

**ANALYSIS OF THE LAW (248/2018) AMENDING THE MACEDONIAN LAW ON
AUDIO AND AUDIOVISUAL MEDIA SERVICES**

Addition to the reports of October 2017 and January 2018

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1. Summary of main findings

The Law on Audio and Audiovisual Media Services of the Republic of North Macedonia, as amended by the Law (248/2018) Amending the Macedonian Law on Audio and Audiovisual Media Services, is in general in accordance with European and international standards on audiovisual media. The latest amendments in some instances strengthen the diversity of representation in various organs, which is positive. There are, however, some unclarities in the Law that may cause concern for sector participants, which underlines the importance of independent and professional implementation. Concerns can be alleviated through an open and transparent discussion with stakeholders, and legal certainty can be provided by regulatory acts by the relevant organs on the implementation and interpretation of certain provisions.

The key issues changed by the latest Law on Amendments include provisions on how to ensure, in the best possible manner, that the interests of different ethnic groups are taken into consideration, and an update of the possible grounds for discrimination of which there needs to be awareness. These amendments are positive. However, there are some changes, such as the system for ensuring Macedonian music content, abolishment of a time limit for advertising on the public service broadcaster, procedural differences between different concerned parties and ambiguous provisions banning public advertising or public funding for advertising, that give some cause for concern and need attention – whether in the form of new amendments or by clear implementation, perhaps including specific sub-legal acts.

The stipulation in the very latest – January 2019 – Law on Amendments that a consolidated version of the Law will be issued is welcomed.

2. Recommendations and main points

The recommendations and main points highlighted in the October 2017 and repeated in the January 2018 report remain valid.

What is new in the latest Law on amendments is the emphasis on minority representation, which is positive. In any country with several significant ethnic minority groups, it is important that safeguards exist for their representation in the media. The principle that ethnic-related proposals should be supported by a majority of both or all ethnic groups concerned has been introduced.

It is unclear why the procedure in the context of possible measures to be taken in case of violation of the law, by-laws or the licence by various sector participants is not the same for the different groups, with some rights given only to media publishers. This should be clarified with a further amendment of the law or at least in by-laws.

The enumeration of grounds for discrimination has been adjusted to modern European practice.

The system by which broadcasters can get a reduced licence fee if they broadcast Macedonian content would be difficult to implement and lead to an additional burden on the Regulatory Agency. Uncertainty may also lead to excessive interference in the editorial independence of broadcasters.

The provision banning public advertising or public funding for advertising could be more clearly defined to avoid misunderstandings.

A general recommendation, as outlined point-by-point, is to consider for each of the points where there is a concern, to consider how these concerns can best be addressed. This can be in the form of new legal amendments, but it is also possible to overcome some unclarities by implementation, accompanied by and clarified in sub-legal acts where appropriate. Given the many amendments of the

Law on Audio and Audiovisual Media Services and the long process related to these, it may be preferable, where possible, to avoid legislative changes if the matters can be addressed in another manner. The importance of consultations and an inclusive process is stressed.

3. Analysis

3.1 Introduction

The Law on Audio and Audiovisual Media Services of the Republic of North Macedonia (Official Gazette of the Republic of North Macedonia 184/2013, 13/2014, 44/2014, 101/2014, 132/2014, 142/2016 and 132/2017) has undergone a number of changes. In October 2017 the Office of the OSCE Representative on Freedom of the Media published a report about proposed draft amendments. Later, the draft amendments were subject to a further round of consultations and a new Law on amendments was proposed, in which some of the OSCE Representative's recommendations were taken into consideration. In January 2018, the Office of the OSCE Representative published an addition to the 2017 report, commenting on the new proposed amendments. On 28 December 2018, a new Law on Introducing Amendments to the Law on Audio and Audiovisual Media Services was adopted by the Parliament. It was published in the Official Gazette on 31 December 2018 and came into effect on 8 January 2019. In January 2019 some additional changes were adopted in a simplified procedure, mainly to clarify transition issues.

The current analysis is an addition to the previous reports and does not analyse the entire law, but focuses on the new amendments introduced by the December 2018 Law and the additional January 2019 amendments. For an analysis of the more substantial amendments to the Law on Audio and Audiovisual Media Services of the Republic of North Macedonia, as well as for information on the mandate of the OSCE Representative on Freedom of the Media and the legal basis for the analysis, please refer to the report of October 2017.

Civil society, as well as media organisations, have reacted to the adoption of the Law, claiming that the latest amendments were introduced without an inclusive and transparent procedure, thus not allowing for comments by stakeholders to be taken into account. This report refers in a general manner to such concerns, where relevant, but the analysis is based on the text of the Law (in a partial English translation) and not on alleged problems with its future implementation.

The report indicates where provisions are unaltered compared with the amendments proposed at the end of 2017 and analysed in the 2018 report. In such cases, the report is referred to and the comments are not repeated. The Article numbers are those of the new Law, with reference made to the Article that is being amended.

3.2 Article-by-Article analysis

Article 1 amending Article 4

No changes compared to what was commented upon in the previous Report.

Article 2 amending Article 12

The general comments in the previous report are still valid. The only additional change is that it is explicitly mentioned that the Council shall decide with a majority of the total number of Council members, including a majority of votes of the total number of Council members belonging to the non-majority communities in the Republic of North Macedonia. This is in line with the general emphasis on securing rights for minority groups that is seen in several places of this Law.

Article 3 amending Article 14

Article 14 has undergone some changes. The principle that ethnic-related proposals should be supported by a majority of both or all ethnic groups concerned has been introduced: The Assembly of the Republic of North Macedonia shall appoint the members of the Council by a two-thirds majority, while it has to have the votes of the majority of total number of MPs that belong to communities which are not a majority in the Republic of North Macedonia. In countries where ethnic representation may be an issue, such a principle can be very useful and promote greater trust among different communities. Some commentators have pointed out that the principle was introduced in the Law without much discussion and, if this was the case, it is unfortunate, as measures introduced to increase trust are usually the most effective if adopted as part of a wide and broad discussion. However, the provision as such is a positive addition to the Law. There is also the addition that when determining the proposal for candidates for Council members, the responsible Committee shall not nominate more than two candidates supported by the same supporting body. This should enhance diversity and is consequently also positive. The provision that the dismissal procedure shall be public is positive (although it is a bit unclear between different versions of the Law if this is a new addition in this Law on Amendments).

Article 4 amending Article 15

No major changes compared to what was commented upon in the previous Report. The addition that the Council shall not receive instructions from anybody is normal under best international practice.

Article 5 amending Article 16

A provision that persons who were members of management bodies of political parties in the last 10 years, counted from the day of release of the public call, cannot be elected Council members. As the Council should be politically independent and seen to be politically independent, this addition is positive. This requirement existed earlier for the Director of the Agency.

Article 6 amending Article 18

Article 7 amending Article 19

Article 8 amending Article 20

No changes compared to what was commented upon in the previous Report for these three Articles.

Article 9 amending Article 23

Article 23 deals with measures to be taken in case of a violation of the law, by-laws or the licence. The possible sanctions or consequences are to be used in a proportional manner and the Article elaborates on the procedure for deciding on the measures. This includes the requirement to request a response from the media in question. However, paragraph 3, which sets out the possibility for a written response, only refers to media publishers, whereas the Article as a whole refers to media publishers, providers of audiovisual services upon request and operators of public electronic communications networks that perform retransmission of programme services. The same possibility to explain should be given to anyone who may be subject to sanctions. In the new added paragraph about providing written notice about the measures decided, the word “offender” is used, which includes all possible parties. “Alleged offender” could also be used as a collective term in other parts of the Article. The final, new addition includes the requirement to provide explanations within three days, whereas the rest of the Article does not contain any time limits. Such limits can be in the procedure for handling cases of the Agency and thus do not have to be in the law as such, but it is good to be consistent: either include timelines also for other matters, like the request of a written explanation, or have all timelines only in procedural by-laws. The order of information – to the offender and then on the website – is now more logical.

Article 10 amending Article 30

No changes compared to what was commented upon in the previous Report.

Article 11 amending Article 48

Article 48 deals with the possibility of prohibiting certain media content in specific cases. This includes such media content that encourages or spreads discrimination, intolerance or hatred towards certain groups. The enumeration of such groups and possible criteria based on which this discrimination, intolerance and hatred could be based has been adjusted to include circumstances that are gaining more attention in the modern debate, like sexual orientation and gender identity for example. As the previous version of the Article permitted additional categories to be included in addition to those enumerated, the change is not of major importance, but it still has a positive symbolic value, providing clarity and legal certainty. The new enumeration is in line with European standards. Although the Article is in line with European practice and it makes explicit reference to the European Convention on Human Rights, it is still worth underlining that any such prohibitions of media content should be very restrictive, as freedom of expression cannot be limited if this is not absolutely necessary.

Article 12 amending Article 80

No changes compared to what was commented upon in the previous Report about the formula. However, new paragraphs introduce a system by which broadcasters can get a reduction of the licence fee through a voluntary system of reporting on the percentage of music in Macedonian or in languages of other ethnic communities of the country. Through voluntary reporting to the Agency for Audio and Audiovisual Media Services on the percentage of music in Macedonian or in languages of other ethnic communities of the country that is broadcast, it is possible to get a reduction of the licence fee by different percentages. It is significant that this system has been criticised by the Agency – the body that will be in charge of implementing it. They are concerned about the difficulties in monitoring this, the administrative burden of adjusting the licence fee in case the broadcasters do not adhere to what they have claimed, and the considerable extra burden more generally on the Agency. These concerns of the Agency are legitimate. It may be possible to alleviate the problems depending on how the system will be developed in practice, but the fact that the body that is supposed to implement it identifies several challenges needs to be taken seriously. It is assumed that there was not a sufficient consultation process before adopting the Law, as otherwise it would have been possible to air such concerns and discuss them before the adoption of the Law, perhaps adjusting it to be more acceptable to the Agency.

The Agency has also expressed concern about the requirement that they shall determine a plan about the duration and type of music that meets the percentage requirements in the Law (paragraph 9). The Agency is concerned that this would be a violation of editorial independence. Also, this point is one where a thorough consultation could have avoided later problems, as the issue depends on the nature of such a plan. A detailed list of what music shall be played would indeed be questionable from an editorial freedom perspective, and is not a suitable task for a regulator. On the other hand, regulators do issue guidelines and proposals, which can be a legitimate way to assist broadcasters to act in accordance with the law. As the Law is adopted and in force, consultations about the wording are no longer relevant, but this does not preclude a real dialogue between the Agency and the legislator and executive on what provisions mean and how they should be implemented, so as to be in accordance with freedom of expression and best international practice. The provision sets out that a by-law shall be adopted, which is important, as the possibility appears a bit unclear due to interpretation issues.

Article 13 amending Article 92

The requirements for Macedonian works in broadcasting have been separated for radio and television. This is clearer.

Article 14-24 amending Article 92

These Articles delete various paragraphs/points of Article 92. No changes compared to what was commented upon in the previous Report.

Article 25, amending Article 102

The Article refers to the banning of public advertising or public funding for advertising purposes, in what commentators have felt to be an ambiguous manner. Instead of a clear provision banning the spending of public money in the media, it is said that the various public organs or publicly owned organs listed in the Article “shall not allocate means for information and familiarisation of the public with their services or activities through private broadcasters”. Media organisations have pointed out that such a provision might allow institutions to fund media in a roundabout way, by not specifically allocating the means but perhaps dissimulating it under allocations for different purposes. A ban on public advertising could be made more explicit.

Article 26 deleting Article 103

Deleting Article 103 means that the specific limit on the duration of advertising for the public broadcasting service is removed. As commercial communications on the public broadcasting service are alluded to elsewhere in the Law, it appears as if such communications are permitted. It is best international practice to limit the time of such communications on public broadcasting, in order to create a more level playing field with private broadcasters that, unlike public broadcasters, normally do not have other sources of funding.

Article 27 amending Article 105

Article 28 amending Article 106

No important changes compared to what was commented upon in the previous Report for these two Articles, just stipulating (in Article 105) that additional rules will be adopted.

Article 29 amending Article 107

In this Article, the various types of programme services of the Public Service Broadcaster are stipulated. There is a new requirement for a 24-hour programme every day of the week for the larger minority and one radio programme in the language of other smaller ethnic communities, which will broadcast 24 hours. The final paragraph stating that “The number of programme services referred to in paragraphs (1), (2) and (5) shall be decided upon by the MRT’s Programme Council upon the proposal of the MRT’s Director.” has been deleted. This may not have a major effect, as the decisions can in any event be taken in a manner decided within the broadcaster.

Article 30 amending Article 109

The amendment is largely editorial, replacing the wording “means for financing of broadcasting activity pursuant to this Law” with the words “financial means of the Budget of the Republic of North Macedonia”. The new wording is clearer, as it directly states that the funding is from the budget of the state, while the previous wording meant that one needs to refer to other provisions of the law to determine the source of funding.

Article 31 amending Article 117

Like in Article 3 (amending Article 14) there is the addition that when determining the proposal for candidates – here for public broadcaster Council members - the responsible Committee shall not

nominate more than two candidates supported by the same supporting body. This should enhance diversity and is consequently also positive. Some terminology changes are also made.

Article 32 amending Article 118

Like the amendment in Article 3 (amending Article 14) there is a need for votes from the ethnic minority representatives, which strengthens respect for ethnic diversity and is positive.

Article 33 amending Article 130

The demands for the director and deputy director are somewhat strengthened, which is positive (provided that the requirements are not disproportional or unrealistic, but this does not appear to be the case here). It is not easy to see what is added, in terms of substance, by adding the wording that the director and deputy director may be elected from among those who will offer the best quality programme for the work of the public service broadcaster, but there is nothing wrong with such ambition.

Article 34 deleting Articles 135 and 140 (and Chapter VII).

No changes compared to what was commented upon in the previous Report.

Article 35 amending Article 143

This issue has not been examined in this report.

Article 36 deleting Article 145

Article 37 deleting Article 146

No changes compared to what was commented upon in the previous Report for these two Articles.

Article 38

The Article is brought in line with the new wording in Article 48, amended by Article 11 (see above).

Article 39

The amendment is a small adjustment clarifying the relationship with the criminal code.

Article 40

Article 41

No changes compared to what was commented upon in the previous Report for these two Articles.

Article 42

The deadlines for the procedure have been prolonged, which is good, as the previous time limits were unrealistically short.

Article 43

Article 44

No significant changes compared to what was commented upon in the previous Report for these two Articles. In the very latest (January 2019) changes, it is clarified when the 2019 Financial Plan shall be delivered to the Assembly.

Article 45

The amendment is an adjustment, given that the year 2018 referred to is already passed.

Article 46

This Article refers to the above-mentioned amendments to Article 143 of the Law concerning responsibility for re-transmission. Operators concerned pointed out that the Article with its transitional provisions contributed to the uncertainty described above. The latest amendments provide a clearer transitional period during which operations can continue. It is also positive that a provision has been inserted that the Council of the Agency is required to publish relevant bylaws, but shall organise a public debate prior to their enactment.

Article 46a

Article 46b

These Articles are added by the January 2019 amendments. They clarify that contracts remain in effect until aligned with the new law, for a certain period. These provisions deal with the matter, which several commentators have stressed, that the transitory period was unclear. It is thus an improvement. .

Article 47

This Article stipulates the entry into force of the Law, eight days after its publication in the Official Gazette.

In the latest Law on Amendments, it is clarified that a consolidated version of the Law on Audio and Audiovisual Media Services can be issued. This is a very welcome addition, as the large number of amendments has made the Law difficult to read, which is not just an inconvenience but has a negative effect on legal certainty for the sector participants.