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Analysis of the draft Broadcasting Code of the Republic of Moldova

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Recommendations

- The draft Code is very detailed in some areas, whereas some detail would better fit in regulations or other secondary legal acts, as such acts can be amended more easily and be drafted in a fashion that allows for more explanations and descriptions.
- Some discretion for the regulator is needed so the non-political nature and perception of the regulator is very important, to give the proper content to positive goals and aims of the draft Code.
- The means of establishing the regulator should be less politicised both by eliminating the role of the President in appointing the chairman and in how the relevant parliamentary decisions are made (Article 76).
- Transparency and access of people to the regulator and the board of the public broadcaster is good but should not infringe on the ability of the regulator to independently and professionally carry out its work. For example, not all sessions can be public and the regulator cannot be obliged to act in a manner demanded by the public.
- The provisions on commercial communications are overly detailed and also appear to

cover matters not related to audiovisual communications. Such general principles fit better in other legislation and the level of detail can be questioned.

- Provisions on right of reply are not in this draft Code but the Code refers (Article 23) to another law, although some detail for broadcasters should be included in this Code.
- The reference to application of international law should not refer directly to the work of the Regulator (Article 5) as this should be taken into consideration at a different level.
- Certain concepts have a scope for confusion that should be cleared up, like European and Moldovan works (Articles 7 and 8) and different kinds of retransmission (Article 97 and 98).
- It is unclear to what extent the draft Code promotes work of independent producers, which is a goal of the Audiovisual Media Services Directive.
- The draft Code states that the Broadcasting Council shall create regulations to ensure access to pluralist audiovisual media services with a distinction made between pluralism of sources and diversity of content. It is important that such regulations are made so the positive goals are met.
- Some Articles (like Article 12 on protection of handicapped people and many Articles in the section on commercial communications) give so many details (and/or refer to further details in regulations by the regulator) that there may be danger such rules would interfere with editorial independence of media providers.
- On sanctions the draft Code gives details (Article 85) and appears rather inflexible. A short list of available sanctions with a statement that they shall take all matters into consideration perhaps coupled with guidelines from the regulator should be sufficient.
- On licensing the distinction between contests (individual licences) and non-contest (general authorisations) is in line with European principles but the language should be clearer and there should not be different bodies involved. An applicant should not have to go to more than one place and the licence should contain the various needed parts. The cooperation between authorities should take care of any coordination. Internet should largely be unregulated.
- Provisions on the digital switchover should be in the section on transitory provisions if these are relevant only for a limited time.
- There should be no possibility for renting a frequency (Article 95).

- The section on dominance (Article 106) needs to be clear on what behaviour (and abuse) it prohibits.
- The public broadcaster should have independence to decide over its finances.
- For community broadcasters the need to have such broadcasters, the benefit of special rules for them and the reason for such special rules should be clear, so that it is not just an unfair competition for private broadcasters.

Executive summary

The draft Code proclaims the adhesion of Moldova to European standards of freedom of expression and the principles of the Audiovisual Media Services Directive (2010/13/EU). This sets the framework for interpretation. The area of application of the Code is in line with the definition of jurisdiction of the Directive. It is important that it excludes internet sites that are not to be equated with broadcasting if the audiovisual media content is only ancillary. Definitions of terms are largely taken from the Directive, which ensures that accepted and widely understood terminology is used, although there are many additional terms defined as well. The definitions within the law of for example European works also meet the principles of the Directive although there are some unclear issues on the relationship between different categories of works. The purpose and scope of the Code underlines democratic principles. The provisions on jurisdiction are taken from the Directive and similar to the European Convention on Transfrontier Television to which Moldova is a party and should thus be similar to what already applies. Supremacy is explicitly given to international treaties. Also acts and decisions of the regulator, the Broadcasting Council, are mentioned in many parts of the draft Code.

The second chapter of the draft Code deals with principles of audiovisual communication. The access to pluralist audiovisual media services is an important element and the draft Code mentions public, private and community media services as well as the need to mirror ideological, political, religious and cultural diversity with a distinction between pluralism of sources and diversity of content. The respect for human dignity and human rights is underlined and negative uses of broadcasting prohibited. Protection of minors and support for disabled people is stated explicitly. Requirements of political and social balance and pluralism as well as protection of language and national-cultural heritage are set out in line with international standards. In general many common features of European broadcasting laws are included in the draft Code like rules on access to events of major importance, ownership concentration provisions, ban on prior control (censorship), reference to intellectual property rights and the right of reply as well as competition law issues. The draft Code provided both more common European principles on transparency and some novelties on participation of the public in the work of organs in the broadcasting field.

A large part of the draft Code contains provisions on audiovisual commercial

communications (adverts, sponsorship, teleshopping, product placement and similar). The provisions are in line with the Directive but much more detailed and appear to cover also general advertising matters that are not necessarily related to audiovisual communications. The public broadcaster and community broadcasters are allowed to have advertising.

The mission and tasks of the regulator, the Broadcasting Council, are in line with European principles. The Broadcasting Council is rightly given the right to develop its own regulation of organisation and functioning but a lot of detail is also given. If the list of competences is good, there is more room for improvement as concerns the structure. The appointment procedure appears to be rather politicised with a role for the President of the Republic as well as for Parliament without guarantees that also opposition parties have influence. There are provisions that aim to safeguard against political bias of members but it is not clear that these are very effective. It should be avoided that the regulator is perceived to have a political colour as it should be a professional body that is not suspected of having any political bias, it should be able to operate well even if there is a change of government and it should be trusted by all actors in the field.

On sanctions the draft Code gives details and appears rather inflexible. The right to appeal is mentioned with reference to other laws. Provisions on cooperation with other authorities are mentioned with a reference to agreements to be made but also with quite a lot of detail in the draft Code. The section on licensing distinguishes between contests (individual licences) and non-contest (general authorisations) situations in line with European principles but in somewhat unclear language. It appears there are different types of licences and there may be different bodies involved. This is not in line with best international practice which foresees that an applicant should not have to go to more than one place and the licence should contain the various needed parts. The cooperation between authorities should take care of any coordination. The point about special regulations for services broadcast in the internet gives rise to some concern as internet should largely be unregulated. The draft Code contains detail on the licensing process and also introduces a very unusual concept of rent of a licence. Moldova has a lot of retransmission and there are various provisions on this.

The public broadcaster is set up by the draft Code. The mission statement, rights and the list of aims and tasks are in line with European practice and editorial independence is stressed.

The managerial committee, supervisory board and the way civil society is involved in this also meets European norms. The limits for property of the broadcaster appear rather detailed and may infringe on the independence of the broadcaster. A subscription fee is established. The draft Code also includes the concept of community broadcasters

Introduction

This analysis concerns the draft Broadcasting Code (hereinafter "the Code") of the Republic of Moldova (hereinafter "Moldova") of May 2011. The analysis is based on the APEL translation provided by the OSCE.

In its preamble, the Code proclaims the adhesion of Moldova to European standards of freedom of expression and access to audiovisual media services. The preamble mentions 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 (hereinafter "the Directive"). These references are positive and should be kept in mind when interpreting provisions of the Code, as it sets the framework for interpretation. This means that if there are several interpretations possible, the one should be selected that best protects freedom of expression and access to media as well as provisions of the Audiovisual Media Services Directive. The background to the new draft Code is to ensure that Moldovan legislation is in line with EU law.

Area of application and other general issues

The first and second Articles outline the object of the Code and which subjects it covers. This is in line with the definition of jurisdiction of the Audiovisual Media Services Directive. It is important as it excludes private communication channels as well as those not aimed at an EU state. Furthermore, it is very important that the Code excludes internet sites that are not to be equated with broadcasting if the audiovisual media content is only ancillary. As the question of where in communications regulation internet fits is often raised, such a clear provision is important in order to ensure that internet cannot be restricted because of this Code.

Article 3 defines terms used in the Code. The definitions are largely taken from the Audiovisual Media Services Directive, which is the correct way to draft legislation, as it ensures that accepted and widely understood terminology is used. The draft Code contains many more terms than the Directive. Some terms like e.g. generalist and topical television or radio service that are not used in the Directive are added. The definitions of national, regional and local broadcasters are added specifically for the country. These distinctions appear legitimate. Prime time should be set as suitable for the country in question and there is no

reason to suspect that the times mentioned are not suitable for Moldova. The question mark in the Article on definitions is that "audiovisual licence" and "broadcasting licence" are identical (unless this is a translation error) so the question is if both terms are needed.

It can also be questioned if the body that issues the technical licence and frequencies could not be specified in the Code rather than just referred to as specialized (unnamed) authority. In any case, as will be explained below, the applicants should not have to contact several different bodies to obtain a licence.

Article 4 stipulates purpose and scope of the Code, underlining the democratic principles of the Code, which is also an important tool for interpretation. The provisions on jurisdiction are taken from the Directive as far as the media service provider is concerned. This is similar as in the European Convention on Transfrontier Television to which Moldova is a party and should thus be similar to what Moldova already applies. Also service distributors are mentioned in the law. This concept is not used in the Directive. The high instance of retransmission in Moldova appears to be the reason for this concept in the draft Code.

Article 5 refers to the Constitution of Moldova and also to international treaties. Supremacy is explicitly given to international treaties. This strengthens the above said on interpretation that should use the international norms Moldova is obliged to adhere to as yardsticks. Also acts and decisions of the regulator, the Broadcasting Council, are mentioned. The reference to international treaties also in paragraph 3 containing the task of the regulator may be confusing. The regulator must act according to a clear legal framework, which is to be created by the national legislative authorities. At the legislative level international provisions must be taken into consideration, but the regulator itself will do this only indirectly through following the national law. At the same time, the provision does not have to be problematic as it can be seen as just an interpreting instruction, explaining how international provisions form a backdrop to the legal situation in total.

The definition in Article 6 of European Audiovisual Works is in line with that of the Directive with the additions necessary due to the fact that Moldova is not an EU Member State. The quota of 75% is also in line with the Directive, which requires a majority. A transitory period to 1 January 2013 is given, which appears reasonable. Broadcasters should

be encouraged to use the period to act toward this goal. Article 7 defines Moldovan programmes. As Article 6 joins Moldovan and European works in one, having a separate definition may be confusing, with a percentage for European works that includes Moldovan works and a separate one for Moldovan works. Article 8 defines own programmes, which are programmes made by the media service providers themselves. This appears different to the Directive, which includes provisions on independent broadcasters that should not be dependent on broadcasters. Such independent broadcasters should if practicable have up to 10% of transmission time. There is no equivalent general provision in the draft Code although independent producers are mentioned in relation to the public service broadcaster (Article 113 and 129).

Principles of audiovisual communication

The second chapter of the draft Code deals with principles of audiovisual communication. The access to pluralist audiovisual media services is an important element, set out in Article 9. The Article mentions public, private and community media services as well as the need to mirror ideological, political, religious and cultural diversity. The Article also importantly makes a distinction between pluralism of sources and diversity of content. Also the different levels (national, regional, local) of media services are recognized. The normative content of the Article is that the Broadcasting Council shall create regulations to ensure that the various good goals are met. This is a positive Article in its strong emphasis of plurality and diversity.

Article 10 is also good and important as this is the Article underlining the respect for human dignity and human rights. The Article prohibits incitement, outlaws child pornography and programmes against good morals as well as generally calls for respect of dignity. Such an Article gets a genuine content via the work of the regulator and it is very important that it is properly interpreted as for example “good morals” may also be interpreted too widely and thus infringe on freedom of expression. It is not advisable – or even possible – to list or describe more firmly all such expressions, as certain discretion and case by case analysis is needed, but it is just underlined here how important the interpretation is.

Article 11 deals with protection of minors in the sense of broadcasts including minors as well as when programmes can be broadcast, different types of broadcasts etc. There is a distinction between programmes without a licence (with just a general authorisation) and those with a

licence where presumably the regulator may give further rules. The reference to co-regulation, to European rules and to more detail from the regulator is positive. This is an interesting example of the multi-layered approach to modern broadcasting regulation and legislation.

Article 12 deals with protection of handicapped people. This also follows in general from the Directive that calls upon states to encourage media service providers to make services accessible to people with disabilities. Details can be set by each country and it is important that the requirement is reasonable and not too burdensome, while there still must be real content to the demand. What could be worrying is the final paragraph of the article on the regulations the Broadcasting Council shall issue regarding disabled persons. It is a very good principle to encourage non-discrimination and protection of disabled persons but regulations from the regulator must not prescribe content of programmes as this would interfere with editorial responsibility. Here it is very important what the mentioned regulations will look like.

Article 13 sets out requirements of political and social balance and pluralism. The Article repeats important principles that follow from international law. The way the first part of the Article is written may appear more as a statement than a normative Article, while the requirements in paragraph 3 and 4 on separating facts from opinion, on news etc. are more normative. In any case, it is not wrong to state explicitly good principles of regulation as this is used as a tool for interpretation.

Article 14 is called “Protection of Information Area”, which is not immediately clear. The content of the Article is the stipulation that the frequency spectrum is national heritage, which is a principle of international law and indeed entails that the spectrum shall be used under conditions set out in law.

Article 15 aims at protection of language and national-cultural heritage. Such provisions exist in many countries, however it is to be noted that there are also other provisions in the draft law on national content which help to protect the same interests. The existence of many different percentages in different Articles of the law gives a somewhat confusing impression. The requirements on dubbing or subtitling are suitable for detail in regulations, as there may

for example be reasons for exceptions. The requirement of minority broadcasting is good but may need to be further specified as the application appears rather vague. This can be done in a regulation.

As for Article 16 its meaning is not clear as access to media services is a fundamental right for which there is no authorisation needed in any case. It should be self-evident that no authorisation is needed to access media. The Article is too brief and general to be a basis for ensuring access in the sense of making sure such programming is also provided. The second paragraph is legitimate but needs additional regulation.

Article 17 on access to events of major importance follows international principles but such rules are often found in regulations on the public service broadcaster – to ensure that they really are accessible. The structure with the regulator stipulating the detail is in line with European rules.

Article 18 on participation in checking observance of audiovisual legislation is an interesting provision that underlines the need for transparency. Although transparency is positive at the same time the Article gives raise to some concern. The draft Code stipulates for example that "Any natural or legal person is entitled to participate in checking up the observance of the audiovisual legislation, including requesting the Broadcasting Council [to undertake various activities, like monitoring, withdrawing licences etc.]." As far as this is just a statement indicating that people have the right to interact with the regulator, it is good. However, the regulator is a professional body that should be best placed to take important decisions so it would not be good if the public could demand actions from the regulator that it may not deem in the best interest for broadcasters, audience or other players. The Article should not mean that the regulator cannot determine its own activities. This could be made clearer perhaps coupled with provisions on public rule-making to retain the positive aspects of the Article.

Article 19 is called Transparency of Broadcasters' Ownership and sets out the kind of information that broadcasters must make publicly available. This is good from the viewpoint of transparency although the detail may fit in a regulation better than the law. It must be observed that obligations are not imposed on broadcasters that are a burden for them without necessarily adding any value for the public or the sector.

For Article 20 the first thing that is striking is that an article entitled “Freedom of Expression” is found some way inside the draft Code when such a principle should be the underpinning of any media or information related legislation. Also, the content of the Article deals with offers of programme services which is important but not really a matter of freedom of expression.

Article 21 on editorial independence and freedom stipulates the very important principle that has been mentioned also above – that the media service providers are the ones that should decide the media content, as long as it is in conformity with general laws. Regulations and laws should not set out details of media content. The ban on censorship is very important; indeed the placement of it in the law could have been such as to better underline this importance. It is true that legitimate regulation is not interference in the editorial freedom but this presupposes that the content of regulation does not go too far.

Article 22 Protection of Copyrights repeats that intellectual property rights must be respected. The details of such rights should be in other laws, but it is a good idea to underline it in the broadcasting law.

The article on right of reply, Article 23, refers to the Law on the freedom of expression. This analysis does not cover this law. The right of reply should be in the broadcasting law and/or regulations from the broadcasting regulator. Even if the right as such may derive from a general principle some details of its application should be in broadcasting law or regulations.

If Article 23 refers to another law for something that really should have been in this law, Article 24 on Protection of Journalists is the other way around. The draft Code is a broadcasting law whereas what the Article 24 sets out is general for any journalists and in any case it is hard to see what really the authorities under this law (broadcasting regulator) can do to implement the Article.

Article 26 on Airing Announcements about State of Emergency is in line with international best practice, provided of course that it is not abused and really is only used for emergencies.

<u>Audiovisual Commercial Communications</u>

The second chapter of the draft Code deals with what is called, in accordance with the Directive, audiovisual commercial communication. This includes adverts, sponsorship, teleshopping and similar. There is also reference to a Code on audiovisual commercial communications, which (as later is made clear although the name "Code" both for a law and secondary legislation is confusing) is a regulation to be issued by the regulator. In most countries in addition there are usually general (meaning not just for audiovisual media) laws that touch upon advertising issues, like consumer protection law or marketing laws. It is not part of this analysis to look at such other laws but it is important the legislative picture is coherent. The broadcasting legislation should contain what is special for this type of media.

The provisions on advertising in Article 28 are to a large extent taken from the Directive and thus in line with it. In addition there are more provisions on good standards of advertising. There is no problem with these standards as such but as with any detailed prescriptions on content one must be very vigilant that this is not too intrusive which it could be if a wide interpretation is given to the various notions (like offence to political beliefs – satire is quite common in advertising and should not be prohibited). It is also hard to say especially in an advertising context what it is that may promote violent, aggressive and/or anti-social conducts or attitudes or stimulate conduct damaging the environment. The provisions in Article 29 on protection of minors are in line with international standards, although also here there may be issues of interpretation. The mentioned regulations of the broadcasting council will assist with this. The ban on advertising for certain products such as tobacco, medical products, certain alcoholic beverages and the occult (Article 30) are also in line with international practice and EU norms.

In Article 31 it sets out how the special Code will be made by the regulator. The possibility for others to demand a review is the same matter as discussed above – transparency and public rule-making is good but the regulator must be able to determine its own work. The Code will provide more details including on language use (Article 32).

The content of the Articles on sponsorship is also mainly taken from the Directive. What is important here is transparency and that the sponsor does not influence programme content. There are prohibitions on sponsoring by firms in certain sectors that are not allowed to

advertise. Such provisions in the draft Code follow international best practice. Special protection is in place for minors.

The next section is on advertising and teleshopping, primarily dealing with teleshopping. Also here international best practice as reflected in the text of the Directive is used. One of the important elements is that teleshopping is identifiable and separated from editorial content. There are also rules on details of how advertising spots are broadcast (so that they are separated from the other programming for example). There are special rules for different types of programmes. The proposed provisions are in line with (or even exactly like) the Directive although there is a lot more detail – some of which may fit better in an instrument of secondary legislation than the law as such. Persons like news presenters may not be used for advertising (Article 44) and useful or healthy habits like eating vegetables may not be discouraged (also Article 44). The law also contains (Article 45) general consumer protection provisions with a prohibition on misleading advertising. All in all the draft Code is very complete as concerns advertising rules. In some countries the broadcasting laws just concern those matters that specifically relate to broadcasting and there is general consumer protection and marketing laws for other issues. What is important is that there are the relevant provisions somewhere. Details will be added also by the Code elaborated by the regulator.

Article 38 stipulates how and when advertising spots and teleshopping can be broadcasted. These provisions also follow international norms, which tend to be similar with some small variations between countries. Public broadcasters are entitled to have advertising although more restricted than other broadcasters. The question if there is advertising on public broadcasters and to what extent is always debated. There is not one best answer from the viewpoint of international best practice although it should be kept in mind that a public broadcaster that is also financed from other sources than advertising may be able to compete unfairly with private broadcasters that lack other means of financing. The public broadcasters have other possibilities to build up their service and thus become more interesting for advertisers, taking more also of this income. Private broadcasters in many countries object to advertising on public broadcasters. At the same time, having advertising allows public broadcasters to get some income that does not come from state (taxpayer) money, which is positive. A balance of some sort should be sought and this can be what also this code proposes – more limitations on the advertising on public broadcasters.

The duration in Article 39 is something where there are certain rules in the Directive with some leeway for the states. The provisions in the Code are in line with these rules. The code contains rules on product placement. This has been a much debated issue in the EU. Here Articles 47-51 give details in line with EU requirements. There are special rules for advertising and teleshopping for alcoholic beverages. Various restrictions apply as well as a requirement to make an announcement about the danger of excessive consumption (Article 52-55). These rules are in conformity with EU rules, found in the Directive. What is more unusual although also in line with recommendations of the Directive is that there are also specific provisions for advertising and teleshopping for food, which among other things prohibits encouragement of excessive consumption of food (Article 56) and prescribes information requirements about healthy food (Article 60). The various provisions on food advertising (including rules for juices, fruit flavoured food etc) are quite detailed but this may be because general consumer protection and advertising rules are weak. This analysis does not include such other legislation, so it is only a presumption made here that there are no detailed provisions in other laws for general consumer protection and marketing matters. If this presumption is wrong and there is other legislation, one main issue is whether it is necessary to repeat details in this law. In any case, it is important if there are many laws on related topics that these are consistent and do not conflict or confuse the issue.

The general impression of especially the requirements for information on the food adverts do appear rather detailed and it may be asked if its required to have such detailed provisions rather than more general rules of what is needed, leaving the detail up to the producers of adverts and/or the broadcasters. The rules and requirements need to be proportional to the reason they are instituted. There are also rules for medical products and treatments including natural products, diet products and similar (Articles 61-69). This is something that many countries have restrictions on, but as in any case, the reasons and necessary extent of restrictions needs to be considered. Especially as there will be some rules also in the Code to be drafted by the regulator, one can really ask if there is a need for such level of detail in the law. In practice it would be so that the makers and broadcasters of adverts have nothing much to decide as everything will be set out in law. Warnings and announcements for adverts for medicines and similar as well as rules on how they can be advertised are common and to a large extent follow from EU law. What is questioned here is the level of detail in a law.

Secondary legislation (that can be changed more easily) would appear a more suitable place for detailed provisions.

As many of the rules (like those for weight-loss and dieting products, Article 68-69) appear to be directed more at the general way such products can be presented it is questionable if a broadcasting code is the best place for all such details. These should presumably be the same or at least very well coordinated with rules for how such products can be presented in shops, in printed publications (directed advertising and printed media adverts) and so on. The Broadcasting Code should be clearly focused on provisions necessary for the broadcasting of commercial communications.

Also for advertising and teleshopping concerning certain professions, there are detailed rules (Articles 70). Here also the question arises if the main concern here is actually the broadcasting part of the matter or if perhaps other legislation should regulate how different professions can advertise themselves.

For political advertising a reference is made to the Election Code (Article 71). This is quite common. It varies between countries, if political advertising is allowed and if the rules are in the broadcasting laws or election laws. However it is done, there should be coordination between the laws. Having rules in the election legislation may in some ways be better as the broadcasting political advertising issue is part of the general political campaign matters.

The final Article in the very long and detailed section on commercial communications, Article 72, stipulates that there may also be other forms of commercial communications and these have to be in conformity with the Code to be issued. The Article points out that the lack of certain regulations in the Code does not mean commercial communications are prohibited. This is good – the basic presumption in any law must be that anything that is not explicitly banned is permitted. With the amount of detail in the draft Code it is generally questioned how even more detail can be set out in the Code to be drafted by the regulator without totally over-regulating the issue.

<u>The Broadcasting Council</u>

Chapter IV concerns the regulator, the Broadcasting Council. The mission is well set out in Article 73:

The Broadcasting Council is the guarantor of the public interest in the area of broadcasting and has the mission to contribute to the development of broadcasting in conformity with the principles of audiovisual communications provided for in this Code, with the international norms and recommendations concerning this area.

The autonomy of the Council is stressed in Article 74. It is given the right to be consulted for legislation and it is given a role to enforce international conventions. This is positive as the regulator should have a central role in all aspects of broadcasting regulation.

Article 75 lists the competences. It includes licensing and control, clearly pointing out that control of programmes is made only after they have been broadcast, which is a very important principle against censorship. The regulator also has a role in assisting to solve disputes, in keeping records, applying sanctions, cooperating with other regulatory organs and European institutions. It can conduct research as well as ask for information from broadcasters. It ensures the transparency of tariffs and conditions for the utilisation of the audiovisual media services as well as the transparency of its own activity. It independence is clearly stated as well as its role in promoting pluralism. All in all, the competences listed in the Article conform to those that a broadcast regulator should have.

If the list of competences is good, there is more room for improvement as concerns the structure (Article 76). The Broadcasting Council is composed of 5 members, whereof four are appointed by the Parliament and one by the President of the Republic of Moldova. There is an attempt to make the process to find members as transparent as possible and candidates are called for in an open invitation. The candidates participate in open debates and the process as such is administered under legislation on transparency in decision-making. The actual decision is made by a special committee of parliament. It is not clear from the draft Code how this committee is composed, under what rules it operates or how the decision in parliament is taken. What would be good is to have some guarantees that the selection and appointment of members of the council is not done following the usual political majority of parliament. If this is the case the council risks having a political colour, which should be avoided as it should be a professional body that is not suspected of having any political bias, it should be

able to operate well even if there is a change of government and it should be trusted by all actors in the field. This can be achieved by for example not allowing the deciding committee to be appointed not according to normal voting rules but allowing also for representation of the opposition. There may also be provisions for how candidates are selected by civil society organisations or similar.

The requirements for candidates are good. The "penal antecedents" may not be clear enough, it is good in itself but such requirement should not be too wide as minor offences should not for all time disqualify a candidate.

The statement in Article 77 that the members of the Broadcasting Council are guarantors of the public interest and shall not represent the authority having appointed them is good. The period in office of 7 years is quite long. On the other hand two consecutive terms are not allowed. It is more common to have a period of four or five years, renewable once, and this would allow for a slightly longer period (good for continuity) but only if the member performs well and wins re-election. However, there are no international rules as such on this but it is up to each country. It would be good to stagger appointments so that not all members change at the same time. It is in line with international standards that it is difficult to remove the member. Also provisions in Article 78 on incompatibilities with being a Member are generally in line with best international practice.

What is very important as there already is a broadcasting regulator is to have transitory provisions, so it is clear how the change to a different council shall happen (see Article 136).

According to Article 79 the chairman is appointed by the President of the Republic. It is not clear whether this person is selected from among the members, which should be the case. If it not, the qualifications for this person are not clear. In any case it is not advisable that the President should have this role, which would appear to fit better for the Council itself, to avoid any impression of politicisation. The procedure for electing the vice chairman is better: the vice chairman is elected by open or secret vote by the majority of the votes of the members of the Broadcasting Council, for a four year term. It is questioned why it is relatively easy to dismiss the vice chairman. He/she may be dismissed upon the proposal of any member of the Broadcasting Council by the vote of the majority of members.

Article 80 on remuneration indicates that the members are full time (or nearly in any case). Many broadcasting regulators have elected and non-employed boards or councils in addition to the employed, specialist staff. This allows getting expertise and a different objectivity than that of employed people. Such members can be remunerated for their work but not for full time work. They may also hold other work like academics or similar.
In general the impression of the draft Code is that it is very detailed. Every country has its own tradition of law-making and this varies also between EU Member States. However, without infringing on the legislative traditions of a state, there are benefits of having somewhat less detail in a law. Laws are more difficult to change than secondary legislation and details can thus be in such other acts. Such acts may also allow a more flexible formulation where things can be described and explained in a way which does not necessarily fit in a legal text as such.

The Broadcasting Council is rightly given the right to develop its own regulation of organisation and functioning (Article 81). However, this said, the draft Code goes on to give a lot of detail. Although transparency as such is positive, for a body like the Broadcasting Council that takes decisions in individual cases and that has to handle secret material (like business secrets) it is not good to have all meetings and all parts of meetings public. This may make broadcasters and others reluctant to share all information. The Council decisions should be public and it should have as much openness as possible, but it should also be possible to have closed meetings or parts of meetings, when the Council so decides. Wide publication of decisions including on the web-page is very good and important.

The fact that the Council issues an annual report, which is debated by Parliament in a wide and inclusive manner is positive (Article 82). At the same time, it is to be hoped that the possibility for Parliament to rather easily reject the report and thus make the chairman have to resign is not abused. The debate and motivation for rejection must be thorough. The Broadcasting Council and the chairman must be able to carry out their work and there is again a risk of politicisation.

Financial independence for a regulator is another important angle of independence as it would otherwise be possible for political forces to influence what should be an independent

regulator by decisions on financing. Thus a long period for financing decisions (as in Article 83) is positive. Whether the ratio for what must be covered by licence fees and grants is realistic it is hard to say. Also here transitory provisions are important.

The broadcasting council is in charge of monitoring (supervision and control), Article 84. For this it has power to request information, make inspections, ask for recordings and so on. All this is important and usual controls of law-enforcement should apply. The Council can act ex officio and on complaints. This is in order, the activities should gradually move to more and more complaints based. The content of Article 84 is in fact a more or less complete procedure for handling cases, something that ideally could be in a separate document issued by the regulator rather than in great detail in the law. The law should contain the minimum procedural guarantees and powers for the regulator. The time deadlines in the Article are positive in that they make sure decisions are passed quickly and without undue delay. However, with all administrative decisions there may be delays for legitimate reasons (extra complex cases which need special investigation) so a certain flexibility is needed.

Article 85 gives the details on sanctions. These should always start with a smaller sanction, preferably a warning, and increase with gravity, for repeat offences and so on. The regulator should have discretion within a general framework to decide on the sanctions. The method employed here with prescribed sanctions per article does not appear to allow such discretion. For many of the violations where now a fine is obligatory, it should be possible to just give a warning for a first offence. Also the amount of fine or other sanction only depending on offence does not permit the very many various matters that can be relevant to be taken adequately into consideration (even if the Article also points to some such matters that should be considered). A short list of available sanctions with a statement that they shall take all matters into consideration perhaps coupled with guidelines from the regulator should be sufficient. As for exhorting to public violence or similar, here it must be kept in mind that presumably there are criminal provisions in criminal law for such matters and the broadcasting regulator is an addition to this and should fit the other provisions.

The right to appeal is very important, it follows from the European Convention on Human Rights (Article 8 ECHR) that there should be such a right. It is not clear what the recommending decisions referred to in Article 86 are but what is essential is that any negative

decision may be appealed in an independent court or similar independent instance. As for details on suspension or not, as the Article refers to other laws, there are presumably provisions in other laws so it must be asked if it is needed to add them here. There is a danger in repeating the same thing in many laws as this may lead to confusion if laws are not all amended correctly at any time of amendment. Such problems can easily be avoided by just referring to another law without repeating its content.

Article 87 contains very important provisions on cooperation with other authorities. It is up to each country, including for EU Member States, to decide if to have a converged regulator or different regulators for different areas of information and communication technologies, competition and other related matters. However this is organised, close cooperation is needed between authorities as there are so many areas where questions converge. The provision that agreements will be made and published means that the cooperation should be known and the means of ensuring it transparent. At the same time, even if the Article refers to agreements, it also contains a lot of detail. Like for other parts of the law, it appears as if too much detail is in the law. If there will be agreements, some of this could presumably be regulated in these agreements.

Licensing

Chapter VII deals with licensing. Article 88 provides that broadcasters and service distributors (for retransmission) need a licence for audiovisual media services. The language of the Article is very complex. What can be distilled from the complex text is the need for licences as well as the rule that contests will be organised if needed. Exactly in which circumstance the contest will be held for the terrestrial digital licence (Article 88.2) is hard to understand. In a digital system there is a difference between licences (or general authorisations) for content and licences for the transmission. For content providers there should be a system for selecting what content gets on a transmission system. This can be done by the regulator or in a different manner like by the transmission platform itself.

It appears from the Article that there are different types of licences and there may be different bodies involved. If this is the case, this is not in line with best international practice which foresees that an applicant should not have to go to more than one place and the licence should contain the various needed parts. The cooperation between authorities as stated in the

previous Article should take care of any coordination. The public registry for licences as prescribed is good. However, the last point about special regulations for services broadcast in the internet gives rise to some concern. Internet should largely be unregulated. As the point refers to that regulations shall be made, it is not possible to comment on these in detail, but the principle of freedom of internet should not be compromised.

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Article 89 mentions different types of licences. In modern European practice only services that use a limited natural resource such as frequencies needs a licence whereas other services need a general authorisation only. The difference between contest or no contest appears to reflect this difference, which is what Article 90 supports as well. For the retransmission licence it is not clear if it is by contest or not. In any event it is questioned if a large number of broadcasters only providing retransmission is a good use of the spectrum, although this appears to be a very common occurrence in Moldova.

In Article 90 there are provisions on digitalisation. Such provisions would fit better in transitory provisions as the matter is of a temporary nature whereas a law should stay in place longer. For digitalisation it is in line with best international practice that existing licence holders have a chance to get digital licences while at the same time new stations must get a chance as well. The nine year term is reasonable to allow for investment – it should be not too short but also not freeze the sector for too long. There should be a chance for renewal after a test. This follows from Article 94 but could be indicated even in this Article for clarity. In Article 91 the content of the licence is listed, in detail. The content is fine but the level of detail in the law is again questioned.

Article 92 gives all the detail on the contest for licences. The services that need an individual licence are in line with international best practice. The announcement content is fine but again excessively detailed. Criteria and basic requirement are very important and should be set out in law. Other more practical details may fit better in other regulations than a law. As mentioned, such other regulations can be amended more easily, leave some matters to the discretion of the regulator, allows for more description in the text with requirements. As for the issues that are to be taken into consideration when deciding who gets a licence, most criteria are good. It is not clear that the share of own or national/European programmes shall be a criteria for deciding as if the applicant meets the legal criteria, doing more than

necessary may not be the best selection criteria. If more than what the law says is positive, maybe then if more is needed the law should ask for more. For practical details such as deadlines, as mentioned elsewhere, the deadlines are good but some flexibility should exist. (This applies also to Article 93)

Article 95 introduces a very unusual concept of rent of a licence. It is very unclear why it would be needed. Licences or frequencies cannot be bought. They are given by the regulator for a limited time to someone who needs them to do something useful. If the holder no longer provides anything useful the licence could be given to another applicant. There should be no need for anything else. The conditions for annulment in Article 96 are fine and what can be used to liberate space for new users. This presupposes that there is evidence for the various matters so annulment is not used lightly.

Article 97 on free retransmission presumably means it is allowed (and not free as free of charge). The Article appears to follow the relevant European rules (the Directive and the Convention on Transfrontier Television) on the matter. However, the relationship between Article 97 and 98 (what can be done without a licence and what not) is not clear. If there is retransmission it is important to have proper legal agreements for it, as the draft code points out. Also the code correctly points out the responsibility for programme content etc. lie with the re-transmitter (Article 99). Article 99 also contains the must-carry obligation that is common in Europe for cable broadcasters and similar.

Article 100 deals with technical licence. This Article reflects a problem with this draft Code. It has already been pointed out that there should for applicants be just one place to go, one authority to contact. There should be **one** licence with the authority dealing with different parts of it. This important fact permeates the comments for also the next Articles. It is acceptable to have rules on modification as in Article 101 and on withdrawal in Article 102 but it should all be in the context of the one unified licence. Just as for any kind of technical or other licence the same applies for the digital licence (Article 103). Also such licences should be all part of the work of one regulator in a coherent system. At the same time here it is important to point out that in a digital system there are two separate licences, for content and for transmission – but each applicant just needs one licence as the licences are held by different entities. Article 103 is appropriate and the detail will be in a separate document.

Article 104 on supervision leaves it unclear who it is that is responsible for the supervision. It must be clear that someone does this but it is possible to delegate it to some private entity or existing public body though an act of the regulator – as long as it is clear who does what and that someone does take such a decision.

The next section deals with property or ownership issues. The first Article in the section, Article 105 on ownership concentration deals with the important issue of limiting concentration. Here is an area where there are special reasons in the broadcasting area (as compared with other areas of the economy) for specific rules. The limitation of concentration shall be seen not just from the economic viewpoint as in competition law but also from the cultural and diversity viewpoint. The Article includes various competition law rules. It is important that these are coordinated with competition law and the work of competition authorities. As for the restriction for owners and spouses, it may be questioned if not more persons like also children could be covered to avoid it being too easy to circumvent the rules. Generally the restrictions for certain persons as well as the transparency requirement are in line with best international practice. Details vary between countries.

Article 106 on the other hand is difficult to understand or see the legitimate purpose for. It goes to great length to explain what a dominant position is. It is correct in the assumption that this in the broadcasting sector is something else than in general competition law. However, it is not prohibited in competition law to be dominant, only to abuse that position. As there are special ownership restrictions in broadcasting the risk of this can be acted on through such rules. What the effect and need of this Article 106 is remains unclear. It cannot be prohibited to have a big audience! What domination it is in Article 108 that needs to be remedied must also be formulated so that this clearly relates to ownership restrictions and not to the quota of audience having gone up because more people tune in to a particular station.

Public Broadcaster

Chapter VI deals with the public broadcaster. It is quite common to have these provisions in a special law, but there is no requirement for that and each country decides it itself. There are in fact benefits from having broadcasting related matters in one law. The term used for modern public broadcasters is public service broadcaster and this is the preferred term as it

shows it is not just a publicly owned broadcaster but one that has a special role. (It is possible that it is a translation issue). The mission statement (Article 109) is in line with European practice as is also the list of activities (Article 111), although there should be no need to list what is not the object of the public service broadcaster.

Article 112 rightly stresses the editorial independence of the public broadcaster. This is reflected in the different decisions that can be adopted by the broadcaster.

Article 113 lists the tasks. The tasks are in line with what public broadcasters usually do. The tasks and the list of objects (activity objects) appear to converge or overlap to some extent so the different aim of the different Articles is not always clear although the idea presumably is to differentiate between aims and objects and the more practical duties. Perhaps the objects (Article 111) could more clearly be expressed as such rather than as activities. The non-commercial advertising is an interesting issue and raises the question if not some more detail on who can request this is needed.

In Article 114 the public broadcaster is given various rights in the public interest. Also this is in line with best European practice.

Article 115 institutes a managerial committee. If in other parts of the law there is generally too much detail here there is very little, for example the period in office of the Committee is not set out but to be determined by the general manager. Also regarding the other persons (point 5c) is not clear if these are determined persons or the general manager decides this. The managerial committee should be clear from the code as much as possible. The tasks in Article 116 for the committee and Article 117 for the General Manager are quite clear and will be supplemented by a regulation. There are quite detailed provisions on the contests that shall be arranged for various positions. There is an attempt to engage civil society and academia. This is good and it is important the requisite rules are made so that it also works in practice. As for the Manager, the only question mark for Article 117 is among the grounds for dismissal the failure of fulfilling the Task book, as this may be a rather subjective decision. It does not have to be a problem however, if the decision is take in the proper manner.

The term “taskbook” (Article 118) is not known in most European jurisdictions but presumably it is what would commonly be called a statute. The substance appears in order provided the logging of it with the legislature is just a formality and does not jeopardize the independence of the broadcaster. Article 119 sets certain limits for property of the broadcaster. These rules perhaps follow from general rules on public property but are rather detailed and may infringe on the independence of the broadcaster, it may also be questioned if this could not have been expressed in another form than the law. The fact that Article 120 states what money can be used for what purposes further restricts the independence. The broadcaster should be able to administer its own budget. As for Article 120 a further comment is that if the public broadcaster is allowed to have advertising and thus competes with private broadcasters it appears unfair that these also have to pay a fee to the public broadcaster.

The subscription fee described (Article 121) and the way to collect it via the electricity bill is a traditional way to do it in many countries. It does not necessarily work very well and several countries have abolished this system or discuss it in favour of other funding mechanisms. This may be a longer term idea to develop but it depends on how well the system functions today. What is not good in the way the rule is worded is that it refers to tax payers and appears not to be linked to possession of a broadcast receiver. If this is the case, it is in fact a regular tax rather than a subscription fee. If it is a subscription fee there must be some way of not paying it, if one does not possess a receiver. From Article 121 this possibility is given, which is good, so the terminology should be changed (or maybe it is a translation issue). However, as the details are in the Fiscal Code there appears to be some confusion if this is to be seen as a tax or something else.

In Article 122 the Supervisory Board is set up and its constitution mentioned in Article 123. There shall be further regulations with more details. It is a good attempt to involve civil society. There are no details on the special parliamentary commission but it would be best if this included representatives of all parties and was not necessarily composed according to regular voting rules. For the qualifications, in the age point there is presumably a typing or translation error, as the meaning presumably is that the person does not reach retirement age but is between 25 and this age. As mentioned before in a different context, the penal antecedents should only include more serious matters so a traffic offence for example does

not forever exclude someone. The staged appointment process is good as are the disqualification grounds (Article 124).

The tasks in Article 125 are in line with best European practice. For the most part the organisation and functioning (Article 126) are also thus in line, although the comment made in a different context above about all meetings being public may apply also here (even if to a lesser extent than for the regulator that deals with more business secrets and similar). For the broadcaster, personnel matters may be such that should not be aired publicly. There should be a requirement on a minimum amount or frequency of meetings. Point 14 presumably means appealed (rather than sued) and this is a good rule but it may be hard to see who is impaired by a decision so the courts may have issues of admissibility to deal with. The court and the procedure to be used should be referred to in the law unless this is clear from other general legislation in the country.

In Article 128 the use of the word corresponding legislature are somewhat confusing, which presumably is a translation issue. The principle of parliamentary control through submission of reports is good.

A transitory period for more independent works (Article 129) appears a good way to achieve this goal.

Community Broadcasters

In Chapter IX the concept of community broadcasters is introduced. This is common in some countries but the concept is not known everywhere. What is important in order to know if there should be such provisions is if there are some special rules and special reasons to have such broadcasters. Only if there is such a need should special rules be made. It appears (Article 132) that the broadcasters can use frequencies licensed to others. This is more understandable than the earlier renting of frequencies but nevertheless also this means that there will be various users of frequencies apart from the ones that based on licences can be the ones expected to be using a frequency.

The point of a community broadcaster is that it has a strong link with a community group. The detailed rules on the community broadcasters may not always be suitable for this

(Articles 130-131, 133). Furthermore the community broadcasters are also allowed advertising (Article 134) which encroaches on the market left for private broadcasters even more. Community broadcasters are given other advantages so also compete unfairly with commercial broadcasters.

Final Provisions

The final provisions contain transitory rules, as is important. These do not appear very clear and may not ensure a smooth transfer in all cases. Any unclear elements must be avoided. The provisions do not clarify what happens if the deadlines are not met.