



**The Representative
on Freedom of the Media**

Further Comments on the draft Audiovisual Code of the Republic of Moldova

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Introduction

This analysis is a follow-up to the analysis made by this expert on 7 April 2006 and to the conference organised by the Council of Europe in Chisinau on 25-26 April 2006 to discuss different drafts for new broadcasting legislation in Moldova. In addition to the analysis made by this expert of the draft Audiovisual Code, there are also several other expert analyses on the many draft laws in the broadcasting field produced by different bodies. A further analysis of the draft Audiovisual Code by the Council of Europe will be forthcoming. The suggestions made here are based, apart from on this experts own views and previous analysis, also on the reviews made by Article 19 (April 2006) of the draft Audiovisual Code and by the Council of Europe of the APEL draft as well as other drafts in the sector (2002 to 2004). This analysis incorporates suggestions from the different expert analyses (that largely converge and do not contain any major differences).

The reason for this analysis and what makes it different from others is that it makes concrete suggestions on what parts of the different draft laws adopted by parliament on 6 April 2006 that, with or without suggested amendments, should be used for the law. There is no detailed analysis of the provisions, which can be found in the various other analyses –the current document more resembles a kind of model law but based on the Moldovan drafts adopted by parliament. The aim of this is to facilitate for the legislator to practically use the different comments made. The need for such a document was seen at the seminar in Chisinau.

Explanations

The draft Audiovisual Code of the Republic of Moldova (referred to as “the Audiovisual Code”) that was adopted in a first reading by Parliament on 6 April as the basic text is also the basis for this analysis. The other texts used are the draft law on broadcasting (referred to as “APEL broadcasting law”) and the draft law on the Public National Broadcasting Institution Teleradio-Moldova (referred to as “APEL Teleradio-Moldova law”) drafted by APEL that were also adopted by Parliament in a first reading. In some instances the draft law on the public local broadcasting institution (referred to as “APEL local public broadcasting law”), produced by APEL but not adopted by parliament is also referred to. When it is said that something contains an Article from the other drafts, this means that the proposed basic article has the same major substantive content as that of the other draft so both mentioned articles may be looked at for ideas on wording, etc. The titles of the Articles of the draft Audiovisual Code are used as they are in the translated version of this draft, even if they at times are unclear. Such unclarity mainly appear to be due to translation issues (such as referring to radio only rather than broadcasting).

The draft Audiovisual Code in many respects meets European requirements but it also has some shortcomings, especially with regard to the relationship between the regulator and the public service broadcaster and related to appointment and similar for the different bodies in the broadcasting field. The APEL drafts are in this respect in many places more in line with European standards, as is pointed out in detail below.

Proposed structure of the law

It is proposed to have one law that encompasses the different aspects of broadcasting legislation, thus using the formula of the draft Audiovisual Code, combining the different issues that APEL has in separate drafts.

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

(In the following, for ease of reference, the existing order in the draft Audiovisual Code is used. The Chapters can however easily be moved to fit with the structure proposed here. When new articles are proposed, they are mentioned in the place where they could be inserted, without changing the existing numbering in the draft.)

Article-by-Article comment

General Provisions

Article 1 – Scope of the law

- Article 1 of the Audiovisual Code can be used
- The content of Article 1 of APEL Teleradio-Moldova law should be added as the law is to contain both general issues and the creation of a public broadcaster.

Article 2 – Meaning of used terms

- Compare definitions with the European Convention on Transfrontier Television, Council of Europe recommendations, EBU documents, etc. Accepted definitions for standard terms from international documents can be taken more or less verbatim. It is useful to use such commonly accepted definitions to avoid confusion about what is covered.
- The Coordinating Council of the Audiovisual should be included in the definitions
- Delete “internet” from Article 2 h) to ensure that the Code does not apply to Internet content.
- The definitions should be drafted last, to see what terms are used in the law and define all of these.
- (If mention of local public broadcasters is made, Article 2 of the APEL local public broadcasting law can be used as a definition, although this is not suggested for other reasons as explained below.)

Article 2bis – General Principles NEW ARTICLE

- A list of general principles in an early place in the law is good.
- Article 3 (1-6) of the APEL broadcasting law can be included but the word non-partisanship (in 5) should not be used.
- Article 4 (4-5) of the Audiovisual Code can be included, but the terminology used must be checked as it is now a bit unclear what the distinction meant between radio broadcaster and service provider is supposed to be.

Article 2ter – Broadcasting Policy NEW ARTICLE

- The Article could state that a broadcasting policy (an elaboration of what is now in Article 35 and what is also included in Article 9 of the APEL broadcasting law) shall be made. Such a policy would normally be developed by the government through the responsible ministry in cooperation with the regulatory agency, but it is also possible to have the regulatory agency doing it as is suggested in the drafts.
- Rights of programme consumers can be taken into account in such a policy, this can be said in the Article (as the special articles on that should be deleted, see below).
- Article 9 of the APEL broadcasting law can be used as a basis for the Article on the broadcasting policy but some of the detail in the Article may be left to the policy instead of being set out in the law. Point 7 should not be used as it is set out elsewhere.
- In the policy it should be clear that there are different types of broadcasting (public, private and community) for both radio and television and with different reach and that the public broadcaster should (with a realistic time) reach the whole territory.
- There should not be frequencies given to only re-broadcasting except in exceptional cases, Article 9 (10) referring to Article 31 (11) in the APEL broadcasting law is good.

Article 3 - European audiovisual works broadcasting

- This article needs to be amended as it is unclear. It stipulates 10% for such works, which is a low proportion as the Transfrontier Television Convention sets out that

where practical and by appropriate means a majority of transmission time should be reserved for such works.

- It is unclear how this Article relates to Article 11 (7) on own production for broadcasters with national coverage. 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.
- If these clarifications are made, the Article can be included.

Article 4 - Radio Broadcaster under the incidence of the legislation of the republic of Moldova

- Article 4 (1-3) is in line with the Transfrontier Television Convention as far as the provisions on which broadcasters fall under Moldovan jurisdiction are concerned. This part of the Article should be kept, this includes Article 3 (9-11) of the APEL broadcasting law.
- Article 4 (4-5) are included above in Article *2bis*.
- Article 4 (6-7) should be deleted and replaced with a special Article, see below.

Article 4bis – Ownership NEW ARTICLE

- There should be a separate article on ownership, it can be in the Chapter on General Provisions or in the Chapter on Private Broadcasters.
- Article 33 APEL broadcasting law contains some provisions: it must be determined which restrictions are desired.
- The provision should – based on what restrictions are desired- state all or some of the following:
 - That ownership is defined as having more than a certain set percentage (10% for example) of the share capital/ownership (such a definition of what is ownership *must* be included but the exact definition can vary)
 - That one physical or legal person cannot own more than [one or two] broadcasters covering the same area
 - That one physical or legal person cannot own both radio and television stations
 - That a physical or legal person that owns print media cannot also own broadcast media
- If there is a need to limit foreign ownership, the law should mention that a foreign physical or legal person cannot own more than a set percentage of a television or radio station

Article 5 – Classification of radio broadcasters

- This article should include all broadcasters and not just radio.
- It would be good to make a distinction based on coverage as broadcasters with national coverage may have different requirements than those with less coverage.
- Community broadcasters may be included as may public local broadcasting institutions if there are/should be such broadcasters.

Audiovisual communication principles

Article 6 – Prohibition of censorship NEW ARTICLE

- 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.

Article 6bis – Code of Conduct NEW ARTICLE

- 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. This reference should also be in the beginning of this chapter.

Article 6ter – Guarantee of morality and protection of minors

- Article 6 (2) prohibits certain programmes but 6 (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.
- It is not possible to have a visual warning sign for radio broadcasts.
- This Article contains Article 7 APEL draft broadcasting law.

Article 7 – Political and Social Balance and Pluralism

- Coverage of elections must be set out in more detail in a separate law or regulation, as it currently is in the Electoral Code.
- The reference made in Article 7 (3) is fine and the needed detail on what this means in the terms of guaranteeing equitable coverage is in the electoral code, so it would be good to make some reference to such more detailed rules. Detailed rules according to the election law can be issued by the election commission or the regulatory agency or in cooperation between them.
- Article 18 of the APEL broadcasting law may be used as inspiration for a more complete Article, although a reference to special election legislation is still justified.
- The time limit on news items appears not justified (Article 7 (4) a).

Article 8 – Editorial independence and freedom

- Article 8 (4) when it talks of the interference should state it refers to individuals outside of the broadcaster.
- This Article contains Article 4 of the APEL broadcasting law but the present Article is more complete.

Article 9 – Free programme reception

- This Article should be deleted as it contains issues that cannot be upheld in a legal procedure in the way that is proposed as well as issues that are too specialised to be set out in a broadcasting law (as explained in the analysis of the draft Code).
- If there is a wish to have a general programmatic statement about access to broadcasting services, Article 6 of the APEL broadcasting law can be used.

Article 10 - Rights of programme consumer

- This Article should be deleted as it contains issues that cannot be upheld in a legal procedure in the way that is proposed (as explained in the analysis of the draft Code).
- General reference to the rights of the consumer may be made in the broadcasting policy.

Article 11 – Protection of Linguistic, Cultural and National Heritage

- 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.

- 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. Some such explanation or reference should be included.
- It is unclear 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.
- Article 11(2) must be clarified and re-written or deleted.
- The priority intended in Article 11(3) is 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. This must be clarified or the point deleted.
- Local production share in Article 11(7) is rather high and as pointed out, the relationship to Article 3 is unclear.
- The relationship between local production and own production in point 7 is unclear.
- In Article 11(8) it is unclear if and how this applies to minority area broadcasters and Teleradio Gagauzia.

Article 12 - Protection of national information space

- This general provision on the use of frequency spectrum could either be a general opening principle (in the new Article 2^{ter}) or be an opening article in the section on licences for use of frequency spectrum.
- This Article in this place should be deleted.

Article 13 – Access of programme consumers to events of major importance

- This is in line with the Transfrontier Television Convention.
- The Article includes Article 41 of the APEL broadcasting law, but the Audiovisual Code is better as some of the detail of the APEL law may be in regulations of the regulatory agency instead of in the law.
- Article 42 APEL broadcasting law on right to extract could be added to this Article.

Article 14 – Ensuring confidentiality to information sources

- This is good and in line with international standards.

Article 15 – Protection of journalists

- This Article should be deleted. The same applies to Article 3 (12-13) APEL broadcasting law. The reasons are explained in the earlier Analysis.

Article 16 – Right to response, rectification and equivalent remedies

- The principle is good and generally in line with international instruments.
- The text in Article 5 APEL broadcasting law is clearer and better formulated and should be used with the additions set out here.
- Article 16 (4) from the draft Audiovisual Code should be included regarding rejecting the right of reply
- It should be added that a reply can be shortened or in special circumstances altered before the broadcasting of it.
- 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, which it may be a good idea to point out.

Article 16bis – Recordings NEW ARTICLE

- 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.

Article 17 – Broadcasting notifications and the state of emergency

- To Article 17 (1) it may be added *serious* threat to public security or constitutional order
- In Article 17 (2) it may be added who the information requests may come from
- See Article 3 (14) of the APEL broadcasting law as well as Article 9 (3) of the APEL Teleradio-Moldova law – there should be just one provision on this for all broadcasters

Article 18 – Respecting copyright and connected rights

- The Article mentions copyright obligations with reference to special legislation on this, which is good.
- This approach is better than Article 37 of the APEL draft broadcasting law, which should not be used as details should be in special law.
- There should be no instances when the Audiovisual Code contravenes copyright legislation so the reference to that in Article 18 (1) should be unnecessary.
- Article 18 (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.
- Article 18 (7) appears unnecessary. It is part of normal regulatory activity to monitor adherence to copyright obligations and not something that should require special registers. Such agreements can be kept by the broadcaster and must be submitted on request.

Advertising, teleshopping and sponsorship

Article 19 – Advertising and Teleshopping

- 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.
- Article 19 (6)g must presumably mean “immoral”.
- Article 38 of the APEL broadcasting law is shorter and in parts clearer, partly due to better translation, but lacks certain important issues such as prohibitions on advertising for certain products such as tobacco or pharmaceutical products. The Audiovisual Code is thus a better basis for this Article but some terminology from Article 38 APEL broadcasting law may be used.

Article 20 – Requirements for sponsored programmes

- 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)) – presumably it means news and current affairs programmes

- (Article 40 APEL broadcasting law largely includes the same issues).

Article 21 – Broadcasting conditions for commercials or teleshopping

- 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.
- Article 21 (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 39 of the APEL broadcasting law that contains the content of this Article and Article 22 is well formulated (or better translated) although it lacks some detail.

Article 22 – Amount of advertising and teleshopping

- This is also in line with European standards, see also Article 39 of the APEL broadcasting law.

Licences

Article 23 – Granting of broadcasting licences

- Article 23(1) and (2) are good in that they make a distinction between licenses for users of frequencies and general authorisations for others.
- What should be clearer in the law is how and when contests must be organised so that the broadcasting market is not stagnant but new applicants have a chance to get licences.
- 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 Article 23 (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. See also Article 23 (3) of the APEL broadcasting law, which is well formulated on programming and related issues but also not complete enough on the entire evaluation basis.
- The ban on appeals in Article 23(10) must be interpreted with caution. Normally decisions of a regulatory agency should be appealable to an independent body, a court or another independent body resembling a court.
- Article 23(11) mentions the Public Service Broadcasting which is good. 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. (See Article 24 of the APEL broadcasting law, although this Article as a whole is too complex). 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. See also Article 7 of the APEL Teleradio-Moldova law of which not necessarily all content should be used but parts of it may be useful.

- The Articles on licensing in the APEL broadcasting law (Articles 22-27) are more complex and divide the licence into different parts, which is not good.

Article 24 – Broadcasting licence extension

- It should be clarified if the broadcaster needs to apply for the prolongation (which they should do).
- The reference in paragraph 2 must be checked so that it refers to the correct provision.
- (This includes Article 23 (4) and Article 24 (1)b of the APEL broadcasting law.)

Article 25 – Broadcasting licence indicators

- It is presumed that data on the transmitter is included in the indicators mentioned. As there should not be a separate technical licence, this licence shall include all relevant factors.
- Article 28 (2) of the APEL broadcasting law on modifications could be added.

Article 26 – Broadcasting licence transfer

- This is good.

Article 27 – Broadcasting licence withdrawal

- It is important that it is clear that withdrawal should not be possible too easily.
- It would be better to state just the special grounds on not starting broadcasting or giving false information here and then make a reference to the fact that a licence may be withdrawn by the regulatory agency in accordance with law for violation of this Code, licence conditions or any codes and regulations issued by the regulatory agency. The possibility of withdrawal would be specified in the section on sanctions where it will be clear that it is the ultimate sanction.
- 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.
- This Article includes Article 29 APEL broadcasting law, Article 29(2) of that draft could be inserted in this Article.

Article 28 - Re-broadcasting authorisation granting

- Extensive re-broadcasting on terrestrial frequencies without any own programming should normally not be allowed.
- It would be better not to handle re-broadcasting separately but 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 and there will be just one unified licence.
- This Article can be deleted and a mention of re-broadcasting added to Article 23.

Article 29 – Programme services re-broadcasting conditions

- If re-broadcasting is treated as a part of a licence, the details for re-broadcasting (what kind of consent from the producer is needed for example as well as the detail that is in Article 31 of the APEL broadcasting law) can be stated in regulations of the regulatory agency.
- Some basic conditions may be added as licensing conditions (Article 23).

- As there is now a large amount of re-broadcasting in Moldova, a transitory provision may be needed on how to phase out existing authorisations over a period of time.

Article 30 – Free Re-broadcasting

- This Article should be deleted.
- Any broadcaster (apart from cable) would need to have a permission of some sort. The content of programming and the right to re-broadcast programme content provided that the required agreements and permits are secured, shall 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.
- If there is a need to mention spill-over in the law, it should be done in the context of the frequency management.

Article 31 - Technical licence granting

- This Article can be deleted.
- The licence should be changed to incorporate all different aspects into 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.

Article 31bis – Cooperation with the National Regulatory Agency for Telecommunications NEW ARTICLE

- An article stating the cooperation between the two regulatory agencies can be inserted, setting out briefly the procedure how frequency spectrum is made available for broadcasting and how the agencies cooperate on monitoring technical standards.

Article 32 – Supervision of technical parameters

- This must also be carried out in close cooperation between the regulatory agencies for broadcasting and telecommunication.
- This Article can be deleted and this aspect included in the general article on cooperation above.

Article 33 – Amendment of the technical licence

- To this Article should be added even more clearly that such changes shall be only if necessary and that the rights of the licence-holder shall be protected.
- The Article should be moved as there will be no separate section on technical licences, it can be by the article on frequencies.

Article 34 – Technical licence withdrawal

- This Article can be deleted as there will only be one unified licence and the conditions are included in the withdrawal Article above.

Article 35 – Development of Program Service Territorial Coverage Strategy

- This Article should be included in the new Article *2bis* proposed above, with the amendments suggested there.
- The Article in this current form and in this place in the law can be deleted.

Article 36 – National Plan for radio-electric frequencies

- The establishment of the frequency plan is presumably the main responsibility of the Telecommunications agency and thus the details must be in the law governing that body. A reference should be made to that law and consistency must be ensured.
- 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. This is best done in the new Article *31bis* above.

Article 36bis – Cable television NEW ARTICLE

- Some mention of cable broadcasting may be made, in the general licensing Article or in a special Article that e.g. sets out the “must-carry” obligation regarding the public service broadcaster.
- Article 32 of the APEL broadcasting law may be used as a model.

Article 36ter – Licence fees NEW ARTICLE

- What is not in the 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.
- The proportionality and transparency of the system is essential.
- Article 30 of the APEL broadcasting law deals with this issue but it is better not to use the term “tax” and as there will be only one licence there will also be only one fee.

Control and sanctions

Article 37 – Exercise of supervision and control activity

- The regulatory agency must have the right to ask for information from licence holders (as well as applicants) as set out in the Article.
- 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 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
- 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 checked so it is to the correct article.
- Article 37 (5) is confusing- it is not clear what the notification mentioned, from which the period starts running, is. If it 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. For starting a procedure, the time may be sufficient.
- This Article includes Article 43 of the APEL broadcasting law but the planned yearly control included in that Article is not necessary.
- The monitoring of broadcasts, the right to request tapes (that must be kept in accordance with provisions elsewhere in the law) must be set out clearly in this section of the law, so that the monitoring and controlling role of the agency is clear.

Article 37bis – Offences NEW ARTICLE

- It may be good for the purpose of clarity to list offences under the law, Article 44 of the APEL broadcasting law could be used as a model.

Article 38 - Sanctions

- 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 must be proportional and start with a less encompassing sanction unless the violation is especially grave, increasing to more serious sanctions for repeated offences.
- Article 45 and 46 of the APEL broadcasting law are better models and could be used, presumably point 5 in Article 46 means appealed and not sued.
- This Code should set out the sanctions so the meaning of Article 38 (2) is confusing
- The procedure set out in Article 38 (4) is 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.
- The reference back to Article 27 in Article 38 (5) is unnecessary as this is the place in the law where the sanction of a possible revocation of licence is set out.
- Article 38 (6) is 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.

Article 38bis – Appeals NEW ARTICLE

- A clear mention of the right to appeal should be made in this section, stating which procedure shall be used and/or to which body appeals are made (e.g. appeals can be made according to the administrative procedure law or similar).
- It must be clear that broadcasters will be notified and can make representations to the Council if sanctions are considered before the final decision is made.
- Decisions of the Council shall be in writing and made public.
- 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.

Coordinating Council of the Audiovisual

Article 39 – Status of the coordinating council of the audiovisual

- The unclarity is 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 independence of the regulatory agency could be stressed more underlining independence, transparency, non-discrimination of its work.

Article 40 - Council Attributions

- Some unclear matters may be because of the terminology used and/or translation matters. 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 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

- In d) 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 (which is why this section should be before the section on control and sanctions, see above).
- As for other tasks of the Council, its role in relation to the public broadcaster is much too big. 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. These points should be deleted.
- As for entry into force, Article 40 (3) 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.
- Article 40 (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.
- Article 40 (5) on the possibility of appeal in court, it may be indicated what procedure for appeals should be used (administrative procedure or similar). This is best to have in a separate Article, see above.

Article 41 - Council responsibilities

- The Article sets out policy objectives without explaining how the Council will be able to ensure this.
- It would 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 made more prominent (in Article 39, see above).
- It may be best to merge this and Article 40 to make one clear, coherent list of what the Council is responsible for safeguarding and what the Council activities are to do this.
- Article 10 and 17 of the APEL broadcasting law may be used for inspiration although there are some unclear issues also in those Articles. This includes the right to sue in Article 10 (9) – there should be no such right but a right to appeal (which may be a translation issue) – as well as that some of the competences in Article 17 are too vague (like what non-partisanship in this context is) and that there should not be the different types of licences that Article 17 mentions, as set out elsewhere.

Article 42 – Council structure

- Appointment of the Council is not in accordance with best European practice, which requires that the members should be independent and not political appointees.
- The special majority for appointment and appointment by parliament rather than government as well as the competence criteria are good but the candidates should be proposed by independent bodies and not just the parliamentary fractions.
- Article 11 of the APEL broadcasting law sets out a good model, although the specific bodies chosen to nominate candidates must be discussed so as to represent as broad a selection of civil society as possible.
- Although it is important that members do not represent certain specific interests but are appointed in their own capacity, it could be good to make some provisions for diversity.

Article 43 – Council members

- The basic process for appointment should be amended as stated so it is good that this Article refers to that members shall not represent the interest of organisations that forwarded them.
- Appointment should be staggered (see APEL broadcasting law Article 11 as mentioned above), so that not all members are changed at the same time.
- Article 43 (5) on dismissal must be clear on that members can only be dismissed on grounds clearly set out in law.
- The grounds for dismissal are not strict enough. 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.
- There should be a possibility to dismiss members that do not fulfil their work, see Article 13 APEL broadcasting law.
- Dismissal should be made by Parliament with the same number of votes as what is needed for appointment and dismissal should be reviewable in court. Article 13 of the APEL broadcasting law may be used as a model.
- Article 43 (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.

Article 44 – Incompatibilities with the position of member of the council

- 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.
- Article 44 (4) should include paragraphs 1-3.
- Article 12 of the APEL broadcasting law is a more complete model, but also that lacks the specification on the political affiliation and it includes a statement on the position being equivalent to vice-minister, which is not good and it lacks the family members in relation to ownership.

Article 45 – President of the council

- The statement that this person should have a position similar to that of a Deputy Minister, although it is not totally clear what is meant this is an unfortunate stipulation as it appears to show that the president holds an official government position.
- Another problem 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.
- 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)).
- (This Article includes Article 14 of the APEL draft broadcasting law, but the provisions there on the status of minister and on participation in government sittings are not good.)

Article 46 – Remuneration of council members

- 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.

Article 47 – Council funding

- The funding mechanism should contribute to the independence of the agency so more independent funding like from licence fees rather than relying on only the state budget would be better.
- In any case, the funding must be organised in such a manner that funding issues cannot be used to exercise pressure over or control over the Council and that sufficient funding is guaranteed.
- This Article includes Article 21 of the APEL broadcasting law, but that Article is also not ideal as it includes issues such as consulting and selling copyrights that are not suitable for a regulatory agency.

Article 48 – Council organisation and activity

- It should not be necessary to have the parliament approve the statute; 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. Such a procedure for public rulemaking should be specified.
- Decisions shall be public as soon as they are made.
- The procedure in Article 48 (4) for establishing the frequency plan should also include the Telecommunications agency. This also affects point 5).
- Article 16 of the APEL broadcasting law is too detailed on this issue and sets out issues that should be in the statute instead and the meetings stipulated are too frequent.

Article 49 – Supervision and control over Council Activity

- There should be parliamentary control as well as possibly audit control of the Council but not in any manner which infringes upon its independence.
- This Article includes Article 20 of the APEL broadcasting law which also does not give much detail.
- The annual report should be published and disseminated to interested stakeholders.
- The law could provide more detail on what the annual report should include. Article IX suggests:
 - a copy of the auditor's report;
 - a statement of financial performance and of cash flows;
 - a description of the activities of the Council during the previous years;
 - information relating to licensing, complaints and research;
 - a description of any sanctions applied by the Council and the decisions relating thereto;
 - information relating to the frequency plan;
 - an analysis to what extent the Council has met the objectives of the previous year;
 - its objectives for the coming year;
 - any recommendations of the Council in the area of broadcasting.

Public Service Broadcaster

Article 50 – Legal status of public radio broadcaster

- The correct title for the public broadcaster should be public service broadcaster and it should not only cover radio.
- It is unclear in the draft law how the transformation from the currently existing broadcaster should take place, if the new one is to be an entirely new entity or the successor of an existing one.
- It is possible to have also local public broadcasters. In many countries these would be a part of one entity – the public broadcaster - but this should be suitable for the situation in Moldova.
- Article 8 of the APEL broadcasting law sets out different types of public broadcasting, although the Articles is drafted in a way that appears to make this type of broadcasting too much subject to state authorities. If the broadcasters are created and also controlled by local authorities this does not meet the requirements for public service broadcasting to be independent and not authority broadcasting. The APEL draft law on local public broadcasters attempts to protect against such control and interference from authorities in the work of the local public broadcasters but in case such broadcasters are set up, it must be carefully considered how to ensure that the safeguards are sufficient.
- It must also be considered when designing the system of public broadcasting how this can be viable. In a small country, a multitude of broadcasters may be unnecessary use of resources and one broadcaster with a regional presence may be better.

Article 51 – Company attributions

- The term “historical truth” in point b) could be dangerous.
- As mentioned above 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.
- The Articles 51, 52 and 56 may be merged or at least put next to one-another, to a more clear statement on the tasks and duties of the public broadcaster. Article 3 and 5 of the APEL Teleradio-Moldova law are clearer than the draft Audiovisual Code.

Article 52 – Main requirements for programme services of the Company

- This can be deleted and the content inserted in a general Article.
- Respect for minority culture should also be mentioned.

Article 53 – Editorial independence

- The Article should 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, see above.
- These principles would also apply regarding influence by the Council and the public service broadcaster needs a real board to ensure these principles.
- Article 8 and Article 9 (1-2 + 5) of the APEL Teleradio-Moldova law can be used as a model.

Article 54 – Advertising, teleshopping and sponsorship

- 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.

Article 55 – Pre-emption right to broadcast and record

- This is OK.

Article 56 – Object of public radio broadcaster activity

- The relationship between different articles and why tasks and duties are set out in so many different articles is difficult to see. There should be a concise list of core activities (in which children's programmes should also be required) of a public broadcaster and no mention of normal ancillary activities such as making agreements.
- Producing advertising activities (point e)) do not appear suitable if this is not a translation matter.
- The reason for point h) on the foreign trade operations is difficult to see.
- Article 56(2) is a problem: the board of the broadcaster and not the Council should have this role. The public broadcaster must have a real board, consisting of independent people with knowledge in the area. The regulatory agency should not be involved in matters such as programming for which there should be another organ that ensures public involvement.
- Chapter III of the APEL Teleradio-Moldova law may be used as a model.

Article 57 – Company management

- This does not provide 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.
- See the comment above on using the APEL Teleradio-Moldova law as a model, although the number of members may be changed if there is no wish for such a large board.
- 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) which shall be done through an open and transparent process.
- 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.
- The APEL Teleradio-Moldova law provides a good example of the kind of provisions needed, see especially Articles 11-28 in that draft.
- The idea of an ombudsman of public service (Articles 29-31 of the APEL draft law on Teleradio Moldova) is an interesting idea although less common in Europe.

Article 58 – Requirements towards the members of the executive board

- The Board of the Public Service Broadcaster should be responsible toward the public, for example through publication and discussion of an Annual Report, though periodic meetings, research etc.
- The APEL Teleradio-Moldova law provides examples.

Article 59 – Incompatibilities with the position of the president of the company and member of executive board

- Article 16 of the APEL Teleradio-Moldova law is a good model, only the membership in political parties could be only a leading position in such parties.

Article 60 – Mandate of the President and Vice-president of the company

- The 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.
- As concerns dismissal the final court sentence should only refer to crimes of certain seriousness. Deprivation of citizenship cannot happen in democratic societies other than by the active actions of the person concerned. 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.
- Article 18 of the APEL Teleradio-Moldova law may – apart from the point on citizenship – be used as a model.

Article 61 – Structure and activity of company management

- 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.
- The APEL Teleradio-Moldova law provides a better model, see above.

Article 62 – Attributions of the president of the company

- The final point should be coupled with requirement to appoint a successor when the term expires.
- Article 27 of the APEL Teleradio-Moldova law can be used as a model.

Article 63 – Attributions of the executive board

- This must be changed as set out above, as this very clearly makes the public broadcaster subordinate and dependent on the Council.
- The APEL Teleradio-Moldova law provides a model.

Article 64 - Task Notebook

- 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.

Article 65 – Property of the company

- The relationship of the new entity to any pre-existing entity and questions of succession to property must be made clear.
- 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.
- The main objection is again the role of the Council.

Article 66 – Budget of the company

- The independence and viability are best served by a subscription fee paid by users.
- The Article does not mention advertising income.

- In any case, the funding mechanism must be stable so that the broadcaster can undertake long-term planning and not be under pressure from the state.
- APEL Teleradio-Moldova law Articles 32-34 provide a possible model.

Private broadcasters

Article 67 – Establishment and activity of public radio broadcasters

- This should not just apply to radio and 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.
- Article 67 (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.
- How private broadcasters finance their activities is not relevant provided it is not against any concentration rules so Article 67(5) is unnecessary.
- Chapter V of the APEL broadcasting law setting out broadcaster’s rights and obligations contains issues that are linked to this section but as these issues are either stated also elsewhere or do not need to be set out specially in law, this Chapter is not needed (apart from certain issues as set out elsewhere in this analysis).

Article 67bis – Community Broadcasting NEW ARTICLE

- To encourage small community broadcasters that provide a specific duty in being close to the community and providing pluralism in a not-for-profit manner, specific rules on such broadcasters could be included.
- This should contain a definition of what these broadcasters are (non-governmental, not political and not for profit serving the interests of the community) and provisions on what is special for them, like reduced licence fees, a licence for a shorter period, etc. (See especially the Article IX analysis.)

Final and Transitory Provisions

Article 68 – Coming into effect of the code and abrogation of certain acts

- It is not evident what the relationship with the existing public broadcaster is and this must be clarified.
- In case there are any existing local public broadcasters or any other type of broadcasters that shall be phased out, this needs to be done over a certain period.

Article 69 – Compliance with the provisions of the present code

- The times to undertake the various activities must be realistic.
- It is not known what happens if the times set out here are not followed.
- 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. If the period is very long, there must be a possibility for amendments – taking into consideration the legitimate interest of the licensees. Also the existing re-broadcasting licences must be terminated over a certain period.
- The staggered appointment process for the Council and the Board of the Public Broadcaster may also require a provision in this Chapter, so that it is clear that among the first members some will have different periods, so the appointment process will work in the future.

