Organization for Security and Co-operation in Europe
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COMMENTS ON THE NEW VERSIONS OF THE DRAFT LAW ON MEDIA AND THE LAW ON AUDIOVISUAL MEDIA SERVICES OF THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

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Introduction

This report comments on the amended versions of the draft Laws – the Law on Media and the Law on Audio and Audiovisual Media Services - that previously were incorporated in one draft law, the draft Law on Media and Audiovisual Media Service of the former Yugoslav Republic of Macedonia. This report is based upon the initial report commissioned by the OSCE Representative on Freedom of the Media in May 2013, an additional report in June 2013 following some amendments to the draft law as well as a meeting in Vienna on 10 July 2013, in which the draft law was discussed with the responsible Minister as well as officials. This short report does not repeat comments and recommendations made in the previous reports, but highlights any remaining concerns in the new drafts. The reader should refer to the original (May) report for statements on the standards applied and the basis for the recommendations made. This report is based on a translated version of the new draft Laws, provided to the author by the OSCE as well as the responsible officials of the ministry.

General comments

The previous draft Law on Media and Audiovisual Media Service has been split into two laws, a Law on Media (hereinafter "the Media Law") and a Law on Audio and Audiovisual Media Services (hereinafter "the Audiovisual Law"). One of the previous comments was that the draft law was long and complex and by having all matters in one law, it gave an impression that all media were dealt with in the same manner, even if there should be different rules for different types of media. From this viewpoint the division into separate laws is positive. However, it is still essential to ensure that print and electronic media are not overly regulated, as the reasons that exist for regulation of audiovisual media do not apply to other forms of media.

The Media Law is short, whereas the Audiovisual Law is still rather long. It was explained in the meeting that in the national legal framework, matters need to be in law that in some countries can be in secondary legal acts, which explains the length of the law. In any case, each country has its own legislative style and there is no uniform international standard, so this matter must be made in the way suitable for the country.

In general, many concerns have been taken into consideration and improvements made. Even if the basis for the analysis is further explained in the first report, as mentioned, it may be repeated here that many comments made are recommendations based on best international practice rather than binding obligations, which means that there is flexibility in exactly how to interpret such standards as best suits the country in question. This report highlights where there is still room for improvement or where additional question marks arise.

Law on Media

The Media Law is short and deals with issues for other media (other than audiovisual media) as well as with some general issues that are relevant for all media such as freedom of expression, the rights of journalists and protection of minors. The references to self-regulation that threatened to blur the distinction between self-regulation and formal regulation have been deleted, which is positive.

The Media Law defines journalists, something that has been pointed out in previous reports as unnecessary and was discussed during the meeting at some length. When looking at the current definition and at how the term is used in the Law, the current definition includes any relevant persons and does not include too many. There is likely to be discussions on the definition in practice - as with all legal terms - as the question of who is a journalist is a moot point in the modern media, but in general the current definition is acceptable. As for Article 11 on the rights of journalists, this reviewer has suggested to delete this as it is either superfluous (stating rights that journalists have in any case) or could give journalists rights in excess to what they have according to normal employment or contractual principles. The new Article has been amended and improved. Even if this reviewer would still prefer to delete it, in the meeting the reasons for keeping the Article were explained and with that in mind, there is no objection to it, as it in its current form does not violate any rules or principles.

The freedom of expression provision was improved in the previous draft (as regards possible exceptions) and has been further slightly amended; it is in line with international standards. A new Article 4 with special prohibitions has been added (national safety, calls for armed conflict etc.). The reason for adding this Article is not clear. Although the content of the Article is in line with international practice, presumably what is mentioned here is already prohibited under other laws so the need to re-state it here is not evident. Even re-stating existing limitations in a Media Law may have a chilling effect and gives the wrong impression: that there are special restrictions on media. What is said here is illegal for anyone, through media or otherwise, and does not need to be repeated in this manner.

One of the earlier comments regarded the need for registration of all types of media. This has been deleted and what remains is a business registration, which is not specific for just media but related to business activity. Article 5 read together with the definitions indicates that only media publication undertaken as a business activity is covered by these requirements, and the requirements are in line with best international practice. Paragraph 4 of Article 5 stipulates that the competent regulatory body, the Agency for Audio and Audiovisual Media Services, shall publish a list of media publishers on its website. This is understood to be the list they obtain from the business registry with no additional information or requirements for media publishers to provide any additional information. Thus there is no objection to such a list. The only question on Article 5 is a legislation-technical question related to paragraph 6 of Article 5: if this Law can obligate the Central Registry in this manner?

Given the discussion on what has to be in law and what can remain in other acts in the national system, the previous comments made on excess of detail (e.g. on editorial boards) can be withdrawn and there are no other objections to these provisions. The only question is on paragraph 3 of Article 10 and the reference to respecting the “professional rules of journalism according to the Law on Civil Liability for Insult and Defamation” as the professional rules should have a wider application than just in relation to possible insult and defamation.

Article 13 is not clear on a couple of points. The editor-in-chief is always ultimately responsible which makes paragraph 2 unclear and paragraph 3 mentions a possibility of indemnity without saying according to which law (with no more detail in this Law). The suggestion would be to strike out all of Article 13 and leave this to contractual relations and professional standards. The suggestion to delete this Article was made in the first report and this suggestion still remains.

As for the information requirements in Article 15, this is in line with international practice but it is worth stressing that it is important that the regulatory body, when making its form, takes into account modern means of providing data and follows the principle of proportionality in its requirements.

On the right of reply (Article 17), the linking of this important principle to the Law on Civil Liability and Defamation is unfortunate (as was said in the initial report) as this right should have a wider application as a first means of redress, normally without need to resort to any lawsuit. It would be better to reformulate the Article to show that the right of reply is also an independent right, not just in cases falling under the Law on Civil Liability and Defamation.

The regulatory body, the Agency for Audio and Audiovisual Media Services, is given a supervisory function over some of the obligations in the Law (as per Article 18). The provisions this applies to are not considered excessive. At the same time, it may be pointed out that in many countries with a free media there is no regulatory body with competence over printed media (and electronic publications) but this is left only to self-regulation or other general organs (police, courts, consumer and competition protection agencies, etc.). Only audiovisual media is handled by the regulator. This does however vary between countries and provided the Agency interprets its role strictly, the proposed situation is acceptable from the viewpoint of freedom of the media. It is essential that the supervision is restricted to the matters in the Articles listed in Article 18, which includes no possibility for content control. This – albeit limited – role for the Agency in relation to other media than audiovisual is necessary, could however be considered as there is a risk of the perception that the Agency has excessive powers also over printed and audiovisual media.

In the penalty provisions, it would be better to include words like “up to” 2%, up to 3000 Euro and similar, to give the Agency discretion to also give lower fines, for first offences of a less serious nature. It is also presumed they can always decide to start with a warning (for example on violations of Article 6 on protections of minors a warning may often be enough to improve future behaviour) although this is not clear from the provisions. Also, it is not clear if always both the legal person and the authorised physical person (see paragraph 2 of Article 19 for example) shall be fined and in that case why? This in most cases would be excessive. As has been stated before, sanctions should always be applied in a gradual manner – starting with a warning and moving on to more serious sanctions. When discussed in the meeting, there was agreement on this point but in the law it still remains unclear. Article 23 of the Audiovisual Law mentions different possible sanctions, but apart from this in the two laws the situation remains somewhat unclear – even more so actually with these absolute numbers in this Law. This would be an area where re-drafting to make the step-by-step implementation coupled with clear proportionality of the sanctions would be valuable.

Law on Audio and Audiovisual Media Services

The Audiovisual Law largely follows the provisions in the Audiovisual Media Services Directive (AVMSD), for example in the definitions, which is good. Some adjustments have been made in this new version, partly translation issues. The Law is long and detailed, but as mentioned above it is a feature of national legal drafting style to have in a law some elements that in many countries can be in secondary legal acts. This includes for example some operating principles of the Agency, but as the content of the provisions is good, this style of legal drafting is also acceptable.

What needs to be looked at critically by the drafters is if all provisions incorporated fully suit also a non-EU member. It appears as if sometimes the adoption of provisions of the AVMSD results in the matter being a bit unclear for non-EU countries. This applies to the definition of European works (is this actually already of relevance for this country?) as well as to e.g. Article 45 paragraph 2 and 3.

As to the competence of the Agency (Article 6) and its duties (Article 18) it may be good to add the words "...or any other Law" to the last point, as also the Media Law gives some tasks to the Agency. The remuneration of the members of the Council still appears rather high, as pointed out earlier.

The right to nominate Council members was a major topic of discussions in the meeting between the OSCE experts and the relevant officials. Some amendments have been made, to have a more diverse set of nominators, including the Bar Association and the Interuniversity Conference. The change is positive. There is no one formula for how to find potential members or what organisations should have the right to nominate. What is important is that there is a real possibility as well as a perception that members may represent different interests. In addition to the nomination process (which includes an open call for candidates), requirements are made on the members. In total, the proposed system is acceptable. The actual functioning of the process is however not clear, as it is not said how many possible candidates each nominator should propose to be selected from. As the nominators propose and the Committee for Elections and Appointments of the Assembly compiles the proposal for the Assembly, there must be more than seven persons for the Committee and the Assembly to select between, or otherwise they can just rubber-stamp the names of the nominators or if they do not accept a name, the process fails. The Law and/or more detailed rules for the process in some other form should clarify that each nominator proposes two or three names for each "place" on the Council they have the right to nominate for, from which names the Committee for Elections makes a choice and the Assembly selects. Details of the process can be in some other act, but given the amount of detail generally in the Law, some reference to the process should be made in the Law.

The term of the members is seven years without possibility for re-appointment and there is no staggering of the appointment process. Previous suggestions in this respect have not been adopted, but it can be stressed that such suggestions are not obligatory and the current process is not contrary to international practice. However, this reviewer would still suggest to limit the period of some of the initial members so that in future there are partial replacements of the members (maybe first after five years) rather than a full change of the entire body at the same time.

A concern voiced in the earlier reports was that the Agency would have powers of control also over printed and electronic media, which should not be the case. This is mentioned above in the comments on the Media Law. However, the new Article on administrative supervision in this Law appears to give excessive powers of supervision over all media. The rules on monitoring and

supervision have been changed. In many ways the changes are improvements as it is now more clear that what is intended is the kind of monitoring that is in line with international practice, which is moving toward more complaints-based monitoring. However the Article 29 on administrative supervision gives rise to some concern, as it is not clear what kind of supervision that can be included here and as it applies to media publishers it includes also printed and electronic publications. Such media should (as mentioned above) only be subject to very minimal oversight and not to any supervision that can be perceived as having a chilling effect on free media content. Although there is nothing here indicating any content supervision, the provision could still have a chilling effect if media publishers perceive this supervision as an intrusion in their freedom. The Article could most probably be deleted without depriving the Agency of the limited possibilities for control that it should have (and that could follow from other provisions anyway, linked to the special situations where it should perform certain control, see above under the Media Law) or otherwise be redrafted to be very clear on the limits of any supervision.

The reasons for the rather long and complex ownership restriction provisions were discussed at the meeting and although they are indeed complicated to read, there are no objections to the substance of the (unchanged) provisions. Provisions on jurisdiction for audiovisual communications, on commercial communications etc. are taken from AVMSD and there are no comments to these provisions. As for previously made comments on the complexity and amount of information required, which is not conductive to introduction of e-governance, this comment remains but it is accepted that the requirements made mainly follow from other existing legislation in former Yugoslav Republic of Macedonia and this Law alone cannot change such requirements, but this is something that gradually and generally will hopefully be simplified in the country. (This refers to for example requirements of notarised documents in Articles 73 and 76 and similar elsewhere). In substance the provisions on licensing are in line with best international practice.

The proportion of national works remains high (Article 92), which was explained as a cultural policy choice linked to means of financing. A small remark to this is just that such provisions will need revision if/when former Yugoslav Republic of Macedonia joins the EU.

Provisions on the public service broadcaster are in general good and in line with international standards. (The numbering of paragraphs in Article 113 in the translated version is wrong). The nomination of candidates is not changed substantially; attempts are made to introduce different viewpoints and organisations. As said above, there are no generally accepted formulas and this system appears appropriate. The same comments as above on the Agency apply as far as the procedure is concerned and number of nominated persons.

The question of funding the Agency from the broadcasting fee was discussed at some length at the meeting. There is not one international model in this respect, as is shown by different views of different international experts, so the unchanged provisions in the Law do not violate any international principles. As for the penalty provisions, the same comments as to the Media Law apply on the double fine for the legal and physical person, although here in the fines there is more room for choice on the size of fines for legal persons, which is good.