



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

LEGAL ANALYSIS OF PROPOSED AMENDMENTS TO THE AUDIOVISUAL CODE OF THE REPUBLIC OF MOLDOVA

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1. Summary

A number of different amendments are proposed (dated in April and May 2015) to the Moldovan Audiovisual Code (260-XVI from 2006). This expert on the request of the OSCE Representative on Freedom of the Media in April 2015 commented on previous draft amendments, in particular stressing the danger with regulating content of broadcasting in a manner that can interfere with editorial freedom as well as threaten freedom of expression. It is positive that the current proposed amendments do not contain such ambiguous and potentially limiting Articles and it is presumed that this means that the previous proposals are no longer up for consideration by the Parliament. Even in situations where propaganda from other states is a serious issue, it is difficult and often counter-productive to try to limit this by restrictive legislation. In the current draft amendments there are still a few unclear provisions on domestic content or content from designated states only (EU Members, Members of the European Convention on Transfrontier Television and the USA) that can have a limiting effect. The proposals are less problematic as they are more proportional, even if the unclarity of some of them is an issue.

The limiting of broadcasters which fall under the jurisdiction of the Republic of Moldova may have negative consequences as it may limit what action Moldovan authorities can take. Following international definitions on such issues is preferable.

The draft amendments strengthen the position of domestic content and protection of the official language. Such rules are used in many European states and provided they are proportional this is an accepted restriction for media.

The draft amendments also contain various issues that do not directly interfere with freedom of expression, such as a different way to stipulate sanctions, adjustments of provisions on the regulator and other relatively minor clarifications. In general, these new amendments mean that many concerns brought up in the April 2015 report are no longer valid, provided the previous draft amendments are now no longer proposed.

This report should preferably be read together with the April 2015 report as details set out in that report are not repeated fully here.

2. Recommendations

- Restrictions on freedom of expression and freedom of the media should be avoided as much as possible. There should not be any attempts to ban propaganda through legislation, as this notion and what is related to it are difficult to define objectively.
- Although recognising the legitimate concerns of countries subject to intense propaganda from other countries, the proposed ban on informative and similar programmes from most of the world is a blunt and at the same time disproportionate tool against propaganda. There are separate slightly contradictory proposals in this respect.
- Clarifying and strengthening provisions on rebroadcasting, domestic production, use of state language and similar are legitimate tools for regulating the media sector, provided the rules are applied in a proportional manner.
- It is better to keep wider provisions on jurisdiction, following international conventions, so as not to exclude subjects from the remit of Moldovan authorities.

3. Analysis

3.1 Introduction

In April 2015 this expert carried out a legal analysis for the OSCE Representative on Freedom of the Media of proposed amendments to the Audiovisual Code and the Law on Freedom of Expression of the Republic of Moldova in particular stressing the danger with regulating content of broadcasting in a manner that can interfere with editorial freedom as well as threaten freedom of expression. In a letter dated 27 May 2015 the President of the Parliament of the Republic of Moldova requests a new opinion from the Representative, on new and changed amendments to the Audiovisual Code (260-XVI from 2006). It is positive that the current proposed amendments do not contain the ambiguous and potentially limiting Articles that were criticised in the previous report. It is presumed that this means that the previous proposals are no longer up for consideration by the Parliament. The new proposed amendments are more in line with best international and European practice and only in a few places give rise to some concern from a freedom of expression viewpoint.

Unfortunately the translation of the new amendments to the Code is different than the previous one, which was used as a basis for the report in April. As was pointed out in that report, the translation then used differed from the translation of the Code and earlier amendments. For this report it will have to be presumed that several differences between the various texts are in fact translation issues and not intended as substantive changes. In some places this is evident but sometimes it is not totally clear, which is unfortunate. For example “domestic product” is now “local production”. As the definition appears to be the same, this is presumably just a translation matter.

Another practical issue to point out is that as the latest amendments are provided in two separate draft laws made in April and May 2015 the relationship of these amendments is not totally clear. It appears from the accompanying letter that both amendments are proposed simultaneously – they refer to different provisions – but as there are some discrepancies, this is not evident. It is still possible to comment on the various proposals however and no doubt the Moldovan authorities will know how to read the proposals.

As many issues are the same as those commented upon in the report from April 2015 by this same expert, such matters are not fully repeated here but reference made to the previous report.

3.2 International standards

This report is based on the mandate of the OSCE in relation to freedom of expression as set out in international instruments to which OSCE participating States like the Republic of Moldova have declared their commitment.¹ More detail on the international commitments is found in the report of April 2015.

These provisions include Article 19 of the Universal Declaration of Human Rights, which states: *“Everyone has the right to freedom of opinion and expression; this right includes*

¹ Helsinki Final Act (1975), Part VII; reiterated e.g. in the Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension (1990) and later statements.

*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 specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights.

Moldova is also party to the European Convention on Human Rights and Fundamental Freedoms (ECHR), which in Article 10 stipulates:

“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.

*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

Additionally may be mentioned the 1999 OSCE Charter for European Security in which the role of free and independent media as an essential component of any democratic, free and open society is stressed.⁴ The Mandate of the OSCE Representative on Freedom of the Media is, based on OSCE principles and commitments, to observe relevant media developments in all participating States and on this basis advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media.⁵

3.3 The Draft Amendments

3.3.1 Definitions

The comments on the definitions (rebroadcasting as well as broadcaster) are the same as in the previous report, as is also the deletion of “own production” (which is stressed more clearly in the new version). As for domestic or local production the words used are different but as pointed out above this appears to be a translation issue. The prime time definition has been amended slightly.

To repeat the comments briefly, the changed definition of broadcaster includes that a broadcaster is someone who holds a licence from the regulatory authority, the Coordinating Council of Audiovisual. As was explained in the previous report this change is not a major issue but to mix a normative requirement to have a licence into the definition is not ideal. To

² Resolution 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>.

³ Convention 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, Point 2. <http://www.osce.org/pc/40131>

use the term “full responsibility” rather than “editorial responsibility” departs from common language internationally used. There is no issue with the change to the definition of rebroadcasting.

The definition of jurisdiction in Article 4 paragraph 1 is slightly different than that in the previous version which was commented upon. The provision differs from terminology used in international instruments. It may be noted that as the criteria for falling under jurisdiction of Moldova appear cumulative, in practice there may be entities for which jurisdiction is unclear as a broadcaster may have certain presence in more than one country – as is foreseen in the Transfrontier Television Convention. The effect may be to exclude subjects from the possibility of any action by Moldovan authorities and it is questionable if this is the desired aim. Keeping the established definition of jurisdiction from the Convention (as it is in the current version of the Audiovisual Code) would be clearer.

3.3.2 Content related provisions

The main issues with the previously suggested draft amendments were the proposed Articles 6¹ and 7¹ plus additions to Articles 6 and 7, which would have had the effect of limiting freedom of expression. These amendments and additions are no longer proposed which is a very positive development. It is presumed that the absence of these proposed Articles from the drafts now submitted for analysis means that they are no longer proposed for consideration by the Parliament.

Article 9 is proposed to be amended as in the draft commented in the previous report. It is proposed to supplement the Article with two paragraphs that ban broadcasting or rebroadcasting channels with informative, informative-analytical or political programmes or shows that emanate from states that are neither EU Member States nor Members of the European Convention on Transfrontier Television as well as a ban on broadcasting or rebroadcasting such shows plus in addition military themed shows. The ban that may be explained by political considerations appears excessive and may be ineffective. It is not a good idea to try to deal with propaganda through prohibitions. Propaganda should be countered by information, even if this is a slower and often frustrating tool. What the current proposal does is to limit a wide range of programmes from the majority of the world. It leaves the possibility for those who wish to target Moldova with propaganda to channel their broadcasting via European states and thus find loopholes in the provision. Furthermore, as set out below, a new proposed addition to Article 11 appears to contradict this Article.

Article 11 clarifies the domestic production. Some smaller changes are made to clarify, the amount of programming in the state language is reduced from 5 hours out of 6 to a minimum of 4. Given that there are linguistic minorities in Moldova and also that the rebroadcasting is reduced this is reasonable. The sentence about European production has been taken out. It is not clear why this is the case but the amendment should not be too relevant. A new paragraph 3 is proposed which aims to clarify the role of programme distributors who are not allowed to place advertisements unless they meet requirements of local production in Article 11 paragraph 2. This prevents bypassing local production (and state language) rules.

In the separate draft amendments initially proposed in April (as opposed to the main draft amendments, from May) a new paragraph 3¹ is proposed to Article 11. This new

paragraph states that “*Broadcasters and service providers shall broadcast domestically produced informative and analytical domestic programmes at a share of 100% of which 80% shall be in the Romanian language. It shall be permitted to broadcast informative programmes and political-analytical programmes made in the Member States of the European Union, the USA, as well as the states that have ratified the European Convention on Transfrontier Television*”.⁶

Such a restriction on the origin of the news and current affairs programmes negatively affects pluralism of the news. Although it does not necessarily violate any explicit international obligations of Moldova it has negative consequences. It will most significantly limit the spectrum of news from Russia, which is of interest to the Russian and Russian-speaking minority in Moldova.

Other changes to Article 11 are presumably errors or translation issues, as the text should refer to paragraph 7 of the Article and not “Article 7”. The text is the same as previously and clarifies the requirement of use of state language. Countries are entitled to protect national culture and language and this is generally seen as a proportional interference with freedom of the media as it meets other legitimate interests.

Similarly, what is called a new “article 11” is presumably a new paragraph 11 in Article 11. The new paragraph prohibits the use of symbols or logos of other television channels, including foreign ones, more than twice a day. Video and audio identification signals of other channels may not be used at all. The first part of the prohibition is not clear, as it does not say how long such symbols may be used. If they are visible for a very long time the effect of reducing the number of occasions evidently disappears. The aim of the paragraph is presumably to act as yet another tool against excessive rebroadcasting of foreign content to avoid producing new and own content. Using a logo if the content does not come from the channel in question could be an intellectual property violation so it is presumed that is not what is targeted here. If however the content is from another channel which is broadcast in accordance with the law, having its logo would not appear to be an additional problem. Regulating the amount of rebroadcasting should be a more efficient way than regulating the use of identification. In summary, there is no special objection to this paragraph but it appears irrelevant.

3.3.3 Enforcement and sanctions

The comments made previously to the amendments to Article 27 still stand. The new matters for which sanctions can be implemented would appear to be included in the provisions on violations of the Code. Adding explicit points for emphasis is not a problem but at the same time not normatively relevant. The new version of the amendment takes into account that some previously suggested new Articles are no longer part of the proposals, otherwise the amendments are the same as in the earlier version. This includes that paragraph 2 of Article 27 which stresses the gradual application of sanctions is regrettably excluded. Although the

⁶ What is meant is that they shall broadcast *domestically produced* informative and analytical programmes. The translation is somewhat difficult to understand but it has been clarified that it refers to only the origin of informative and analytical programmes and does not intend to require exclusively this category of programmes, nor stipulate the origin of all programmes.

same effect still follows from Article 38 and Article 27 read together, if new things are added to the Article just for emphasis it is not necessary to exclude other things that are also there just for emphasis – in this case, emphasis of how exceptional licence withdrawal should be.

The amendments proposed to Article 38 are in substance the same as previously suggested (with some amendments to adjust to other changes). This is a different way of expressing sanctions, with reference to concrete Articles rather than a general list as in the existing Code. This new way of drafting may provide more legal certainty but in practice probably the difference is not very big. An additional copyright violation is added, which is in line with international practice. Some other new elements are included in the proposed amendments that were also proposed earlier in 2015 but not specifically discussed in the April report. This includes that those broadcasters that are subject of sanctions must make this public, which is a positive step as this may contribute to the warning effect of sanctions. Also, the way the regulator communicates decisions is made clearer. Parts of the existing Article 38 have been declared unconstitutional in 2012. In the changed version of the proposed amendments, the matter of suspension of decisions pending appeal has been taken out. This issue is not commented upon in any detail (as it would need a thorough analysis of procedural legislation which this report does not permit) but a solution that is in line with constitutional provisions must be found. There are no clear international best practices on this, as it vary according to legal systems if suspension of decisions can be sought and how. In any event, this must be suitable to the individual case as in some instances it is necessary to be able to enforce decisions immediately whereas in other cases on the contrary, if a decision is enforced the appeal will be in practice pointless.

The previously suggested mention of the role of the regulator in relation to copyright is no longer in the draft amendments. As copyright issues are mentioned in the list of violations in Article 38, the result is not very different – intellectual property rights are among issues the regulator can deal with, indeed it is not unusual that the responsibility for intellectual property matters is not just for the broadcast regulator (which perhaps is behind this adjustment).

The changes to Article 43 on the regulator, both the initially suggested ones and the change made to these, are somewhat difficult to read because of the above mentioned use of different terminology. It appeared previously as if a clarification was made on not permitting more than two consecutive terms – which is good – and this is now no longer in the draft. However, it is presumably in the Code already albeit in unclear language (in the translation) so the minor clarifications proposed and now deleted were presumably not of any major substantive relevance.

3.3.4 Other amendments

A provision is suggested on regular measurements of audience share, through a company selected through a tender. This is positive.

A difference between the earlier proposals and the ones commented upon here is that a previous proposal to ban advertising on the public service broadcaster is no longer included. As can be seen if looking around in Europe (or the world) there is no unified practice on whether the public service broadcasters have adverts or not, but this is a decision for each

country. The only thing that can be stressed is that such a decision cannot be taken in isolation as it needs to be part of a package, considering how the public service broadcaster is to be financed, how unfair competition with private broadcasters is to be avoided and similar issues.