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 AND THE LAW ON FREEDOM OF EXPRESSION OF THE REPUBLIC OF MOLDOVA

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1. SUMMARY OF MAIN FINDINGS

The report analyses amendments to the Audiovisual Code and the Law on Freedom of Expression. The explanatory note lists as reasons e.g. media market development, modern technologies, development in the region leading to a significant negative impact on human rights, state security, the status of the sovereign, independent and integral state. Although not stated, this expert presumes that a trigger for the amendments is widespread Russian propaganda directed at a number of states, including Moldova, after the annexation of Crimea in 2014. Despite legitimate concerns, a number of the proposed provisions are excessive and not in line with best international practice. The legislator may have over-interpreted possible restrictions and not analysed thoroughly whether the desired results could be achieved with less intrusive instruments or based on existing law. Some of the amendments are proportional, like having stricter criteria for domestic content. There are also amendments not related to the main concerns, like limits on advertising on public broadcasting, changes to the definition of prime time etc. that fall within what each country can determine independently. Some other changes depart from international principles but in less significant ways.

The most relevant amendments from the viewpoint of freedom of the media deal with programme content. This includes prohibiting politicians and some other persons presenting certain broadcasts. The basic idea is good but the ban is wide and it should be considered if there might be a danger of excluding people who have a legitimate role. Other amendments state that they protect human rights and rule of law, but may be abused to restrict broadcasting. Several provisions are either without normative content or repeat rights (like right of reply, prohibition against incitement) which already exist. Several provisions concern the role of moderators, while such rules fit better in guidelines or codes of conduct plus as part of editorial decisions of broadcasters. The gradual application and proportionality of sanctions is less clear after the proposed amendments.

A risk with the amendments is that they contain words that are not amenable to clear definitions (obscene language, accusation). Provisions may restrict expression too much and have a self-censoring effect, even if they purportedly address legitimate concerns (defamation, obscenity). A requirement to have the view of any institution criticised may mean media will be vary of criticising public institutions, while such activity is an important part of its watch-dog role. For confidential and unverified sources, it would appear that existing rules (like on accuracy and impartiality of news) as well as guidelines and editorial responsibility would be sufficient. There is a danger with provisions that set out to protect human rights through restricting certain broadcasts. This includes programmes, which may be against the sovereignty, territorial integrity or independence of the state or national security, including programmes which fall under the law on fighting extremist activities. Although states have a legitimate right to restrict certain programmes if these are a threat against the state, there should be very limited restrictions. Existing provisions against incitement should be enough. The proposed ban on news programmes or programmes on military topics that emanate from non EU or the European Convention on Transfrontier Television states are excessive and risk to be a blunt instrument against their real target. Propaganda should be countered by information, even if this is a less immediate remedy and can be frustrating.

A change is also made to the Freedom of Expression Law to prevent anonymous material. The decision to have anonymous material should be an editorial decision. It is not impossible to have such material if the media decides and checks that it is not harmful. Furthermore, the mass media is likely to have responsibility regardless if this is stated like in the proposed amendment, so the addition only provides a ban which may be interpreted too widely and lead to stifling of interesting debate.

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 too difficult to define objectively.
- Although recognising the legitimate concerns of countries subject to intense propaganda from other countries, instead of introducing new rules it is better to implement forcefully any existing provisions on matters such as incitement to hatred and violence, balance in news, etc.
- Many of the proposed amendments are too restrictive of media freedom, duplicate already existing provisions in the law or are open to abuse and misunderstanding, including a risk of self-censorship and should thus not be adopted *(regarding a number of the amendments to the Audiovisual Code Articles 6, 7 and 9).*
- Detailed application of the law should be left to the editorial freedom of media outlets, possibly complemented by guidelines and codes of conduct, but should not be set out in law. Provisions related to how moderators of broadcasts should act and similar could be proposed in a Code of Conduct issued by the regulator rather than in the law, making these provisions rules of guidance rather than binding prohibitions and instructions *(regarding certain amendments to the Audiovisual Code Articles 6 and 7).*
- The proposed stricter definitions and rules for local production are adequate as less intrusive and more proportional tools for addressing concerns *(regarding certain amendments to the Audiovisual Code Articles 2 and 11).*
- There is no need for a total ban on anonymous material but provided broadcasters are aware of their responsibilities they should be free to determine how they deal with such amendments *(regarding the amendment to the Law on Freedom of Expression).*
- Amendments to the terms for members of the regulator, suspension pending appeal, advertising ban on the public service broadcaster and other smaller amendments are generally positive or have no direct implication for freedom of expression.

3. ANALYSIS

3.1 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, to which OSCE Participating States have declared their commitment.[1]

Article 19 of the Universal Declaration states: *"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.

Freedom of expression is also stipulated by Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR):

"*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]

The Republic of Moldova 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. This report underlines how Moldova can best ensure that its legislation respects free expression and free media.

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

[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.

[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

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 this freedom can be implemented in practice. International best practices have developed on how to achieve this. One main issue for legislators as well as regulators to deal with is how to ensure respect for the principles established by the European Court of Human Rights (ECtHR) that any restrictions to human rights, including freedom of expression, should be proportional, necessary in a democratic society and set out in law.

As the current report analyses changes to the legislation, the final point above – that the restrictions must be set out in law – is basically respected, although an unclear law or legal provisions open to misinterpretation may mean that this criteria is not fully met. The main challenges with the legislation analysed in this report however relate to proportionality and necessity. Freedom of expression is not an absolute right, but its limitations must be very carefully made given the importance of the right – not just as a basic right but also as a prerequisite for exercising many other human rights and fundamental freedoms. It is important that an international principle of protection of freedom of expression is that also unpleasant or unimportant speech is protected – there is no quality requirement for speech. It is protected regardless of its content, unless it violates any of the legitimate rules such as prohibition on incitement to hatred or violence or defamation. The threshold for what is seen as incitement and defamation should be high in a democratic society with freedom of expression and the rule of law.

3.2 Amendments to the Audiovisual Code

3.2.1 Introduction

On 31 March 2015 a legislative initiative has been submitted to make amendments to the Audiovisual Code (Law No 260-XVI, 2006) and to the Law on Freedom of Expression of the Republic of Moldova (Law No 64, 2010).[6]

In the explanatory note the need to make changes is explained based on media market development, modern technologies and constant development of the European case law. In addition, it is mentioned that an important factor is development in the region, expressed as sensitivity of information that may have a significant negative impact on human rights compliance, state security, strengthening the status of a sovereign, independent and integral

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

[6] The version of the Audiovisual Code that this expert has been provided with appears not to be the latest version, as some of the amendments do not fit with the basic text of the Code. For example the amendment to Article 2 u) mentions a change from 19:00 to 18:00 (definition of prime time) but the Article does not contain the number 19:00. It is presumed that such changes not reflected in the translation are minor and they do not appear to influence the substance of the amendments analysed in any significant manner. Some of the differences between the laws appear to be due to different translations of the original law and the amendments (like “local” or “domestic” production for example). It is also difficult to understand the amendment to Article 7 paragraph 4 as the mentioned words do not fit with the current wording. Also this change appears to be of a minor importance so this unclarity is not relevant for the main substance of the report.

state. Other explanations include that insults and defamation committed in public, especially through media, by ordinary citizens, politicians and journalists have become commonplace and cause injuries to human dignity.

Although not expressly stated, this expert presumes that one important trigger for the proposed amendments is the issue of widespread propaganda broadcasts from Russia directed at a number of former Soviet states, including Moldova, after the annexation of Crimea in 2014. This has caused concern in a number of European states, leading to legal amendments as well as regulatory decisions banning certain broadcasts or channels.[7] At least to some extent, such concerns appear to be behind proposed amendments.

The explanatory note refers to constitutional principles as well as international provisions like the ECHR. The note underlines Article 1 paragraph (3) of the Constitution which proclaims that the Republic of Moldova is a democratic rule of law State, respecting e.g. human dignity and political pluralism. Article 32 of the Constitution protects freedom of expression and also permits its restriction as it may not prejudice the honour, dignity or the right of the other person to hold his/her own viewpoint. Similarly to the rules in the ECHR, Article 54 paragraph (2) of the Constitution sets out that rights and freedoms may not be subject to other restrictions than those provided for by law, which are in compliance with the unanimously recognised norms of international law.

Despite these references to protection of rights and the restrictions on their limitation, a number of the proposed amendments are not in line with best international practice but limit freedom of the media in an excessive manner. It appears as if the legislator has over-interpreted case law on possible restrictions as well as not analysed thoroughly enough whether the desired results could be achieved with less intrusive instruments. This is an understandable reaction in a tense geopolitical situation, in which Moldova is in a vulnerable situation, but even so, protecting freedoms through restrictions is not a good way forward. Although frustrating and appearing as a slow mechanism, propaganda and lies are best combatted with a free debate and free media.

3.2.2 Definitions and Jurisdiction

Some amendments are suggested to the definitions in the Audiovisual Code, in support of other substantive amendments or with an important function by themselves. Given the different translations in the amendments and the present Code, it is a bit hard to see exactly what the full effect of the proposals are. One such change is to the definition of retransmission, which has been changed so that the retransmission is done by a distributor of services rather than a broadcaster.

The definition of broadcaster is changed to include that a broadcaster is someone who holds a licence from the regulatory authority, the Coordinating Council of Audiovisual. Although this change is not a major issue, the new definition is not ideal. It mixes a normative provision (the need to have a licence) with a definition. Further, the new definition does not mention

[7] Russian propaganda is of general concern in Europe, see e.g. https://euobserver.com/foreign/127135

editorial responsibility. This expression is used in many contexts (like the EU Audiovisual Media Services Directive, AVMSD[8]) to define broadcasters in an era in which, due to various technical means for distributing content, it is increasingly difficult to define broadcasters. It is not clear that the chosen expression of full responsibility is better than editorial responsibility.

Some translation issues aside, it appears that the difference as concerns domestic production is that co-production is no longer seen as domestic and local technical and intellectual means have to be used for independent producers to be included in local production. This is a certain toughening of the requirements which is in line with a concern of excessive foreign broadcasts. Such changes are less intrusive means than prohibitions to address such concerns.

Other changes to definitions that are of less significance to the freedom of expression questions analysed here are that the definition of own production has been deleted and there is a change to the definition of prime time.

There is a change to Article 4.1 on which broadcasters are under the jurisdiction of the Republic of Moldova. It limits the instances when a broadcaster will be deemed to be under such jurisdiction and it also mentions a licence as a condition. For example, the possibility that editorial decisions are taken in Moldova but the labour force is in an EU Member State have disappeared. The references to the European Convention on Transfrontier Television in Article 4 have been deleted as have the paragraphs that repeat the jurisdiction criteria of this instrument. This is regrettable as it is better to ensure that legislation is clearly in line with international conventions to which the country is a party and such explicit references help indicate the link to international obligations.

3.2.3 Programme content provisions

The most relevant amendments from the viewpoint of freedom of expression and freedom of the media are those that deal directly with programme content. In this context, Article 6 on different situations in which broadcasts may be prohibited is complemented with an additional paragraph:

> "(4) *The transmission/broadcasting of news programs, analytical programs and debates presented or moderated by politicians, civil servants or people who are members of the staff of civil servants, as well as people authorized to candidate to presidential, parliamentary or local elections shall be forbidden.*"

The basic content of the provision is good and such rules – at least related to news – are often found in codes or practice or similar. They may fit better in such documents than the law but if this has been an issue in Moldova and existing provisions are not enough, there is no major objection to such provisions being in the law. However, the ban appears to be quite wide and it should be considered if there might be a danger of excluding people who have a legitimate role in some broadcasts (for example a member of staff of a civil servant might have a role of moderating debates in some context). A more limited exception to exclude that politicians or

[8] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

other people in positions of power try to exert influence through "hidden" political broadcasts is what should be aimed for. One benefit of having such rules in guidelines or codes rather than the law, is that it is then easier to explain, illustrate and so on – a text in a law has to be more concise.

The Explanatory Note explains that detailed regulations concerning the protection of human rights in correlation with the rights and obligations of the moderators of audiovisual programmes, specifications to ensure political and social balance and pluralism, as well as the protection of the rights of the opposition to express its views, are introduced. Despite these laudable aims, the proposed provisions are not very suitable as they leave many openings for misunderstanding and excessive restriction.

A new Article 6^1 is proposed:

"*Article 6^1. Protection of human dignity and the fundamental human rights.*

(1) The broadcasters are obliged to respect the fundamental human rights and liberties, the dignity, honour, private and family life, as well as the right to one's own image.

(2) Audiovisual programs during which accusations are brought against people regarding their behaviour and illegal deeds, shall ensure that these accusations be argued and supported with pertinent proof or shall at least specify the evidence supporting the accusations, and the people in question have the right to intervene with their own point of view by exercising their right to reply. The moderators of the audiovisual programs are obliged to request the right to reply from the person in question. The violation of the right to reply shall hold the broadcaster liable, according to the legislation in force.

(3) Moderators of the audiovisual programs are obliged to ask the guests of the show to prove the accusations, and, in case evidence is not provided, the moderators shall immediately point out, during the same program/show, that the accusations are not supported by evidence. The violation of the present paragraph, including by encouraging the production of unproved evidence or the omission of the information about the lack of evidence with respect to the accusations brought, shall hold the broadcaster liable.

(4) The moderator of the audiovisual programs shall not use nor allow the use of obscene language or incite to hatred and violence."

Although this Article appears to protect human rights and strengthen the rule of law in broadcasting, this impression may be misleading and the Article could be abused to restrict broadcasting. The first point of the new Article does not appear to add anything that does not already follow from both the Constitution and the Audiovisual Code as well as other legislation. The right of reply – which is the key content of the right detailed in points 2 and 3 - is an important right, which already exists in the law, Article 16. The basic right is very important and can be exercised in different ways – immediately or in subsequent broadcasts. Even if the Article 16 is drafted more with subsequent replies in mind, the most essential point is that such a right is recognised in the law and broadcasters are free to ensure it is exercised also immediately, if that is suitable. How to exactly do that and the behaviour of

moderators, such rules fit better in guidelines rather than adding more provisions which may be confusing as they partly duplicate existing provisions.

What is meant with “accusation” is not clear. As the ECtHR has stressed in numerous cases, restrictions to freedom of expression must be necessary in a democratic society, proportional and set out in law (which includes an understanding that they must be clear enough). New restrictions in law should not be added if they are not necessary and if matters can be dealt with in less restrictive ways, like through guidelines etc. Although defamation is a reason for restricting freedom of expression, there should not be excessive prohibitions on this as such rules may restrict expression too much as they may have a self-censoring effect.[9]

Point 4 duplicates an already existing ban on incitement (in Article 6 paragraph 1 of the Audiovisual Code). That provision appears to be enough as a basic rule and details on what role and responsibility a moderator has fit better in guidelines or similar. The rule proposed in point 4 may be difficult to implement, as it is not clear what exact responsibility a moderator has and how it should be exercised. The term “obscene language” is not an exact term which makes it difficult to implement with legal exactitude. A guideline that allows for exemplification is a more suitable instrument, coupled with the instructions given to moderators as part of their professional responsibility.

Additions to Article 7 on political and social balance and pluralism are also of such a nature that they may restrict free speech and free media debate. What are presented as legitimate rules appear to go too far and not be justified, as the potential problem that the rules are aimed to deal with is not serious enough to merit what could become excessive restrictions on media. The danger is that the requirement to have the view of any institution criticised will lead to media being vary of criticising public institutions, while such activity must be an important part of investigative journalism and the watch-dog role of the media. Also as for confidential and unverified sources, it would appear that existing rules (like on accuracy of news and other programmes) as well as guidelines and editorial responsibility would be sufficient.

The new proposed provision - Article 7[1] Information security and protection of information - mandates the regulator, the Coordinating Council of Audiovisual, with observing and protecting fundamental rights and freedoms, specifically the right to correct and objective information. It can be asked what the added value is of this paragraph is. The regulator already has its role set out in law and this role for a regulator in a state with freedom of expression, promotes free media even if this is not mentioned specifically. The second and third paragraphs of the Article show that the idea is instead that such protection is exercised through restricting certain broadcasts. This includes programmes, which may be against the sovereignty, territorial integrity or independence of the state or national security, including programmes which fall under the law on fighting extremist activities. Although states have a legitimate right to restrict certain programmes if these are a threat against the state, there should be very limited such restrictions. Provisions against incitement, which already exist, should be enough. The law on fighting extremist activities has not been analysed for this report, but it is presumed such a law may allow measures also against broadcasts if they fall under this law.

[9] The OSCE Representative on Freedom of the Media has for example recently (7 April 2015) criticised Greece for a long prison sentence against a journalist for defamation.

Although the background to such provisions can thus be well understood, it should still be avoided as much as possible to make special rules against propaganda. It is better to rely on existing provisions like bans of incitement, impartiality in news and so on. It is difficult to objectively define the terms used in paragraph 2. The summary process in paragraph 3 departs from the idea of a gradual and proportional application of any sanctions.

The final paragraph is the implementing provision. It is not good legislative practice to have one sanction in a special provision when generally sanctions are grouped in one place in the law (Articles 27 and especially 38). Also, the provision appears to impose withdrawal of the licence as the first sanction, without warning or other less intrusive measures according to the principle of proportionality and gradual application of sanctions. This principle of gradual sanctions is set out in the law, in Article 38. This Article is amended through these amendments but the provision on gradual application is still included even if in a different manner. It should not be diluted by having special stricter sanctions in one particular Article.

Article 9 is proposed to be supplemented with two paragraphs that ban news programmes or programmes on military topics that emanate from states that are neither EU Member States nor Members of the European Convention on Transfrontier Television. These changes point to the same concern as that which has been mentioned above, of propaganda aimed at the country from other states. Propaganda should be countered by information, even if this is a less immediate remedy and can be frustrating. These bans appear excessive. They cover programmes from the majority of the world including such major producer of broadcasting like USA. The propaganda that the provisions wish to limit are likely to anyhow get through as for example Sweden and the UK are used as countries of origin for Russian propaganda currently addressed at the Baltic States. Thus the provisions risk limiting desirable programmes and not being an effective tool against what it actually aims at.

3.2.4 Other amendments

In Article 11 the proportion and placing of domestic production shall be increased and differently expressed. This has been mentioned above in relation to definitions as well. This provision as a tool against excessive foreign broadcasting is proportional.

On sanctions, Article 27 is to be supplemented with a number of provisions also related to incitement, propaganda and similar. As at least in the version of the law that this expert has had access to Article 27 point b) states that a licence can be withdrawn from someone who violates the Code and as the various matters mentioned are violations of the Code, the added value of the new provisions can be questioned. They are presumably added to emphasise but the normative value as opposed to the symbolic value is limited. The second paragraph which stipulates a proportional and gradual application of sanctions is deleted which together with other changes in the law means that the previous gradual and proportional application in line with best international practice has been taken out.

Article 38[1] on suspension pending appeal has been added. This process is not commented upon in detail but in principle an independent effective appeal (which may need to include

suspension) is good. There was previously little detail on appeals and no suspension mentioned.

A short addition is made to Article 41 to indicate the role of the regulator in relation to copyright, which is a good addition.

A small addition, also positive, is made to Article 43 as concerns members of the Regulator who are restricted to two terms. This is an improvement- The other changes to this Article are small and of limited substantive interest.

One interesting amendment is made concerning the public broadcaster. Article 53 is amended so that it rules out advertising on the public broadcaster (previously it was restricted but not categorically banned). This is a policy choice for each country and there are reasons both for and against. (The changes to Articles 54 and 64 are consequences of this suppression of advertising). Many countries restrict advertising to provide a more level playing field for other broadcasters who normally have no other sources of income as well as to provide a different, commercial-free, viewing experience to the audience of the public broadcaster.

3.3 Amendments to the Law on Freedom of Expression

A change is also made to the Freedom of Expression Law. Such laws are quite unusual in countries with freedom of expression, as this freedom normally follows from constitutional provisions and only restrictions to it need to be set out in law. This is done in the various laws based on which such restrictions are justified. The Moldovan law sets out these provisions generally in this law.

According to the amendment in Article 3 a new paragraph (4^1) shall read as follows:

"*(4^1) The author of the information distributed through any mass media shall be individualized and identifiable. It is forbidden to disseminate the information from anonymous authors or authors who cannot be identified. The responsibility for disseminating or placing such information rests with mass media in question*."

The commentary refers to the case Delfi v. Estonia[10] in the ECtHR (decided October 2013 but currently under review in the Grand Chamber), but this appears to be an over-interpretation of the case. The ECtHR supported the position taken by the Estonian courts that an internet site that allows comments from the public must have a system to monitor such comments, as it is responsible for their content if it provides the means through which the content reaches an audience. The decision to have anonymous material should be a question of editorial decision. There may be reasons not to have identified authors without this necessarily being a problem. It is not impossible to have anonymous material if the media decides and checks that it is not harmful. Furthermore, the mass media is likely to have responsibility regardless if this is stated like in the proposed amendment, so the addition only provides a ban which may be interpreted too widely and lead to stifling of interesting debate.

[10] Application no. 64569/09 *Delfi AS v. Estonia* (10 October 2013, referral to the Grand Chamber 17 February 2014).