



**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

**LEGAL ANALYSIS OF THE DRAFT LAW ON MEDIA AND
AUDIOVISUAL MEDIA SERVICES OF
THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

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Conclusions and Recommendations

- The main objections to the draft Law concern printed and electronic publications and the requirements made on them for registration. These provisions should be deleted completely as there is no need for registration of such publications in addition to what follows from other laws (for tax and business purposes) and any registration requirements may have a chilling effect on freedom of the media.
- The draft Law is very long and complex. It contains matters that should instead be in a different form of instrument, such as secondary legal acts of the regulator or some other more flexible type of instrument. The draft Law also includes too many different things, which makes it hard to manage and causes a risk that it will create additional restrictions for some types of media (notably print and electronic publications) that are not necessary in a democratic society with free media.
- The draft Law blurs the distinction between self-regulation and formal regulation by mentioning self-regulation in various places, thus making it obligatory and limiting its self-regulatory character.
- There should not be any definition of journalists and editors in the law, as this may have a limiting effect and in any case does not serve any necessary purpose.
- The definition of media publisher is extremely wide and includes also categories that should not be regulated in the same or similar manner as providers of audiovisual services or programme packages.
- The definition of electronic publications is too complex and risks including too many types of web-sites, thus restricting freedom of the internet.
- The reference to freedom of expression is good, but the possible limitations of it are potentially too wide and there should be the safeguard that restrictions must be necessary in a democratic society. Restrictions to freedom of expression should not be seen as a type of permitted censorship.
- Unnecessary references to other laws not only make the Law longer and more complex to read, but also create a risk of discrepancies and interpretation issues, if the different laws use slightly different formulations.
- Access to information should not apply just to media but to all, in a general law, and does not need to be repeated in this Law.
- The draft Law provides too much detail on issues that should be within the discretion of media outlets (on editors-in-chief, on contracts, for example).
- The draft Law states obvious principles of democratic rule of law societies. The Law should be drafted so that what is not prohibited is permitted as an obvious matter. This includes the right for journalists to express their opinion.

- Any sanctions must be applied in a gradual and escalating manner, with revocation of the licence only as an ultimate sanction in extreme cases. Sanctions are to be handled by the regulator with the possibility to appeal them to court, with a clear indication in law of the division of roles of the regulator and the courts.
- The ownership restrictions are very detailed and complex and although they may have a positive aim in trying to ensure plurality and avoid concentration, they set up so many restrictions that in a small country it may exclude too many potential owners. The provisions should be simplified.
- In general the rules on the regulatory agency are in line with European and international standards, but the appointment process has too little involvement of civil society. The period of nine years for Council Members (and eight years for the Director) is too long and there should instead be a shorter period with the possibility of prolongation to allow for more flexibility. In the transitional provisions it is not clear if members of the existing regulator can be members of the new one.
- The provisions on audiovisual media services (linear and non-linear) are in most part in line with international standards, as they incorporate the AVMSD but if the content of the provisions is mainly non-objectionable, the style suffers also here from excessive detail that would be better left to other forms of acts.
- It is important that the coordination with the agency for electronic communication is handled smoothly and without excessive burdens for the applicant.
- The obligations on percentage of national music and programmes appear excessive.
- The provisions on the public broadcasting service are in line with European and international best practice, apart from that more civil society involvement in the appointment process of the Council would be needed.
- The broadcasting fee should not be used to finance the regulatory agency, but this should be done (partly) by a fee for broadcasters.
- The provisions on monitoring and the rights given for this purpose are excessive and risk having a chilling effect on media. Monitoring is legitimate and important, but should not be excessive and should gradually be replaced more and more by complaints-based enforcement.

Executive summary

This analysis concerns the draft Law on Media and Audiovisual Media Services of the former Yugoslav Republic of Macedonia. The basis for this analysis is the commitment of the OSCE to freedom of expression as protected by international instruments. The draft Law

utilises terminology and introduces provisions that harmonise with EU rules, like the Audiovisual Media Services Directive 2010/13/EU (AVMSD). However, the Law uses a very wide definition of media publisher, including also categories that should not be regulated in the same or similar manner as providers of audiovisual services or programme packages, like printed and electronic publications. One important problem is the definition of electronic publications that is potentially confusing and there is a risk that too many different web-sites may be included and thus regulated, which should not be the case. The law includes too many different things, which makes it hard to manage and which imposes a regime suitable for one type of media (audiovisual) on other types (print and electronic)

The purpose of the Law is in general in line with best international practice, among other things also emphasising freedom of expression and many good aims, like plurality, competition, protection of users, introduction of new technologies and so on. These positive aims may not be enough to avoid some of the potentially restrictive elements of the Law however. The reference to freedom of expression made in the Law is good, but there are potentially too wide possibilities for limitation with terms like protection against unrest or the protection of morals that may be misused, especially there is no clause on restrictions being necessary in a democratic society. The Law appears to see permitted restrictions as a form of (permitted) censorship.

The draft Law in many places includes references to other laws, which is in general not needed. Unnecessary references to other laws not only make the Law longer and more complex to read, but also create a risk of discrepancies and interpretation issues, if the different laws use slightly different formulations. As for access to information, this provision should not be needed as best European and international practice is that there is access to information legislation that decides on access to information for all – media and others. Although there may be practical differences in access for media as compared to the general public (press cards etc.) the principle of access applies to all.

The requirement to have an Editor-in-Chief is a reasonable obligation, as the structure of responsibility may be construed around this but the Law should not need to give detail on the process, on the need to make contracts, etc. which looks like micromanagement by law. It is worrying that the Law in its provisions on ethical principles from self-regulatory acts appears to blur the distinction between self-regulation and the legal, binding system.

In some context the Law does not recognise that some freedoms are obvious in a rule of law state and do not need restatement, like the right of a journalist to express his or her opinion. As with too many references to other laws, any such not needed provisions not just make the Law too long and complex but also open up a risk for interpretation issues.

Whenever sanctions are imposed, there should be a gradual imposition of sanctions, like first a warning, then possibly a fine, before there is question of the ultimate sanction: revocation of a licence. This escalating nature of sanctions is unclear in several places in the Law and also the respective role of the regulator and the role of courts are not clear.

The draft Law introduces a very long and detailed list of ownership restrictions, to avoid concentrations. The list appears to be overly detailed and include too many possible constellations.

Rules on the work and composition of the regulatory agency are in general in accordance with international and European principles. As concerns the appointment of Council Members there appears to be very weak representation of civil society. If the authorised nominators ensure that a wide variety of candidates are considered, the proposed system may still be suitable, but as there is a risk of an Agency that is too close to the governing structures, an obligatory stronger representation of civil society should be introduced. The term of office of nine years is long. It is better to have a shorter period (maybe four or five years) with possibility of prolongation once. The same is true for the period of the Director (eight years).

The main objections to the draft Law concern printed and electronic publications and the requirements made on them for registration. These provisions should be deleted completely as there is no need for registration of such publications in addition to what follows from other laws (for tax and business purposes) and any registration requirements may have a chilling effect on freedom of the media. The provisions on audiovisual media services (linear and non-linear) are in most part in line with international standards, as they incorporate the AVMSD. If the content of the provisions is mainly non-objectionable, the style suffers also here from excessive detail that would be better left to other forms of acts. The obligations on percentage of national music and programmes appear to be excessive. In the absence of a converged regulator (which is a choice and not an obligation) it is important that the coordination with the agency for electronic communication is handled smoothly and without excessive burdens for the applicant.

Provisions on retransmission through public electronic networks are mainly uncontroversial. As for the provisions on the public broadcasting service, these are generally in line with best European practice including the long list of obligations, although it is indeed very long and extremely comprehensive as is the list of standards and principles for the broadcaster. Most provisions on the public broadcaster follow best European practice, including the different organs of the broadcaster and how the Council is to be appointed but there is a lack of a guaranteed civil society involvement in the appointment process. The period of five years with one possible re-appointment is suitable.

As for the broadcasting fee it is not to be recommended that this fee also pays for the Agency and there should be some possibilities for exceptions from the fee, even if people have no receiving equipment and against a special application. The amount of the fee is not clear and in any case, a formula rather than a set fee should be stipulated so as to allow for changes for inflation without having to amend the law.

The section on programme and expert monitoring risks having a chilling effect on broadcasters. Monitoring must be clearly to ensure that licence criteria and programme standards are adhered to and must not be or be seen to possibly be an additional control of broadcasting content. In addition, many regulators move toward more of complaints-based

enforcement rather than monitoring. This has the double positive effect of allowing actions to be in line with what the public is concerned about and being more effective as it uses less resources. The monitoring set out here appears excessive both in how and when (how often) it is performed and how it is explained in the Law (with a lot of detail).

Introduction

This analysis concerns the draft Law on Media and Audiovisual Media Services of the former Yugoslav Republic of Macedonia, in an undated English translation version but known to be from April 2013. Details of terminology are not commented upon, as the analysis is made of a translated text. The analysis follows the order of the draft Law. The draft Law (hereinafter referred to as “the Law”) replaces the Broadcasting Law in the country.

This analysis is made based on the text of the Law only, without comparison with other laws. The suggestions made are based on international standards and best international and European practice. The comments include both issues that are potentially against best practices for a free media and comments that are rather suggestions of style and proposals for general improvement.

This analysis does not deal with the process of drafting the Law, although as a general comment it can be stated that maximum transparency and a participatory process with real possibilities for interested parties to contribute to the legislative process is very valuable in any rule of law state. It is hoped that also this Law can benefit from such an inclusive process.

International standards on Freedom of the Media

The basis for this analysis is the commitment of the OSCE to freedom of expression as protected by international instruments like the Universal Declaration of Human Rights to which OSCE Participating States have declared their adherence.¹ Article 19 of the Universal Declaration says:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”²

This right is further specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights.

The right is also expressed in Article 10 of the European Declaration on Human Rights:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

¹For example in the Helsinki Final Act (1975), Part VII. The commitment to freedom of expression has been reiterated by participating States for example in the Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension (1990) and later statements.

²Resolution 217A (III) of the General Assembly of the United Nations, adopted on 10 December 1948. A/64, page 39-42. See the full official text in English at: <http://www.un.org/Overview/rights.html>.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”³

The former Yugoslav Republic of Macedonia is a party to the instruments mentioned here and bound by these provisions, something reinforced by its role as a participating State of the OSCE.

In addition to these international instruments, the 1999 OSCE Charter for European Security stresses the role of free and independent media as an essential component of any democratic, free and open society.⁴ The Mandate of the OSCE Representative on Freedom of the Media includes:

“Based on OSCE principles and commitments, the OSCE Representative on Freedom of the Media will observe relevant media developments in all participating States and will, on this basis, advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media. In this respect he or she will assume an early-warning function. He or she will address serious problems caused by, inter alia, obstruction of media activities and unfavourable working conditions for journalists.”⁵

For the draft law analysed here, international standards related to public broadcasting⁶ and to regulatory agencies for media⁷ are relevant. The Council of Europe has issued a number of recommendations of relevance and although these are not legally binding, they do provide important guidance on how freedom of expression shall be guaranteed in reality. This includes the importance of an impartial public broadcaster and an independent regulatory agency – both with the necessary conditions for their work provided by the state.

General comments and first part of the Law

Against the background of the international instruments and standards mentioned, each country decides based on its own traditions what legislative style it uses. There are no unified

³Convention for the Protection of Human Rights and Fundamental Freedoms , Rome 4.XI.1950. www.echr.coe.int/NR/...DC13.../Convention_ENG.pdf

⁴ See point 26 of the Charter for European Security, adopted at the Istanbul Summit of the OSCE, 1999. http://www.osce.org/documents/mcs/1999/11/17497_en.pdf

⁵ Mandate of the OSCE Representative on Freedom of the Media, 1997, see Point 2. <http://www.osce.org/pc/40131>

⁶Recommendation Rec(2007)3 of the Committee of Ministers of the Council of Europe to member states on the remit of public service media in the information society; Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting (which apart from its specific subject matter, which is not of relevance to the discussion here, re- emphasizes the important role of public broadcasting).

⁷ Council of Europe Recommendation Rec(2000)23 to member states on the independence and functions of regulatory authorities for the broadcasting sector; Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe and Declaration of the Committee of Ministers (26 March 2008) on the independence and functions of regulatory authorities for the broadcasting sector.

standards for this, but there are best international and European practices on legislative drafting. The draft Law is very long. The reason for this is that it contains many different types of media, including some that should not be regulated in this way (as explained below) but also that it contains a lot of detail – some of which could with benefit instead be in secondary legal acts that are more flexible.

The Law stipulates (Article 1) that it regulates the rights, obligations and responsibilities of media publishers, providers of audiovisual services and providers of programme packages. With this, the draft Law utilises terminology that is close to what the European Union (EU) uses in its new rules, like the Audiovisual Media Services Directive (AVMSD), Directive 2010/13/EU. However, as is shown by the Law, the definition of media publisher is extremely wide and includes also categories that should not be regulated in the same or similar manner as providers of audiovisual services or programme packages.

Article 2 on the purpose of the Law is in general in line with best international practice, among other things also emphasising freedom of expression. The article also includes many other good aims, like plurality, competition, protection of users, introduction of new technologies, and so on. This is positive and provides a provision to point to in interpretation of the Law – thus showing that in a question of interpretation, the solution most beneficial to freedom of expression should be chosen so as to be in line with the stated purpose of the Law. At the same time, only such interpretative tools may not be enough to avoid some of the potentially restrictive elements of the Law. The listed purposes include a transparent, independent, efficient and accountable regulatory body, which is positive, but as it stipulates this body, shall be “in the media domain” there is a danger of a too wide area of application of such a body. This fear is confirmed by the detailed rules on the regulatory body.

Article 3 contains definitions. In general, it is a good idea to use definitions from international instruments (like EU or International Telecommunications Union, ITU, acts) as this means that in a globalised world the same notions are used in different countries. In the draft Law this is the case to some extent, but at the same time the definitions in some respects are too wide, which means that the Law may encompass more than what should be the case for a modern media law in a country respecting freedom of expression. The main example of this is the definition of electronic publications. These are included in the definition of media, although some types of web-sites are explicitly excluded. These definitions are not easy to read as the excluded types of sites are rather generally defined and there is a risk that too many different web-sites may be included and thus regulated, which should not be the case. There is also a separate definition of electronic publications, also with many excluded types of sites and still more exclusion provisions in the context of audiovisual media services. Generally such detailed lists of exclusions are not good as they open up for many definitional and interpretative problems. It is better to *include* what is necessary in the law in a narrower fashion. From these definitions the main impression is that so many things are excluded, it is hard to see what remains included. However, the main problem is caused not by poorly drafted

definitions but by the fact that the law includes too many different things, which makes it hard to manage and which imposes a regime suitable for one type of media (audiovisual) on other types (print and electronic).

It is also not clear why journalists and editors-in-chief need to be defined in the law, what practical significance this has. It may indeed have a negative effect by excluding persons involved in media from legal protection, given that in modern media many different persons are involved in creating media content and there is no need to limit this.

If the Law was focused on audiovisual media services, the definitions of the AVMSD could be used to a large extent, which is done also now to some extent. The definitions could in many places be shorter. For example, the examples provided of what is an audiovisual programme and what is television broadcasting appear unnecessary or at least would fit better in a text with another status than law, like an explanatory memorandum or a regulation by the regulator. The reason for this is that on the one hand, any enumerations in a law – even if only exemplifying and non-exhaustive – risk creating interpretation issues, as there will be attempts to identify and use loopholes. The other reason is that acts of a different dignity can more easily be changed and can allow themselves a more descriptive and less strict language.

If many definitions are too long, the one on European Audiovisual works is too short in that it talks about “Member States” without saying Members of what. The definition is taken directly from the AVMSD, but in the Directive as opposed to in this Law it is clear what Member States are in question.

The final comment to the definitions in Article 3 is that at least 80% of the territory for national coverage is rather low, but this should not have much importance in practice as long as it is just a definition and does not affect for example coverage in digitalisation plans or similar planning.

General and Common Principles of Media Publishers

Section I of the Law covers general and common principles of media publishers, including broadcasters, print media and electronic publications. Such a wide coverage is problematic as different considerations apply and thus the rules should be different for the various forms of media. The reference to freedom of expression is good, but the limitation in paragraph 3 of Article 4 is potentially too wide. Protection against unrest or the protection of morals, are just two examples of issues that can be interpreted so as to restrict freedom of expression too much. At least the safeguard that restrictions must be necessary in a democratic society should be added. What is very worrying is paragraph 10 of Article 4, which includes a prohibition of censorship but qualifies this prohibition by reference to paragraph 3. This shows a mistaken understanding of what restrictions of freedom of expression are: they should not be seen as censorship - censorship should be banned without qualification - as legitimate restrictions still do not give the right to exercise the process known as censorship like pre-control of publications, need to ask permission for certain content beforehand and so on.

As for paragraph 4 of Article 4 this could be deleted completely, as the matters it lists are presumably illegal under other legislation (much of it also under international law) and it thus follows that it is illegal to do such acts through media. It is not necessary to list this specifically; as such express prohibition can also potentially be abused to restrict freedom of expression. Also, the essential elements of the paragraph can be subsumed under the third paragraph, which already shows that freedom of expression is not absolute.

Paragraph 5 of Article 4 appears to have worthy aim of protecting minors, but the prohibition is very wide. There may be situations in which some of the information listed as prohibited is in the public interest. This kind of rule fits better in secondary legislation as a guideline with a possibility of exceptions in the public interest. As for paragraph 6 of Article 4, this provision may fit better in other legislation but it can also be here. Paragraph 7 appears to state the obvious as it states that something illegal shall be illegal (it is not allowed to act unlawfully). Also the statement in paragraph 9 on the competent court taking decisions appears obvious, but for this paragraph there may still be a point, as it stipulates jurisdiction for courts so that there can be no question of this.

Principles for media publishers in Article 5 are generally in line with international practice, although there is always a risk involved with terms such as “moral values” as this unfortunately in many countries is abused as a way to impose certain values on media and stifle different opinions. Such concepts fit better in codes of conduct and similar instruments, where it is possible to have a more analytical and interpretative text. Values of non-discrimination and tolerance are expressed, which is positive. Privacy and dignity is mentioned twice, in the first (potentially ambiguous) and the fourth (more clear) point. Promotion of international understanding and cooperation as well as fairness is another potentially ambiguous point, although as an ambition of values to adhere to it may remain.

Article 6 on obligation to publish or broadcast certain information is in line with international standards, including that there are criteria to avoid it being abused by asking for too much information to be broadcast, of for example a political nature. However, the need for paragraph 3 of the Article is unclear.

As for Article 7 on access to information, this provision should not be needed in the Media Law. Best European and international practice is that there is access to information legislation that decides on access to information for all – media and others. Although there may be practical differences in access for media as compared to the general public (press cards giving access to restricted places or events, etc.) the principle of access applies to all. There should thus not be any need to repeat such information here. The Article refers to the Law for free access to the information of public nature. If thus such a law exists, there is no need to refer to it here. Unnecessary references to other laws not only make the Law longer and more complex to read, but also create a risk of discrepancies and interpretation issues, if the different laws use slightly different formulations.

As for Article 8, the requirement to have an Editor-in-Chief is a reasonable obligation, as the structure of responsibility may be construed around this. But the Law should not need to

give detail on the process (paragraph 2). It is enough for this to be determined in the acts adopted according to Article 10 and which this Article refers to, the Law does not need this detail. Article 10 on what acts shall be adopted also contains somewhat too much detail – especially paragraph 4 on the need to make contracts looks like micromanagement by Law. Even more worrying is paragraph 6 on ethical principles from self-regulatory acts. It is very good to have such principles and self-regulation of media is very positive and in line with best European and international practice. But if these principles and the system are made obligatory by law, it loses its character of self-regulation. In this Law, the status of self-regulation is not clear. The point of such a system is indeed that it is a system created by the media sector participants themselves and is something else than the legal, binding system.

Article 11 on the right of a journalist to express his or her position is also worrying, as this should be self-evident. By having it in the Law, the Law appears to have as its starting point that things that are *allowed* need to be stipulated, which is not the principle of a democratic rule of law state, where everything that is not prohibited *is* allowed and there is no need to list this. What makes Article 11 even more worrying is that the right to express opinions is “in accordance with the provisions stipulated in this Law”, indicating that journalists are in fact NOT free to express opinions in any case. Paragraph 2 may be a well-meaning attempt to protect journalists, but it instead again looks like micromanagement by law and in addition may be difficult to uphold in practice, as there may be instances where it is legitimate to terminate a contract because of the opinions of someone. A journalist that expresses violent opinions on people of a certain ethnicity while working on a publication for such an ethnicity is just one example that comes to mind; a rabid atheist at a religious programme is another. The best thing is to delete Article 11 totally. Article 12 should also be deleted. Again, there may well have been good intent, but the Article does two things, none of which are good. First, it deprives the self-regulatory system of its self-regulatory nature by incorporating it in law and secondly, it interferes with labour relations, even if it states that it does not do so.

Also Article 13 would best be deleted, as these matters should be sufficiently regulated by copyright legislation and by here making similar but slightly different provisions, there is a serious risk of confusion.

Article 14 on protection of sources is good. This analysis has not included looking at exceptions in the criminal law. This way of structuring the protection, with exceptions in criminal law, is in line with best international and European practice and it is hoped that the exceptions are not too wide.

Article 15 deals with the co-regulation and self-regulation. It is very good to have such systems, but as mentioned already above, there is a risk of depriving a self-regulatory system of its self-regulatory character if it is made obligatory. The different kinds of systems (self-regulatory and official) fulfil different functions and should operate separately although in cooperation. But such cooperation should not be prescribed in detail in the Law. Especially paragraph 3 of Article 15 looks like it departs from the self-regulatory role.

Article 16 on the impressum is in line with international principles, but a practical way to do this (especially for broadcast media) so as not to overburden the publication needs to be found. There is presumably already practice and the regulator as well as media will use its common sense when doing it.

Article 17 on the public's right to information (paragraph 1) is difficult to understand: why is there a need to stipulate such special right of access to information beyond what follows from various obligations of media publishers to give certain information as well as general access to information provisions? The rest of the Article on obligations to provide data is in line with international practice although availability on-line of the data may be enough, without the obligation to have it in print publications or on broadcasts. The only additional point in Article 17 to comment on is in paragraph 7. If the media publisher has an obligation according to the Law, such obligation applies also without a reminder, but even after a reminder, it is a much too harsh sanction to revoke the licence. There should be a gradual imposition of sanctions, like first a warning if the legal deadline is not met (instead of a reminder), then possibly a fine combined with a new deadline – a process which can even be repeated twice with escalating fines, before there is question of the ultimate sanction: the revocation.

Article 18 on the prohibition of a secret co-owner is not well formulated. A general requirement of transparency of ownership is better. Under Article 18 it is possible to infer that the main owner is allowed to be secret. This is not the intention, but provisions with such dual meaning are not good. In general, although the limitations on ownership as such are good, the articles on this are very long and complicated to read. Article 21 and 23 appear to partly state the same thing. The content of the various bans is generally good although maybe even a bit restrictive for a small country (as so many categories are included in the banned groups) but a problem is the opaque nature of the provision. It is better to try to briefly list illegal combinations of ownership and keep these to a minimum. In Article 24 – nor elsewhere - it is not said what the consequence of finding illegal concentrations may be. Article 25 requires information of any ownership changes: this is OK, but it also possible to exclude very small changes. Some of the procedural detail in Article 25 would be better suited for regulations (secondary legal acts) passed by the regulator itself. This is one example of how the Law is overburdened with detail. The same is true to some extent of Article 26 and 27 although the most important comment here is that again revocation appears to be possible too easily (Article 26 paragraph 4 and Article 27 paragraph 4). There should always be an escalation of sanctions. Article 28 is an example of something that is not necessary to state, if there is no reason the competition rules should not apply, there is also no reason to say that they do apply. At the same time, given that the media sector is often treated in a special manner, this is an Article that although superfluous from the purely legal angle, may still be of an important informative value.

Article 29 on right of reply is good, but its placement in this chapter a bit surprising. The indemnity according to law mentioned in the Article is confusing. There should normally not automatically be any right to indemnity, but as the Article refers to laws, there are presumably some rules in for example defamation law and this just is a reference to that. For

freedom of expression it is important that it is not too easy to get monetary compensation from media outlets, as in many instances the right of reply may be sufficient and it is unfortunate if defamation cases are frequent. This Law does not amend the defamation law, but by making reference to it in the context of right of reply it gives the wrong impression that the two should go together, when in practice right of reply should normally be enough.

Agency for Media and Audiovisual Media Services

In Section II on the competent authority a new Agency for Media and Audiovisual Media Services is set up. As this replaces an existing body, it is important to have adequate transitory provisions. These appear to be a bit inadequate in this Law (see below) although the formal transition is handled. The statements on independence of the Agency (in Article 30 and 31) are good. Other rules of a formal nature are in places old-fashioned, like the requirement of a stamp (Article 30 paragraph 6). There should instead be consideration of how to introduce more modern forms of dealing with authorities, like e-governance.

The Agency competences in Article 32 are adequate as long as the role in relation to self-regulation is really just to encourage. The meaning of ensuring access to operations of media publishers is a bit unclear as said above and the role of the regulator in relation to access to diverse and independent information is a bit difficult to see. However, if it means to make standards and ensure that the media outlets uphold them, this is fine.

Accountability rules, rules on adopting rules of procedure and so on are all in line with international and European standards. It is also good that the Agency ensures that there is transparency in its operations (Article 35 and 36) – on this, in addition to meetings, there should be an on-going possibility to engage via the web-site. Some flexibility on what opinions to publish on the web-site should be given, as there is always a risk of nonsensical information being sent. The composition of the Council and its working rules are good. The compensation they are paid should be reasonable in relation to how much work they are expected to undertake. As this varies between countries, it is not possible to comment on one standard type and size of remuneration, but the remuneration proposed here appears rather high.

As concerns the appointment of Council Members (Article 40), there appears to be very weak representation of civil society. If the authorised nominators ensure that a wide variety of candidates are considered, the proposed system may still be suitable. It may be noted that there is no one system used for this in different countries, but many different methods that however should try to get as much involvement and as broad an engagement as possible. As there is a risk of an Agency that is too close to the governing structures, an obligatory stronger representation of civil society should be introduced. The term of office of nine years (Article 41) is long. It is better to have a shorter period (maybe four or five years) with possibility of prolongation once. This allows for more flexibility. One problem in the appointment process is that there is no staggered appointment, which would mean that all members are appointed and leave their post at the same time, which is not good at all for continuity of expertise and for uninterrupted working of the Council. The appointment

requirements in Article 42 and termination in Article 43 are in line with international standards. Also the competencies in Article 44 are good, but it may be a good idea to add an open-ended point like “Any other tasks necessary to fulfil its role under this Law” or similar, so that the Council to some extent can determine its own agenda.

The provisions on the Director are also without major problems, although the statement that he or she is to be employed as a professional is not so clear (paragraph 4 or Article 45) and the term of office of eight years (Article 46 paragraph 3) is too long. For the same reasons as mentioned above in relation to the Council, a shorter period with a limited possibility of re-appointment is more flexible and allows evaluating the work more frequently. Other rules concerning the Director are good although it is important that the oversight of the Council works properly so as not to concentrate too much power in one person. The same is the case for staff (even if the rules on the monitoring expert service are a bit overly complex), where it is positive that they are not civil servants (Article 48 paragraph 2) as this makes it possible for the Agency to have more room for decisions on staff competences and how to attract the right staff.

Article 49 on measures in case of violation is more problematic, as it is not clear on the important principle that any sanctions should go from the less intrusive to the more serious one and that it appears as if the Agency most often has no possibility to decide by itself but matters must go to court. It is very good to be transparent on decisions but it must still be borne in mind that there may be some elements that legitimately can be kept secret.

Publisher of print media and electronic publications

In Section III on the Publisher of print media and electronic publications some of the most serious objections to this Law are found. This starts with the very idea that print publications need to be listed (Article 52). There is no reason to restrict the number of printed publications and thus there is also no need to have any registration or similar procedure for them. Such matters that legitimately require a form of registration (like tax and normal business matters) will be regulated in general legislation. Reasons to intervene against printed publications (like defamation, child pornography, incitement to violence) are regulated in other laws like criminal law. This leaves no reason to ask printed publications for special registration, as even a “light” such requirement may act to some extent to hinder publications and hence reduce plurality and freedom of expression. The requirement in Article 52 is in addition not particularly “light” but includes quite a large number of required information. Even just a formality can be restrictive and this has a negative effect on free media. Article 52 should be deleted in its entirety.

As for electronic publications, the problem here is the difficulty to define these in a satisfactory manner, as explained above. Generally it is best to not have any registration requirement for such publications, as such requirement risks to be too restrictive by including all kinds of web-sites. Even if there are exceptions, as explained, the end result still risks including too many kinds of web-sites and thus would act as a restrictive measure for the freedom of internet. Article 54 is consequently also best deleted. There are certain matters that may be in legitimate need of regulation related to ICT (like internet), but these are better handled in different legislation as this should not have anything to do with content

and thus does not resemble media regulation. (This includes matters of responsibility and the role of internet service providers, access issues and similar).

Audiovisual media services

Section IV on audiovisual media services is more in line with international standards as audiovisual media is regulated in all countries – because of its use of frequencies or other limited transmission facilities (digital multiplexes) as well as for traditional reasons of its perceived great importance for society. The provisions in the Law appear to follow the AVMSD and the Trans-Frontier Television Convention. Again, like said before, it is necessary to make clear what the expression “member state” means (member of what?) when formulations of the Directive are used as here, in a national Law. In this Section, there are not many issues to comment on, as international documents are used as a basis and thus provide the international standards. A small comment on the record-keeping requirement in Article 59 is that although thirty days is good for the regulator, providers of the audiovisual media service may find it long. On the other hand, modern technology makes keeping records cheaper and easier, so it should not be a problem. Article 60 should be covered by copyright legislation, but a reminder here may be in order. Restrictions on commercial communications are quite far-reaching but in line with standards employed by many countries. The adoption of codes of conduct should be a choice of providers of media services (see paragraph 21 of Article 64). In paragraph 22 there is a typing error, the paragraph it refers to should be 21.

In Article 66 on product placement, the exceptions in paragraph 2 and 3 are so wide that not much is left of the ban, but this is in line with what is used in many countries so it cannot be said to be against any international standards.

The registration of non-linear media services in Section IV.2 appears to be adequate in that it is not too restrictive or burdensome and it is important that it is also implemented in this “light” manner. As concerns promotion of European works (Article 71) to be stipulated by the Agency, it is important to see this as a process so that it does not become too expensive to fulfil in the short term.

For linear media services, the rules also appear to be in line with international standards and the Agency will make more specific rules, which is also in line with best international and European practice. A practical, legislative concern is in paragraph 5 of Article 72 if this Law can give obligations to the Agency for Electronic Communication, set up by another law. In the first paragraph of Article 75 is an example of a superfluous provision, as it should be evident from general legislation that a commercial company can undergo liquidation in accordance with law. Article 76 is a long and complex Article, of which some of the content might be instead in other forms of legal acts, although the substance is acceptable (although not all deadlines for action by the Agency are clear, see paragraph 8).

In Section IV.3.2 on licensing also international standards are used to the main extent. The use of the word ratings in Article 77 is not clear to this reviewer. Generally the provisions

introduce digital broadcasting in a good manner that appears to meet with the rules and concerns for this new technology. As for some of the detail (especially in Articles 78-80 but also Article 82 and Article 85) it may again have been possible to have this in another form of legal instrument than the Law itself. As an example, it is quite possible to let the Agency design a form (see Article 82) that meets certain requirements in Law, without having to set out in Law what this form should exactly look like. In addition, as to the substantive requirements in Article 82, they appear to be onerous with a lot of obligations for notarised documents and similar. As mentioned above, national legislation should instead look at how to enable more modern forms of governance such as e-governance.

In Article 84 on awarding the licence, the availability of appeal is very important and in line with the European Convention on Human Rights (Article 6) but such appeal could first go to the Agency, at least for its review before it is submitted to the court. If the Agency contains a body that is independent from the decision-making body that took the initial decision, there can even be a first substantive review within the framework of the Agency, but if that is not the case, in any event the Agency should have the possibility of looking at the matter before it goes to court. Another reflection is that the Law is so detailed that very little actually appears to be left to the discretion of the Agency.

In Article 86 the important matter of the need for a licence from the Agency for Electronic Communication is mentioned (paragraph 3). In countries that do not have converged regulators (and the choice whether to have this or not is up to each country, without any international rules), it is essential that the absence of such a joint body does not mean any additional bureaucracy or procedures for the applicant, but the different agencies must sort out any issues without the applicant being burdened or any risk of conflicting decisions. Such coordination needs to be worked out between the agencies.

The dispute resolution procedure of paragraphs 6 and 7 of Article 86 is good and in line with the kind of role that regulators especially in the Information and Communication Technology area have according to best international practice. However, the issue of coordination between different laws and giving tasks in one law that relate to another needs to be considered so no gaps or unclarity occur. In Article 89 there is an absolute prohibition on transfer of a licence. It is also possible to permit this with prior approval of the Agency. In Article 90, the licence fee is stipulated – the formula is very complex and an example of something that may better be in a different form of legal act. As to the size, this will not be commented upon in detail here, but it is important that in the context of the national economy it is realistic and not excessive (especially as there is also another fee, for frequency use, Article 91). Revocation rules (Article 93) appear satisfactory, but the judicial protection stated in Article 94 lacks all detail. In a Law which normally is much too detailed, here some additional indication of the procedure or a reference to another law would be needed. As for cessation, in paragraph 2 of Article 95, it is not clear why the Law must stipulate what the Council shall NOT do.

Section IV.3.3 deals with programme principles, rights and obligations, including such important matters as events of great significance. In general the rules are in line with international standards. Section IV.3.4 on programme standards equally incorporates

international standards and best practices, although exact duration of minimum broadcast and similar is for each country to decide within reasonable limits. As for European works and works of independent producers (Article 100) the requirement should be met gradually in a realistic manner, so as not to be too expensive for broadcasters. This can be set out in detailed in the mentioned rules to be drafted by the Agency. The obligations in Article 101 on national music and programmes appear to be excessive however. Even if there is a transitional period, it may be hard to reach these aims in a realistic fashion and it is also questionable if such high percentages are needed for the legitimate aim of protection of local culture and language. The vagueness of the concept of specialised formats (paragraph 3 of Article 101) may lead to interpretative problems, especially as broadcasters may look to try to avoid the burdensome requirements. Paragraph 4-6 of Article 101 are even more unclear, as it is not clear if the percentage is of music broadcasts or – as it reads now – of the entire broadcasting time. In this latter case it is a very much excessive obligation, as it infringes on editorial freedom to ask for such high percentage of a certain type of programming. There can be more rules on programme content for the public service broadcaster, but even for this broadcaster, the main programming decisions should be made by the body itself. In general, Article 101 could be much shorter with detailed rules (that need to be clearer) in other legal instruments.

For Article 103, second paragraph, it is surprising why just one sport is singled out for this restriction.

Article 105 only refers to other laws. This should not be needed, unless it is needed as a reminder, but excessive referencing to other laws not only makes this Law very long but it may also lead to interpretation issues.

Section IV.3.5 on advertising, teleshopping and sponsorship includes provisions from international instruments including AVMSD. The placement of such rules in totally different parts of the Law is confusing. Article 111 again refers to other laws so it is a question if this is necessary to repeat.

Retransmission through public electronic communications networks

Section V deals with retransmission of programme services through public electronic communications networks. The rules are adequate although again very detailed for a law. The monitoring fee (Article 116) may be difficult to administer in practice.

Public broadcasting service

Section VI deals with the Public Broadcasting Service and restates the provisions on the country's Radio Television. It is important to have clear transitory provisions to make the transition from the existing broadcaster and any change in rules smooth. This analysis does not include any analysis of the previous law to identify possible changes. The rules are in line with international standards. The programmes produced for neighbouring countries and Europe (Article 121, paragraph 3 and 4) raises the question how these will be distributed, but it can be presumed this will be agreed with countries concerned. The last paragraph of Article 122 on new technologies brings to mind again the statement that what is not

prohibited is allowed and thus does not need to be set out in Law, but presumably the statement is to be seen as an encouragement to use new technologies and as such it is positive.

Article 123 is complicated, but the end result is probably acceptable, although more decision-making rights to the broadcaster itself over its financing of various matters would presumably not pose any risk. The long list of obligations in Article 124 is in line with international and European standards, although it is indeed very long and extremely comprehensive as is the list of standards and principles in Article 125. Most provisions on the public broadcaster follow best European practice, including the different organs of the broadcaster and how the Council is to be appointed. Article 131 provides for a mixture of authorised nominators to include cultural and educational institutions, including for minorities. However, as there is no guarantee of civil society involvement, this should be made stronger (as the character of the bodies could be too state dominated). The period of five years with one possible re-appointment (Article 132, paragraph 2) is suitable. A staggered appointment process to avoid that all members change at once would be needed, but it is possible this is achieved through the transition from the existing body. In Article 136 (paragraph 1) it is said that the sessions of the Council shall be public, which is good, but it may be good to have some possibility for closed sessions (parts of sessions) as well, in special circumstances. This may be necessary if for example in connection with election and dismissal of persons, it is required to discuss sensitive matters.

The broadcasting fee

Section VII deals with the broadcasting fee. It is not in line with international standards that this fee also pays for the Agency (Article 149 paragraph 3). The Agency should rather be paid for by the broadcasters fees than that of the public, as the latter is rather intended to pay for programming, the possibility to be informed and so on. This is the motivation for making such a fee obligatory: that it is part of the cultural and educational duties of the state that everyone can be asked to pay for. More indirectly, also the regulator could fit in this picture, but it is still to be preferred that the regulator is seen as an organ that works with the (commercial) sector participants, for their benefit, and thus is financed by them.

Article 150 on collection of the fee does not give any possibilities for exceptions, even if people have no receiving equipment and not even against a special application to be relieved of the fee. The amount of the fee in Article 153 is not clear (190 what?) and in any case, a formula rather than a set fee should be stipulated so as to allow for changes for inflation without having to amend the law – especially as the same Article in fact provides for a procedure of amendment.

Monitoring

Section IX concerns performing programme and expert monitoring. Monitoring is a normal part of regulatory activities, but it is not so common to have this as a separate unit and separate section of the Law. Rather it is one of the roles of the regulator, one among many. Monitoring must be clearly to ensure that licence criteria and programme standards are adhered to and must not be or be seen to possibly be an additional control of broadcasting content. In addition, many regulators move toward more of complaints-based enforcement

rather than monitoring. This has the double positive effect of allowing actions to be in line with what the public is concerned about and being more effective as it uses less resources. The monitoring set out here appears excessive both in how and when (how often) it is performed and how it is explained in the Law (with a lot of detail). Such detailed rules and provisions on what the broadcasters must provide monitors with (Article 159) may have a chilling effect on the media landscape and it also does not appear to fulfil any important function that is essential for the free media landscape.

Penalty provisions

Penalty provisions are in Section XI. These penalties should be realistic and not excessive in the national context with some flexibility and room for discretion in how large penalties to impose. This analysis does not include an assessment and control of whether all relevant provisions are listed.

Transitional and final provisions

On the transitional and final provisions in Section XII, the first one (Article 164) sets out what happens when the country joins the EU but it is not clear what applies before then in this particular respect (jurisdiction) as the Articles 58 and 164 read together do not show this clearly. The transitory provisions for the organs to be set up (Agency and public service broadcaster Council) are quite comprehensive but it is clear that there will not be a staggered appointment process, which should be introduced, and it is not clear whether existing members of the bodies can be elected to new ones. The time-table for digitalisation (Article 168) may need to be adjusted or divorced from the rest of the Law, in order to be realistic.