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

LEGAL ANALYSIS OF THE DRAFT LAWS AMENDING AND COMPLEMENTING THE MOLDOVAN AUDIOVISUAL CODE

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5 May 2014

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Executive Summary

A series of amendments to the Audiovisual Code of the Republic of Moldova no. 260-XVI, dated 27 July 2006 (or laws amending this Code such as Law 165 from 11 July 2012 and other earlier amending laws) have been presented in 2013 and 2014. In addition, a related proposal has been made for a Law complementing Article 24 from the Law on contentious administrative matters no. 793-XIV, dated 10 February 2000 (5 February 2013). These amendments cover several important areas, such as content matters (including right to reply and respect of human dignity), must carry and other retransmission of programmes, appointments to the Coordinating Council of Audiovisual, ownership concentration, audience measurement and administrative procedure.

The report is divided into categories according to the abovementioned content rather than according to the different proposals and is based on the mandate of the OSCE in relation to freedom of expression as set out in international instruments such as the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of opinion and expression, to which OSCE Participating States have declared their commitment.

Key Considerations and Recommendations

- There should not be detailed provisions in law on how to moderate debates or deal with undesirable statements in broadcasting, with moderators being legally liable, as this risks having a chilling effect on free debate in media and infringes on what should be within the editorial responsibility of media outlets. The creation of a better debate climate should be done through education, discussions and guidelines, with only a minimum of restrictions in law and only for the most serious instances, like incitement. Amendments to the Audiovisual Code that stipulate details on content related issues and liability for moderators should not be adopted.
- The right of reply is an important tool to enable a good debate with different viewpoints being heard, but the right must be applied in such a manner so as not to limit freedom of expression and not to infringe unduly on editorial responsibility. A right of reply according to international practice exists in the Audiovisual Code and it is not clear that additions are needed, at least not in the potentially limiting style that is proposed.
- Restrictions on unverified or confidential information are not well drafted as they can act as a limit on freedom of expression, contributing to the chilling effect on debate that any details on how to present information may have. Such rules should not be adopted.
- Must-carry obligations to ensure access to public service broadcasting as well as other programmes of public interest are positive as they provide more choice for the audience, but must also take into account the legitimate business interests of broadcasters.

- The regulatory authority must act within the law but must be able within its competence to act independently with suitable discretion.
- The proposal to introduce a special 3/5 majority in Parliament to approve candidates to the regulatory authority, the Coordinating Council of Audiovisual, are positive as it is important to find candidates with a wide acceptance in society.
- Proposals for stricter ownership requirements are positive as they support media pluralism. The change should be introduced in a certain period, as it changes the legitimate expectations of current media owners who must have a reasonable – albeit not too long – period to adjust before they can be sanctioned for violation of the law. Clarifications of concepts such as control and beneficiary owner are good.
- Greater transparency requirements to deal with ownership issues are a positive complement to ownership restrictions, but there must be a possibility that not all information provided to the regulator is public – with clear rules for what may be kept confidential. The current proposed amendments are not clear on whether any restrictions can be made to the transparency.

Analysis of the Draft Laws

1. Introduction

A series of amendments to the Audiovisual Code of the Republic of Moldova no. 260-XVI, dated 27 July 2006 (or laws amending this Code such as Law 165 from 11 July 2012 and other earlier amending laws) have been presented in 2013 and 2014. In addition, a related proposal has been made for a Law complementing Article 24 from the Law on contentious administrative matters no. 793-XIV, dated 10 February 2000 (5 February 2013).

The proposed amendments partially overlap. The various issues the proposals refer to are detailed below, divided into categories according to the content rather than according to the different proposals.[1] Some of the proposals are accompanied by informative notes. These show that the motivation for the amendments includes matters such as a concern for a bad debate climate in Moldova, insufficient access to some programming and a need to strengthen procedures.

Some smaller amendments of very limited substantive content (of the type to clarify used terms for example) are not discussed in the report.

[1] Not all the translations of the proposed amendments contain dates, so it is not known how they relate to one-another (replacing another proposed change or being presented as alternative proposals in parallel, etc.) but this is not essential for the comments on the content of the proposals.

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 such as the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of opinion and expression, to which OSCE participating States have declared their commitment.[2] The right is also expressed in Article 10 of the European Convention on Human Rights.[3] Moldova is a party to these instruments and bound by these provisions.

In the 1999 OSCE Charter for European Security 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]

Although each country has the right to determine the details of its media landscape and the content of its media legislation, such legislation must respect the principles included in international commitments on freedom of expression and ensure that it can be implemented in practice. International best practices have developed on how to achieve this.

3. Respect of Human Dignity, Right of Reply and Other Content Related Matters

A new Article 6^1 is proposed for Chapter II of the Audiovisual Code, for the respect of human rights, dignity, honour as well as protection of privacy and the right to one´s image. Such general respect for fundamental rights should follow from the Constitution but it is in line with international practice to specify in special legislation on different issues what it means in practice. What however needs to be carefully considered – even if the aim of such legal protection is good – is that the legal provisions setting out the protection are not so detailed that they in practice limit rather than support rights and freedoms. In a society with freedom of expression it is part of this freedom that people can decide how to express themselves, with rules and restrictions only to avoid infringement of other rights.

The second paragraph of the proposed Article 6^1 sets out that any allegations of illegal behaviour have to be supported by evidence and the persons concerned have the right to reply. It is unclear how the new proposed provision relates to existing provisions on the right to reply (Article 16 of the Audiovisual Code). The paragraph makes the moderators of the programme liable for failure to provide the right of reply. This is not good and the provisions in the existing Article 16 are more in line with best international practice.

[2] 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.
[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

The need to support allegations with facts and to provide right of reply are important elements of a good broadcasting system. The details of right of reply may fit better in secondary legislation, with the principle set out in law, as is done at some length in the existing Article 16. The situations in which such a right should be give and the way to do this can vary a lot depending on the type of programme, what allegations are made and how, etc. It is not practical to always include an immediate right of reply (for example, if a person makes an allegation in a live broadcast about a person who most likely would not be present at that moment) but the right can be exercised in a subsequent broadcast. Guidelines on how to do this so can be made by the regulator to help ensure that the reply is given due prominence but also so that spurious demands for right of reply are not used to disturb programming or for whatever less legitimate reasons. There does not appear to be any need for the legal amendments suggested now.

The responsibility for properly according right of reply should follow normal rules for who is responsible for broadcast content, which would be the responsible owner and/or editor. The existing Article on right of reply includes this. There appears to be no reason to hold a programme moderator responsible, but such responsibility – if the moderator has on purpose or by grave negligence violated rules – should be an internal matter for the broadcaster. In legal sense, it is the broadcaster as an entity that is responsible. The paragraph does mention that the responsibility is in accordance with legislation in force, which might be confusing, as such legislation would normally not be directed against the moderator. (It is possible that this reference is only to the sanctions.)

The third paragraph states that moderators must request evidence for any accusing statements or otherwise inform that there is no such evidence. Although the idea that unsubstantiated allegations shall not be made is good, it is still not suitable to have detailed provisions in a law, as these can have the effect of limiting freedom of expression for fear of acting against the rules. This would be true especially in regard to the mentioned sanction for encouraging un-proven accusations, for which both the moderator and broadcaster can be held responsible. It is not clear what such “encouragement” could be and there is a risk of wide interpretation in order to prevent debate. It is better to have guidelines on how to react to any allegations made, how to explain what investigations have been made and so on rather than to sanction this in law. Media ethics and proper behaviour of all involved in creating broadcasts are to be preferred to legal provisions that may have a chilling effect.

The rest of the proposed Article goes on to set out rules against incitement as well as against licentious language and repeats a second time the ban against unproven accusations. The latter is a repetition in substance and not needed. As for the ban on incitement, this is of a different dignity than that against licentious language and mixing the two in one paragraph is not a good idea. Although it is possible to have rules on what language to use in broadcasting, especially at times when children may be in the audience, such rules are best set out in secondary legislation or guidelines and the rules in a modern society should not be too strict. Rules and regulations should not act as a “taste police” but it is up to editors to ensure suitable programmes for different audiences. Incitement to hatred and violence is however a different matter. This is one of the legitimate reasons to limit freedom of expression and in

many countries such activities are banned by criminal law. The responsibility for such activities lies with the broadcaster and not with the moderators. Incitement is briefly mentioned in the existing law, Article 6. As said in the point above, any internal responsibility for moderators that the broadcaster wants to claim is an internal issue. For incitement under the criminal code, the moderator may also be personally responsible, but from the viewpoint of the Audiovisual Code, the responsibility is with the broadcaster as a legal entity and not with other individuals.

Proposed amendments to Article 7 deal with verification of information and the need to state clearly if sources and/or information cannot be properly verified. Information related to certain persons or to public institutions shall be broadcast only if accompanied by a statement from the person or institution – or in case of institutions, if the institution refuses to offer an opinion in which case this shall be said. These provisions are not good from the viewpoint of freedom of the media and should not be added to the law. They can have a limiting effect on public debate, especially on a critical debate regarding public persons and public institutions, which is so essential for any democratic society. Issues should be presented from different viewpoints, giving a chance to those criticised or challenged to state their point of view, with efforts made to illustrate matters objectively and truthfully. It is very good if there are guidelines as well as regulations, rules or some form of secondary legislation to set out what requirements there are on such reporting and how to achieve this. However, issues in the public interest must be debated and sometimes it may be necessary to do so without having statements from those concerned. To make this a legal obligation will have a chilling effect on the public debate and is not proportional to the aim of having a proper debate: achieving a good discussion climate is to be obtained by education on ethical issues, by giving the possibility to counter arguments with other arguments, etc., and not by prohibitions and rules in law.

Similar criticism can be made of the proposed new paragraph 4^1 to Article 7 about balance in informative programmes (analytical and debates), requiring fair representation of political parties. As a general principle, balance and fairness in political reporting can be set out. Balance is indeed already mentioned several times in the existing Article 7. In addition, for election periods there can be special rules on broadcasts to more specifically regulate equitable representation. In other periods, having detailed rules on how political matters should be presented may have a limiting effect. Even if the intention of the rules may be good, they open too many possibilities for misinterpretation that can be used to prevent political debate. Furthermore, the previously existing Article 7 (that does not appear to be abrogated by the new proposals) would seem to be sufficient. Detail on how to achieve balance should be part of the exercise of editorial responsibility and a certain leeway must be given to editors, journalists and others involved in the public debate through media.

The addition to Article 8, new paragraph 4^1 on banning public figures of a certain position from presenting news and informative programming is in line with rules that exist in several countries. It is very common that such persons are banned from advertising (as is the case also in Moldova, Article 19) but it can be extended also to certain other types of programming, as it prevents the trust held by such persons from being abused or rules on

balance in election reporting from being circumvented. The only criticism against the proposed provision is that the word "politician" is quite vague and could include a lot of people: it should be interpreted so that only people know for their political, public activities in known positions are covered.

In the informative note to the proposals on human dignity, right of reply, etc., there is an extensive reference to case law of the European Court on Human Rights. It is correctly stated in the note that freedom of expression is not an absolute freedom and one reason it can be limited is to protect other rights such as privacy. However, the same restrictions on how freedom of expression can be limited that are mentioned in the informative note and a careful reading of mentioned case law actually does not support the kind of rules proposed here, as they go beyond what is necessary and proportional.

4. Must-carry and Other Retransmission of Programmes

There are different and partially overlapping proposed amendments to Article 29 on must-carry. The provisions include that public service broadcasting as well as local informative and analytical broadcasts offered free of charge by private broadcasters shall be included in the basic packages of any distributors of programmes through telecommunications networks (or in one amendment, distributors of services). Such so-called must-carry rules are common in the broadcasting legislation of many countries and are to be welcomed, as it gives people access to more content. In the era of digitalisation, it is important to actually make use of the possibilities to provide additional content so that benefits of digitalisation can be enjoyed by people. Additional programming free of charge is a clear benefit. As far as public service broadcasting is concerned, it is not just an extra benefit to make it available but it should be a clear requirement as the idea of public service broadcasting is that it should cater to the whole population and thus it must be easily available, regardless of what package of content that people select. This requirement is already in the law, but the new item of the proposals is that instead of just stating that when possible, broadcasts of local broadcasters shall be included in any provision of programming via the telecommunications network, it is mentioned that free of charge informative and analytical programmes shall be included.[6]

Public service broadcasting should be available in any package of programmes, without extra charge[7] whereas any other additional free-of-charge programming is a valuable extra benefit for audiences that service providers should make available if possible. Any interference with the right of distributors to decide freely what to provide must be motivated and proportional,

[6] There appear to be three proposed amendments with partially the same content, regarding the free retransmission of public service broadcasting and other free programming, with one undated proposal referring specifically to content related to a certain region and broadcasters from that region being obliged to retransmit it and another short amendment which requires public service broadcasting to be included and private, local broadcasts if possible plus for certain localities an obligation to include local, free-of-charge programming for that region. One proposal also contains amendments to classification of broadcasters. It is not known if the different proposals are parallel or consecutive, but the essence and thus the comments made to them are the same regardless of this.

[7] Which does not mean that there can be *no* charge, as licence fees for public service broadcasting may exist.

like any intervention in the business activities of private partners. If the provision of extra programming is in the public interest, provides something of value for the audience and it is not overly onerous for distributors to provide it, there is nothing against such rules.

Another addition to Article 29 includes that foreign programming can be retransmitted freely in the territory of Moldova provided it does not contravene the Article in the Audiovisual Code that deals with programme standards. This changes the existing provisions on the Coordinating Council making a list of programmes for rebroadcasting, As said above, access to additional content is positive but for foreign content there may be various considerations that need to be kept in mind, including copyright rules (that are linked to a certain territory), possible differences in rules on legitimate restrictions on audiovisual content in different countries (different watershed times for example). Provided the Article referred to is sufficient to ensure that such matters are considered, providing foreign programmes is positive. It does not appear that the copyright issue is clearly dealt with in the new proposed Article or those it refers to. However, in this context in the Republic of Moldova the special situation of having traditionally had a very large proportion of foreign re-broadcast programming should be kept in mind. There is nothing wrong with providing access to foreign programmes and in the modern media environment people in any case have various possibilities to access foreign content if they are interested, speak foreign languages and so on. At the same time, it is important that there is local content, dealing with local issues of importance for the country and its regions.

The informative note to these legal amendments shows clearly that the background is political. It states: *The legislative amendment excludes the future possibility of carrying out severe attacks on the fundamental liberties, which have taken place in the Republic of Moldova at the end of 2013 – beginning of 2014, by arbitrary exclusion from the programs of main distributors of services the programs of the inconvenient broadcasters*. The stated aim is good as is as wide an availability of programming as possible. In addition to legal amendments, careful oversight by the regulator will be necessary. What however complicates the matter are the following paragraphs of the informative note, stating that the Coordinating Council has arbitrarily produced a list of excluded programmes and thus in the view of the parliamentarians proposing the amendments presumably exceeded its authority. The regulator will have to implement also the new provisions and no legal change is fool-proof against misuse, so if there really are problems with the work of the regulator, other measures may be needed. However, it is essential to determine if there was a case of the regulator abusing its role and acting outside of its mandate, as the parliament should not replace the independent regulator. This report cannot comment on what the real situation was, as that would need a different kind of analysis as this one of legal amendments. The possibility for independent regulators to act without political interference is essential, but at the same time the regulator acting within the law is equally essential. It can only be repeated that problems and different interpretations of the situation in such a politically tense situation as that of Moldova and all of Eastern Europe at the current moment need to be worked out and not dealt with just by legal changes.

The informative note mentions that activities of the Coordinating Council have been non-transparent. This report cannot comment on that, but can underline the importance of transparency. If the Coordinating Council feels it has been acting within its mandate and had both legal basis and legitimate reasons for restricting certain retransmission of broadcasts, there can be no reason not to transparently show its reasoning and decision-making process.

5. Appointments to the Coordinating Council

Another change, to Article 42, deals with appointments of members to the regulatory authority – the Coordinating Council of Audiovisual. The change is in the voting percentage needed in the Parliament, 3/5 of the total number of members of Parliament. In general, for appointment of members of bodies such as the Coordinating Council, it is important that they have the widest possible acceptance of different groups of society and that they are not seen to be political appointments, which is why a large majority is good – normally ensuring that also some opposition support is needed.

6. Ownership Concentration

The proposed addition to Article 66 deals with limitation of ownership concentration. This is a very important aspect and it is positive that the restrictions are now strengthened with a limitation to two instead of five licences in one administrative unit or zone and with sanctions for violation. The text of the Article is not quite clear (which may be a translation issue) in that it mentions that exclusiveness is excluded. This is good, but the ban on more than two licences should apply in any case, even if having more than two would still not lead to exclusiveness (in a region with many broadcasters). Presumably this is the case and the additional mention of exclusiveness is just to emphasise this (as is also done in the current law), in which case it is fine. The sanction of losing the broadcasting licences if the provision is violated is good and proportional although it may be better from a formal point of view to gather sanctions in one place in the law.

With any legal change, it is important that concerned parties have time to adjust. There should be transitory provisions to avoid that the change in ownership limitation provisions leads to entities being immediately in violation of the law and liable to sanctions before they have had a reasonable time to adjust.

An earlier amendment from June 2013 proposes the inclusion of new definitions of “control” and “beneficiary owners” in the Code (Article 2). The proposals refer to the Law on Competition and stipulates how the notion of control and that of beneficiary ownership shall be understood. It is a positive addition, as it should help deal with ownership restrictions by getting to the real situation and making paper-constructions to avoid anti-concentration rules more difficult. The provision is extensive and quite detailed and it should be possible to

include in it most manners in which indirect control of entities is exercised. The coordination with the Law on Competition is good.[8]

Article 23 of the Law is proposed to be amended and has additions, to set out more extensive transparency and publication deadlines for the regulator – all designed to establish real ownership and control. The amendments are to be welcomed, as transparency in the process can deal with many potential problems and the additional work and effort required by the regulator and the applicants is legitimate and proportional to establishing confidence in the process. Just as a small note of caution: It must be mentioned that some documents that applicants provide may be seen as business secrets that are not to be made public. It is important that the regulator has a possibility to not make everything public, as applicants are obliged to give full information to the regulator but not all this information can be public even if the main principle is one of transparency. The kind of information that can be kept secret should be based on the law on public access to information and internal guidelines to supplement any laws.

Also amendments to Articles 28, 38 and 66 contain provisions that increase the transparency requirements and make the real control of broadcasters known. There is no objection to any of these proposed changes. Time limits for publication are short (2-3 days) but the information to be published is not complicated and it is legitimate to ask for such information, including the report that shall be submitted annually by broadcasters. On the latter, it may just be emphasized that it is important that the demands that are made are not interpreted excessively: the broadcasters can be asked to submit basic information but such requests should not be so onerous as to make it hard for the broadcasters to concentrate on their core tasks. To avoid this, it is good that the Coordinating Council according to Article 66.7 shall prepare and publish models of the reports it requests.

7. Audience Measurement

The addition (new Article 19^2) to the section on advertising about at least two operators for measuring audiovisual media audiences is not objectionable as such, but it is unclear what the normative content of the Article is. The Code appears not to create the operators and indeed especially if these are private entities the law cannot create them; it also does not appear to intend to licence firms if indeed they need a licence. The proposed Article just says that at least two operators can perform the tasks but it does not create two or help to deal with the situation if there are not at least two.

8. Administrative Procedure

A proposed amendment from February 2013 to the Law on Contentious Administrative Matters (Law no. 793-XIV, dated 10 February 2000) amends the procedure of appeal of

[8] This review does not include a comparison with the Law on Competition but it is presumed the provisions are properly coordinated.

decisions of the regulatory authority by stipulating a time limit of 30 days. According to the new paragraph to be added to Article 24 of the law, requests related to the decisions of the Coordinating Council of Audiovisual regarding the use of sanctions for suspending or withdrawing broadcasting licences shall be examined by the administrative court as a priority with the time for examining the cases not exceeding 30 days. The provision in itself is positive although it would be better to formulate it not absolutely but with some small possibility for exceptions, even if only under strict conditions and in special cases. Absolute timelines without any possibility for exceptions are too inflexible and can cause problems, but exceptions should be rare.

According to the informative note, the background to the proposal is that a real need has been shown in practice as well as stressed by the constitutional court (referring also to the European Court on Human Rights). In such a case, a legal amendment can be welcomed, as it is to be avoided to have long handling time in the cases mentioned, as broadcasters lose their chance to earn an income while licences remain suspended or withdrawn.