licensing process is to establish the applicability of criteria - what is needed to be able to apply should be formulated differently. Article 23(7) although good in itself may also be unclear as to the exact extent of this publication. The examination referred to in point 9 should not just look at the proposed programmes but also at all other criteria that are relevant for the licence, such as financial viability, technical potential and similar.

The ban on appeals in Article 23(10) must be interpreted with caution. Article 6 of the European Convention on Human Rights requires a fair and public hearing in cases concerned with the determination of civil rights and obligations as well as criminal charges. Case law of the European Court of Human Rights has shown that this provision should be interpreted widely. Normally decisions of a regulatory agency should be appealable to an independent body, a court or another independent body resembling a court. At the same time, an evaluation of applications of the kind meant here would normally not be something to which there is always a right of appeal. But for elements of the process and similar, it is not possible to exclude any form of appeal.

Article 23(11) mentions the Public Service Broadcasting. This can either have a licence issued by the agency with the distinction that it has the right to such a licence without a contest or it can be stated that it does not need to have a licence as it operates based on the law. Both versions are used by European states. As the regulatory agency is to have some control also over the public broadcaster it is good that it also has a licence even if this will have to look different from those of private broadcasters. Article 23(11) is thus good but other provisions on the kind of role the Council has vis-à-vis the public service broadcaster must be changed as set out elsewhere in this analysis.

**Article 24** on extension is good but it should be clarified if the broadcaster needs to apply for the prolongation (which they should do). The reference in paragraph 2 should be to Article 23(5).

In **Article 25** it is presumed that data on the transmitter is included in the indicators mentioned.

In **Article 26** it must be clear that transfer can only be made with the consent of the regulatory agency and that the transfer can only take place after such consent has been obtained.

The possibility in **Article 27** to withdraw a licence for violation of licence conditions is good in itself but the formulation that the licence will be withdrawn if the holder systematically does not follow the licence conditions is not clear (what is systematic?), nor is the second point on violation of the Code as the severity and means of violation are not specified. It would be better to make a reference to the fact that a licence may be withdrawn by the regulatory agency in accordance with the law for violation of this Code, licence conditions or any codes and regulations issued by the regulatory agency. The possibility of withdrawal would be repeated also in the section on sanctions. The violations of audiovisual property regime (presumably referring to copyright) need then also not be stated separately here. As for the technical licence withdrawal, see the specific remarks elsewhere about how different technical and other aspects of the licence should be seen as one licence.

As for re-broadcasting authorisations (**Article 28**) this commentator would question why this is handled as a separate issue from the licence. It would be possible to have the provisions included as conditions for a licence in the sense that a broadcaster may wish to do some re-broadcasting as well as produce own broadcasts. The regulatory agency will then consider each application on its merits, be they for only re-broadcasting or a mixture. The substantial provisions for re-broadcasting would be conditions for a licence for re-broadcasting much in the same way as conditions are made for broadcasting licences of any kind. Just as for other licences, the regulatory agency decides and makes public the conditions for re-broadcasting. Closer integration of re-broadcasting and broadcasting licences should enable to obtain a good and realistic mixture of own programming and re-broadcasting. The Council would be able to ensure this (like the conditions of **Article 29**). It should be noted that minority broadcasting should not be obtained just through re-broadcasting from other countries, but by own production in minority languages as well.

**Article 30** is not clear. Any broadcaster (apart from cable) would need to have a frequency and even if there is a right to re-broadcast programming, this cannot be done without any authorisation. It is then unclear what Article 30 actually refers to. If it is the content of programming and the right to re-broadcast programme content provided that the required agreements and permits are secured, then it may be asked if the Article is necessary and why it cannot be taken into consideration in the normal manner in which programme standards are taken into consideration by the regulatory agency. If it is cross-border spill-over of broadcasts from another country that is intended, the handling of this is part of management of the frequency spectrum. It is indeed possible to make agreements on this but that would not be re-broadcasting in the sense this Article appears to infer.

**Article 31** contains provisions on the technical licence that should be changed to incorporate the different aspects and make one licence. The applicant should only have to submit one application and the authorities themselves should between them elaborate the system for granting the different types of licences. Deadlines and such for the cooperation can be in internal working orders of the authorities. The supervision referred to in **Article 32** must also be carried out in close cooperation with the regulatory agency for broadcasting. It is increasingly common in Europe and elsewhere to have joint regulators for telecommunications and broadcasting. This is not a requirement but is seen in many countries as desirable because of convergence of technologies. In any case, close cooperation is essential and a minimum of bureaucracy for the applicant. The withdrawal provisions in **Article 34** must also be better coordinated with withdrawal provisions related to any reason for withdrawal of a licence.

Presumably the National Regulatory Agency for Telecommunications and Informatics is set up and regulated by another law. Its tasks are probably also set out in such a law so it is important that those tasks that are relevant here fit with that law. (For example, change of technical parameters may be possible also for other frequency-users and these should be the same for all.) The best way to ensure consistency is to refer to such other law and only have the minimum necessary in this law on the cooperation between the different regulatory authorities for the purpose of the technical part of the licence. Articles 31 to 34 in their present form are best deleted and the relevant content incorporated in the licence provisions earlier in the law and/or in Council tasks.

**Article 35 and 36** refer to establishment of a broadcasting and a frequency plan, the latter that presumably is the main responsibility of the Telecommunications agency. These provisions should refer to the necessary cooperation and the way the aims of covering the entire territory with broadcasting and similar must be taken into account by the body responsible for frequency planning. It is not good to have separate systems for planning the frequency spectrum for different uses, so the coordination with whatever other provisions there are on this matter are very important.

What is not in the section on licences or in the draft law is a provision on licence fees. Although details may be set out in regulations by the regulatory agency, some basic criteria may be set out in law. In any case the proportionality and transparency of the system is essential. For the independence of the regulatory agency, financing through licence fees is the best system.

#### Control and sanctions

The regulatory agency must have the right to ask for information from licence holders (as well as applicants) as set out in **Article 37**. It carries out its control tasks by monitoring programmes as well as reacting to complaints from the public or possibly from authorities. With time the process should be mainly complaints driven, whereas some more ex officio activities may be needed early on after changes in the law to ensure that the broadcasting standards are understood and implemented. Complaints should normally come from private subjects; public authorities should only in exceptional circumstances have to react to the content of broadcasts, which means that the formulation in Article 37 (3) may be changed to just mention ex officio (which is what is presumably meant with “from the office”) and complaints. The reference in Article 37(4) must be to the wrong article. Point 5 in Article 37 is very confusing but this may have to do with translation and/or words missing. Otherwise it is not at all clear what the notification mentioned, from which the period starts running, is. If the intention is that the authority has 15 days from the time of broadcast to investigate a complaint, this appears too short, at least if it is more than just initiating the investigation. Although it is good that complaints are investigated quickly, the types of cases may be of very different nature and sometimes an investigation must take longer. For starting a procedure, the time may be sufficient.

**Article 38** on sanctions is also unclear. This is another example of where the translation may be to blame for confused content, as what “subpoena of becoming legal” means is unclear. The sanctions to be used should start with a warning and the range of sanctions may also include fines and suspension or finally revocation of the licence. Sanctions should be proportional and start with a less encompassing sanction unless the violation is especially

grave, increasing to more serious sanctions for repeated offences. All mitigating and aggravating circumstances should be taken into account. This Code should set out the sanctions so the meaning of point 2 in Article 38 is confusing, does it refer to another law? The procedure set out in point 4 is also not good – the agency normally deals with the cases and does not forward to any other authority. Only in the rare cases where some criminal offence unrelated to this law has been committed, may there be a reason to contact other authorities, but this follows from general principles of law and does not need to be set out here. It should be extremely exceptional that broadcasting may give rise to criminal offences. If something like a tax crime or a crime of provision of child pornography is committed by a broadcaster and this comes to the knowledge of the regulatory agency, they will cooperate with law enforcement authorities, but in cases of violation of licence conditions or broadcast principles the agency itself deals with the cases.

The reference back to Article 27 in point 5 is unnecessary as this is the place in the law where the sanction of a possible revocation of licence is set out. Point 6 is also good in substance if it indicates that the agency shall work with the broadcasters to ensure that they meet the requirements of the licence and the code, but the language is confusing, e.g. the use of the term subpoena. It is however a good principle that the agency should work with the broadcasters – it should not be seen just as a controlling and sanctioning body but as a partner.

The monitoring of broadcasts, the right to request tapes (that must be kept in accordance with provisions elsewhere in the law) should also be set out in this section of the draft law, so that the monitoring and controlling role of the agency is clear. A clear mention of the right to appeal should also be made in this section.

#### Coordinating Council of the Audiovisual

The tasks set out in **Article 39** are good and the slight unclarities are probably due to translation such as the mention of radio broadcasters only (as discussed above) or as stating that private broadcasters are included in the public one. The substance appears fine and is presumably clear in the original language. The independence of the regulatory agency could however be stressed even more in accordance with e.g. Council of Europe Recommendation Rec(2000) 23.

**Article 40** on Council Attributions contains some unclear matters that also to some extent may be because of the terminology used. This includes point b) on supervision of the accuracy of programmes and how that relates to point d) on monitoring. In point b) it is also not clear what the public notification means. Presumably point b) intends to state that no prior control of broadcasts is allowed, which is correct and an important point (which could be stated in a more visible manner). But it is difficult to see what content there really is in point b) other than the task of monitoring, which follows from d). In this latter point, the term “proposal of programme services” is not understandable. It would be sufficient to set out the duty of the Council to monitor broadcasts and to investigate possible violations as well as act on complaints.

As for other tasks of the Council, its role in relation to the public broadcaster is too big. Even if it is good that also the public broadcaster falls under the competence of the regulatory agency as this ensures regulatory consistency, the tasks set out in points e) to j) give the Council so big powers over the public service broadcaster that it in fact controls it. The public broadcaster should be an independent body that manages its own affairs with the Council

performing regulatory tasks in much the same manner as for private broadcasters. The institutional autonomy as well as editorial independence of the public service broadcaster must be ensured.

In Article 40, paragraph 4, the ground of decisions being made public is not clear to what extent such grounds can be made public (taking into account e.g. matters of the nature of commercial secrets that may be part of the ground for a licensing decision), but this may be decided in detail by the Council so for a legal provision this may be sufficient. As for entry into force, some of the matters in the Article are of the nature of rulemaking and for rules and regulations it is normal to state a time for entry into force that is sometime in the near future. Not least for issuing and changing licensing rules, these should not normally enter into force immediately as broadcasters may need some time to adjust. As for the possibility of appeal in court, it may be indicated what procedure for appeals should be used (administrative process or similar). Even if it is possible it is not always advisable, depending on the seriousness of the case and the type of sanction, that a sanction is applied pending appeal. In any case this must be made clear in the law.

The Council Responsibilities in **Article 41** sets out policy objectives without explaining how the Council will be able to ensure this. It might be better to place these before the Article on tasks (attributions) and make sure it is clear the tasks of the Council implement the objectives so that there is no danger that it may appear as if the Council could take more encompassing measures and interfere with broadcasters. The transparency of the activities of the Council itself – as well as objectivity and non-discrimination of its activities – could be stressed or perhaps just made more prominent.

Appointment of the Council is not in accordance with best European practice, which requires that the members should be independent and not political appointees. Although the actual process in **Article 42** makes some attempts to ensure diversity and a not too close party political affiliation - with a special majority for appointment and appointment by parliament rather than government - the candidates should be proposed by independent bodies and not just the parliamentary fractions. They should come from different walks of life so that they will be perceived as being as independent as possible.<sup>5</sup>

**Article 43** is good in itself provided the basic process for appointment is amended in some way as stated above so that the members are less likely to be political appointees. Now it refers to that they shall not represent the interest of organisations that forwarded them but without any provisions for independent organisations to forward candidates. It would be good to make a staged appointment process, so that not all members are changed at the same time. Point 6 on the status of the members being that of public officials is not good, it is not clear if this means that they are civil servants, but in any case they should not be seen as civil servants or any other form of public officials that are under control of authorities in any manner. Indeed, one of the incompatibilities in **Article 44** should be clearly stated as being that of a civil servant or other public official with the exception of academic positions (the latter as is said in Article 44). The political independence in Article 44(2) covers any affiliation with a political party – it may be sufficient that the person cannot hold any elected or appointed position in a party as only membership in a party may be difficult to prohibit. As for dismissal in Article 43, it must be clear that members can only be dismissed on grounds clearly set out in law. The grounds for dismissal in Article 43(5) are not strict enough and allow for

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<sup>5</sup> See Council of Europe Recommendation Rec(2000) 23 on the independence of regulatory authorities.

interpretation that may enable to get rid of “uncomfortable” Council members. Deprivation of citizenship cannot normally happen in democratic societies other than by the active actions of the person concerned and the need to have this as a special ground for dismissal is thus not suitable. Both convictions by court and health reasons must be restricted to only serious cases.

**Article 45** on the president of the Council, states that this person should have a position similar to that of a Deputy Minister. Although it is not totally clear what is meant by having a position similar, this is an unfortunate stipulation as it appears to show that the president holds an official government position, which should not be the case. Another flaw in Article 45 is again related to the relationship between the Council and the public broadcaster. There should be no need for the president or any other representative of the Council to take part in meetings of the Executive Board of the public broadcaster, indeed it is unsuitable that they do so as the Council should supervise the activities of the public broadcaster and not interfere beforehand – just as for any broadcaster. In exceptional circumstances the Council may be invited for a special reason but normally the two bodies must be held separate. Finally, three weeks appears to be a short time to establish a new Council, especially as there should be a provision for organisations to put forward candidates (Article 45(8)).

**Article 46** refers to legislation so it is presumed some legislation exists that sets out the remunerations and similar. It would be better to determine this separately especially for the Council.

Funding of the Council shall come from the state budget. There is no provision on licence fees. The funding mechanism should contribute to the independence of the agency<sup>6</sup> so more independent funding like from licence fees rather than relying on the state budget would be better. With the current provisions in **Article 47** there is no independence whatsoever from the state funding and no requirements for clear plans to avoid that the government tries to exert influence through funding.

To ensure the independence, the provision in **Article 48** on the parliament approving the statute should be taken out; this can be done by the Council itself. Openness and transparency of the work of the Council is positive but as it will deal with individual cases it is not suitable that all its sessions are open to the public. There may be certain open sessions as well as a procedure for public rulemaking. In addition, decisions shall be public as soon as they are made. But all sessions of the Council must not be open to the public. The procedure in point 4) of Article 48 for establishing the frequency plan should also include the Telecommunications agency. This also affects point 5).

In **Article 49** point 4) it is unclear what speciality commission is intended. There should be parliamentary control as well as possibly audit control of the Council but not in any manner which infringes upon its independence.

#### Public Service Broadcaster

The correct title for the public broadcaster should be public service broadcaster and it should not only cover radio. What is unclear in the draft law is how the transformation from the currently existing broadcaster should take place, if the new one is to be an entirely new entity

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<sup>6</sup> Council of Europe Recommendation Rec(2000) 23 and the EBU model public broadcasting law among other documents.

or the successor of an existing one. In any case, succession issues must be sorted out relating to activities, property, personnel and similar. The basic idea of succession or a new body should be in the law whereas details may be in other regulations. (This refers to **Article 50** as well as the transitory provisions.)

**Article 51** is in line with European standards but the term “historical truth” in point b) could be dangerous. Somewhere in the law it needs to state that the public broadcaster shall cover the entire population of the country or at least as much as is at all possible and with the plan to cover all areas in the near future.

In **Article 52** respect for minority culture should also be mentioned. The importance of the diversity of cultural expressions is promoted through the above mentioned Guidelines as well as e.g. in a recent (October 2005) UNESCO Convention on the protection and promotion of the diversity of cultural expressions, endorsed also by the Council of Europe in Recommendation Rec(2006)3. This mentions enhancing diversity of the media through among other measures public service broadcasting. The fact that broadcasting from other countries may be available in what in one country is a minority language does not mean that no such broadcasting should be made in the country in question – by both public and private broadcasters.

The statement in **Article 53** on prohibition to interfere is good, but could state that no-one external to the public broadcaster itself can interfere. The very important provision on banning censorship could be made more prominent for all broadcasters. These principles would also apply regarding influence by the Council and the public service broadcaster needs a real board to ensure these principles.

As for advertising, in order to ensure fair competition, the amount of advertising time on the public broadcaster should be more limited than on the private ones so special rules for advertising are needed. It may also be questioned if teleshopping should be allowed at all. As the public service broadcaster receives public funding and is in a special position compared to other broadcasters also through other means such as guaranteed licence and frequencies, it will always have a strong competitive position. This position must not be used to dominate the advertising market unduly. The reference in **Article 54** is thus not sufficient (and the reference is wrong, it should be Chapter III).

Some of the activities in **Article 56** such as producing advertising activities (point e)) do not appear suitable if this is not a translation matter. Also the reason for point h) on the foreign trade operations is difficult to see. Article 56 should be a concise list of core activities of a public broadcaster and no mention of normal ancillary activities such as making agreements. As explained, Article 56(2) is a problem: the board of the broadcaster and not the Council should have this role.

One very important comment to this draft law is that the public broadcaster should have a real board, consisting of independent people with knowledge in the area. This brings in the public into the management of the broadcaster and ensures that a diversity of views and ideas are taken into account in the work of the broadcaster. Even if the regulatory agency should also have some competence related to the public service broadcaster, it should not be involved in matters such as programming for which there should be another organ that ensures public

involvement.<sup>7</sup> Currently the Executive Board (**Article 57**) does not look like an independent board. The persons are partly in subordinate position to one-another, which would make it hard for them to act a board. They are internal to the broadcaster and will thus not be able to bring in the influence and knowledge from society that a public broadcaster needs. The too close link with the regulatory agency has been mentioned. Although the open and transparent contest for finding executives is good, this should be handled by the board of the public broadcaster and not the Council and there should be an equally open and transparent manner of appointing the board. The Council may be involved in the process of appointing the board of the public broadcaster e.g. by organising the selection process, but it should not be involved in or have any influence over the board once appointed. The board of the public service broadcaster shall be involved in appointment of the director of the broadcaster (again with a possibility for some involvement also of the Council). Normally lower positions of special directors can be appointed as a normal executive decision of the public broadcaster but if not, it is the board and not the Council that should be involved.

In **Article 60** on the mandate, as concerns dismissal the final court sentence should only refer to crimes of certain seriousness. The other major flaw of this Article is again that the Council is given wide powers. The Council should not be able to dismiss the board of the public broadcaster. The other conditions are also not suitable. As above, deprivation of citizenship cannot happen in democratic societies other than by the active actions of the person concerned and the need to have this as a special ground for dismissal is thus not suitable. Point e) is very unclear and in any case an amendment of a legislative basis should not be a ground for dismissal as it may open for possibilities of the authorities to get rid of persons through changes in some legal provisions. Persons employed will be subject to labour contracts and this is another reason why a real board is needed that has a different security and can ensure independence.

In **Article 61** it is evident that there is a subordinate position for the Executive Board of the public broadcaster to the Council and this is not acceptable. The editorial independence of the broadcaster must be ensured.

In **Article 62** the final point should be coupled with requirement to appoint a successor when the term expires.

As has been stated many times above, **Article 63** must be changed as this very clearly makes the public broadcaster subordinate and dependent on the Council. The Council is a regulatory agency with regulatory functions but not a board of any broadcaster and there should be a real board that carries out the functions in this Article independently. The Council will exercise some influence over the public service broadcasting through its regulatory activities and as the public service broadcaster will have a licence (although a special licence). This influence will not jeopardise the institutional autonomy, nor the editorial independence.

The meaning of the Task Notebook in **Article 64** is somewhat difficult to understand but this may have to do with the unusual term used in English. The importance of the document is also difficult to understand but as it appears to be just some list of facts about the broadcaster there should be no objection to it – in any case such information is needed in the licensing process.

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<sup>7</sup> See the EBU Public Broadcaster Model Law. This model law includes a separate administrative council. It is not necessary to have two councils or boards, but the principles of the model law can be obtained with just the one organ as well especially when a certain relationship with the regulatory agency is maintained.



For **Article 65** an important reflection is that also made above about the relationship of the new entity to any pre-existing entity and questions of succession to property. Other than that some of the detail should be left to the board of the public broadcaster to decide in accordance with normal commercial terms and legislation in force so the need for such detailed provisions here may be questioned. Other than that, the main objection is again the role of the Council.

As for the financing of the public broadcaster, there appears to be no subscription fee (**Article 66**). Although European countries are free to decide themselves the exact nature of financing a public service broadcaster, its independence and viability are best served by a subscription fee paid by users. It is unsuitable to be financed mainly by state budget allocations as this reduces the independence. Furthermore, this Article does not mention advertising income. As said above, although the provisions on advertising need more detail, presumably some advertising will be allowed and this will be an important source of income.<sup>8</sup>

### Private broadcasters

Also this section (**Article 67**) should not just apply to radio. The heading is wrong in that it states “public” but it is obvious from the content that what is meant is private. The section should be placed earlier in the law as mentioned above. Point 3) is not clear as it is not evident what the remaining 25% of ownership may be – presumably public ownership. This is not ideal as the balance between public service and private broadcasters should be maintained by the fact that there is a separate public service broadcaster and the rest of the broadcasting field is made up of private broadcasters without public involvement or interference. However, there is no prohibition on some public ownership and for example community involvement.

What are lacking in the draft law are proper provisions about ownership, limiting concentration of ownership, regulating cross-ownership and generally ensuring plurality. As set out above, the provisions inserted in Article 4 are not sufficient. In order to monitor such things, broadcasters must provide information on ownership according to criteria to be stipulated in detail by the regulatory agency but that can be mentioned more generally also in the law. But how private broadcasters finance their activities is not relevant provided it is not against any concentration rules so Article 67(5) is unnecessary.

### Final and Transitory Provisions

As is said above, it is not evident what the relationship with the existing public broadcaster is and this must be clarified. In addition to that, the only comment to this section is that the times to undertake the various activities must be realistic. Furthermore, it is not known what happens if the times set out here are not followed. Amendments made in the last changed draft improve the section slightly but the stated concerns remain. It is good to state that pre-existing licences remain valid, but it is not shown for what period. Presumably there is a period in the licences. As it is not known what this period is, it is not possible to make a specific comment on this but if the period is very long, there must be a possibility for amendments – taking into consideration the legitimate interest of the licensees.

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<sup>8</sup> On funding of public service broadcasters see the EBU Model Public Broadcasting Law and OSCE declaration from March 2003 on New Challenges, New Solutions for Public Service Broadcasting.

### Explanatory Note

The Explanatory Note attached to the latest draft version sets out in general that the aim of the law is to reach modern European standards. The importance attached to the provisions on rights of the programme consumer is not shared by this commentator for the reasons set out above. Even if the stated aim to give consumers rights is good, the law does not provide any real enforceable possibilities for this and in any case, normal regulatory activity of an independent regulator should ensure the relevant protection. The desired strengthening of independence of the regulator but also that of the public broadcasting service could be further ensured as stated above.