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**LEGAL ANALYSIS ON THE DRAFT CODE OF AUDIOVISUAL MEDIA
SERVICES OF THE REPUBLIC OF MOLDOVA**

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Executive summary

This Analysis examines the draft Code of Audiovisual Media Services of the Republic of Moldova (hereinafter – the Code).

The Code is aimed at creating the framework required for the implementation of the 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 (also known as Audiovisual Media Services Directive). This reference to the Directive expresses the political aim of the Moldovan legislator to adopt a legislative framework inspired by the rules and principles established by the European Union and applicable to the specific area of audiovisual media services, and particularly reinforced by the fact that Moldova signed an Association Agreement with the European Union in 2014. However, this legal analysis is only based on international and regional standards regarding freedom of expression and media regulation, but not on the abovementioned Directive, which needs to be seen as an internal or “domestic” norm of the European Union.

It is recommended to broaden up the aim and refer to what is probably the actual and most clear objective of the Code, specifically establishing a complete and comprehensive regulation applicable to the provision of audiovisual media services in Moldova, including the mission and organization of public service media and the role and attributions of the Audiovisual Council, as the independent regulatory authority of the sector.

Some of the definitions of the Code need to be improved in order for them to be fully in line with international standards, particularly those referring to autonomous public authorities and protection of national audiovisual area.

The purpose and scope of the Code also needs to be improved in order to provide legal certainty vis-à-vis the services that are actually included or excluded, particularly in the area of certain online services.

Provisions on local and minority language programmes also need to be amended in order to grant proper protection to minority languages in the Moldovan audiovisual sector.

Regarding hate and extremist speech, the Code needs to fully incorporate the case law of the European Court of Human Rights allowing only limitations vis-à-vis expressions that incite or justify violence, discrimination, xenophobia or any other form of intolerance.

As for content regulation, provisions on access to audiovisual media services, correctness of information, protection of minors as well as cultural responsibilities would also need a few recommended changes in order to be completely in line with international standards and best comparative national practices.

The analysis also contains a series of recommendations regarding the establishment of a more proportionate and clear licensing system, a more comprehensive regulation of community media, as well as better nomination and appointment procedures regarding public service media managerial and supervisory posts, along with members of the independent regulatory authority.

Summary of recommendations

- It is recommended to broaden up the aim of the text in the preamble by referring to establishing a complete and comprehensive regulation applicable to the provision of audiovisual media services in Moldova, including the mission and organization of public service media and the role and attributions of the Audiovisual Council, as the independent regulatory authority of the sector.
- The references made to “autonomous public authority” may instead use the adjective “independent” instead of “autonomous”.
- It is recommended that the definition of “protection of national audiovisual area” also incorporates a reference, as a limit, to the basic international principle that protects the exercise of the right to freedom of expression – “regardless of frontiers”.
- Regarding the subjects to which the Code does not apply, it is recommended to clarify and unify the terminology and concepts used in the text, as well as avoid its current contradictions.
- It is recommended to reconsider the provisions on local programmes by adopting a regulatory point of view aimed at protecting minority languages instead of the national official one.
- The prohibition affecting the transmission and/or retransmission of audiovisual media services which have the effect of restricting the freedom of expression is recommended to be removed, as otherwise it may lead to restrictive interpretations and the imposition of arbitrary restrictions.
- It is advised to have one single norm establishing the prohibition of censorship and defining it as any form of prior content control, restriction or limitation by the Government or any other public body or officials.
- It is recommended to introduce a more detailed regulation on protection of confidential sources in order to cover all media actors, establish possible exceptions, and indicate the procedure and State bodies entitled to apply them. Specific protection vis-à-vis so-called whistle-blowers is also recommended.
- The norm prohibiting programmes that “present apologetically totalitarian, Nazi and communist regimes, authors of crimes and abuses of these regimes, and denigrate their victims” is too broad and vague and falls short of international legal standards. It is recommended either to replace it with a precise and limited norm, or simply to remove it and subsume the finalities of the legislator under the general hate speech clause already present in the Code.
- Principles included in the Code to promote and protect access by citizens to audiovisual media services need additional safeguards to properly protect editorial independence and freedom of media outlets. It is also advisable to differentiate between commercial and public service media, the latter bearing the most relevant and cumbersome responsibilities in this area.
- The requirement of impartiality applicable to all kinds of providers may hinder the right of private media outlets to disseminate - truthful- information from the specific angle of their own editorial views, whereas the requirement of accuracy would rather be more related to media professionalism and responsible reporting. Therefore, impartiality - in addition to accuracy and objectivity – is recommended to be imposed solely on public service media.

- It is advised to clearly establish the need not to show the image or to identify minors in cases where they are associated with crimes (either as victims, witnesses, or perpetrators) or any other circumstance or event that might affect their physical, mental or moral development, image and reputation.
- It is advised to prohibit the dissemination programmes containing pornography or promoting violence only in cases where conditional access and age and identity verification systems are not in place.
- It is recommended that programmes that are likely to affect (but not seriously) the physical, mental or moral development of minors may be provided using other systems apart from conditional access, particularly content classification and airing time restrictions (watersheds).
- It is recommended to remove the provision imposing that all programmes transmitted in other languages shall be accompanied by translation into the Romanian language, or to reformulate it in a more proportionate manner.
- Provisions establishing that radio and music television services shall contain at least 30% of musical works in the Romanian language, including 10% of musical works originating from composers, performers and producers originating in the Republic of Moldova may require specific exceptions for providers specialized in very niche music genres, which either have no significant production in Moldova and/or incorporate no language (hip-hop, electronic music, classical music, etc.).
- It is recommended to circumscribe the licensing requirement to the provision of linear terrestrial broadcasting services solely, and to establish a notification system regarding the use of other transmission platforms.
- It is recommended to introduce in the Code adequate rules regarding the abovementioned process and criteria. In any case, these processes to adjudicate broadcasting licenses are recommended to either aim at granting access to single frequencies (which seems to be, apparently, the current legal scheme) or to full digital multiplexes.
- Article 28 establishes a series of limits vis-à-vis the legal regime of property of private media service providers. In particular, and among others, Rules establishing that commercial organizations financed in whole, or in part, from the State budget cannot be the beneficial owner of private media outlets are excessive. It is recommended to formulate such a provision in order to target only private companies financially and effectively *controlled* by State bodies.
- Prohibition vis-à-vis political parties and “socio-political” organizations, trade unions and religious cults owning private media outlets is disproportionate and is advised against. It is recommended to replace it with a norm, that would, for example, limit the possibility to obtain a national frequency, but permits the use of other transmission means. The same concerns would apply to provisions like those included in paragraph 8 of article 28, with regards to the possibility for such entities to hold shares, voting rights, or stakes.
- The Code needs a specific reference to the role of the regulator consisting of effectively monitoring and guaranteeing the proper and independent functioning of public service media outlets, according to the objective, mission and activities established in the law and any other relevant instruments.

- The Code needs to clearly state that any price or rate for the provision of the public media services should be cost-oriented, and should never represent or impose a barrier or a serious impediment for citizens in order to access the benefits of the public service.
- A wider regulation vis-à-vis community media in terms of possible formats and technologies is needed. In the cases of the provision of such services via the use of frequencies, international standards require that a part of the spectrum stays unallocated for the future use of this purpose.
- It is recommended that media service distributors are only subjected to the obligation of obtaining an electronic communications license or authorization and of notifying the Audiovisual Council about the number and denomination of services they provide, as well as the respective provider in terms of editorial responsibility. Provisions and requirements, such as obtaining the so-called “retransmission authorization”, or the possibility of being sanctioned for the mere retransmission of illegal content, need to be removed.
- Further requirements and professional qualifications need to be introduced vis-à-vis the position of the General Director of Teleradio Moldova Company, in order to guarantee a fully professional and efficient performance of his/her functions.
- The inclusion of loss of support of members of the Supervisory Board as one of the causes of the dismissal of the General Director of Teleradio Moldova Company is too vague and broad, and therefore needs to be eliminated or replaced with more detailed and objective reasons regarding lack of professional performance.
- The State budget allocations to fund the activities of Teleradio Moldova Company need to be a fixed 0,9% (the English version of the text is not completely clear on this matter).
- Further requirements (criteria) and professional qualifications also need to be introduced vis-à-vis the position of the member of the Supervisory Board of Teleradio Moldova Company (5 years of unqualified experience would still be too broad and insufficient to guarantee professionalism).
- A qualified majority vote of the members of the Audiovisual Council is recommended as a requirement to elect the members of the Supervisory Board of Teleradio Moldova Company.
- Further requirements (criteria) and professional qualifications need to be introduced vis-à-vis the position of a member of the Audiovisual Council, in order to guarantee a fully professional and independent performance.
- The final appointment of the members of the Audiovisual Council is recommended to require, in any case, a qualified parliamentary majority in order to properly guarantee their independence as well as the broadest consensus on their suitability.
- References to the competence of the Audiovisual Council vis-à-vis video-sharing platforms need to be clarified or removed.

Introduction

The present analysis was prepared by Dr. Joan Barata Mir, an independent media freedom expert, at the request of the Office of the OSCE Representative on Freedom of the Media.

This Analysis refers to the draft Code of Audiovisual Media Services in Moldova (hereinafter, “the Code”).

The structure of the comment is guided by the tasks formulated by the Office of the OSCE Representative on Freedom of the Media. These tasks include comments on the current version of the draft law by comparing provisions against international media standards and OSCE commitments; indication of provisions which are incompatible with the principles of freedom of expression and media; and recommendations on how to bring the legislation in line with the above-mentioned standards.

The Analysis first outlines the general international standards on freedom of expression and freedom of information and then presents those particularly referring to audiovisual media services. These respective standards are referred to as defined in international human rights treaties and in other international instruments authored by the United Nations, the OSCE and the Council of Europe.

Part II presents an overview of the proposed legislation, focusing on its compliance with international freedom of expression standards. The Analysis highlights the most important positive aspects of the draft law and elaborates on the drawbacks, with a view of formulating recommendations for the review.

Part I. International legal standards on Freedom of Expression and Freedom of Information

General standards

In Europe, freedom of expression and freedom of information are protected by article 10 of the European Convention on Human Rights (ECHR), which is the flagship treaty for the protection of human rights on the continent within the context of the Council of Europe (CoE). This article follows the wording and provisions included in article 19 of the International Covenant on Civil and Political Rights (ICCPR), and is essentially in line with the different constitutional and legal systems in Europe.

Article 10 reads as follows:

“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.”

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. It also presents broader implications, as the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy¹.

On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute and therefore may be subject to certain restrictions, conditions and limitations. However, article 10.2 ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law, b) the interference must pursue a legitimate aim included in such provision, and 3) the restriction must be strictly needed, within the context of a democratic society, in order to adequately protect one of those aims, according to the idea of proportionality².

¹ See the elaboration of such ideas by the European Court of Human Rights (ECtHR) in landmark decisions such as *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, and *Handyside v. The United Kingdom*, Application No. 543/72, Judgment of 7 December 1976.

² See for example *The Sunday Times v. UK*, Application No. 6538/7426 Judgment of April 1979.

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to the international legal standards extant in this area. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the right to everyone to freedom of expression and states that:

“This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards”³.

Standards with regards to audiovisual communication

General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights adopted on 29 June 2011, by the UN Human Rights Committee⁴, states the following (para 39):

“States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3.92 Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. <...> States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses”.

Paragraph 40 of the same document also establishes that:

“The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”

Similarly, the international rapporteurs on freedom of expression, including the UN Rapporteur on Freedom of Expression and Freedom of Opinion, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of

³ This document is available online at: <http://www.osce.org/odihr/elections/14304>.

⁴ Available online at: <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

Expression, have adopted several joint declarations which included relevant provisions and recommendations particularly focusing on audiovisual media services regulation⁵.

There is a valuable and solid interpretative jurisprudence in the CoE, established in the course of decades by the European Court of Human Rights, which also includes the provision of audiovisual media services in their connection with the right to freedom of expression and freedom of information. The case law covers areas including the responsibilities of the State in allocating proper frequencies (*Centro Europa 7 S.r.l. and Di Stefano v. Italy*, 7 June 2012⁶), legal certainty in the regulation of broadcasting (*Groppera Radio AG and Others v. Switzerland*, 28 March 1990⁷), non-arbitrariness in the process of granting a broadcasting license (*Meltex Ltd and Movsesyan v. Armenia*, 17 June 2008⁸), the need to avoid monopolies (*Informationsverein Lentia and Others v. Austria*, 24 November 1993⁹), or the need to properly protect the independence of public service broadcasters (*Manole and Others v. Moldova*, 17 September 2009¹⁰), among others.

Moreover, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have developed numerous recommendations and declarations that contribute to clarify, to establish and to develop principles, requirements and minimum standards regarding the effective protection of rights included in Article 10 ECHR, in particular vis-à-vis different aspects related to the provision of audiovisual services (including media pluralism and transparency or media ownership, protection of journalists' sources, public service media governance, remit of public service media in the information society, promotion of democratic and social contribution of public media, or the independence and functions of regulatory authorities, among others¹¹).

Last but not least, the European Convention on Transfrontier Television also establishes a common set of rules with regards to this specific media service among CoE member States¹².

⁵ See for example the latest Joint Declaration, adopted on 2 May 2018, on media independence and diversity in the digital age, available online at: <https://www.osce.org/representative-on-freedom-of-media/379351>

⁶ Available online at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-111399"\]}](https://hudoc.echr.coe.int/eng#{)

⁷ Available online at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57623"\]}](https://hudoc.echr.coe.int/eng#{)

⁸ Available online at: [https://hudoc.echr.coe.int/eng#{"fulltext":\["Meltex%20Ltd%20and%20Movsesyan%20v.%20Armenia"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-87003"\]}](https://hudoc.echr.coe.int/eng#{)

⁹ Available online at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57854"\]}](https://hudoc.echr.coe.int/eng#{)

¹⁰ Available online at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-94075"\]}](https://hudoc.echr.coe.int/eng#{)

¹¹ Available online at: <https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts> and <https://www.coe.int/en/web/freedom-expression/parliamentary-assembly-adopted-texts>

¹² Available online at: <https://rm.coe.int/168007b0d8>

Part II. Overview of the proposed legal reform

Content and scope of the proposed legislation

The draft that is the object of this analysis is titled “Code of Audiovisual Media Services”. The version used by this expert is dated 28 March 2018 (unofficial translation into English provided by the OSCE).

According to its short preamble, the Code is aimed at creating the framework required for the implementation of the 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 (also known as Audiovisual Media Services Directive, hereinafter, AVMSD)¹³.

This reference to the AVMSD expresses the political aim of the Moldovan legislator to adopt a legislative framework inspired by the rules and principles established by the European Union and applicable to the specific area of audiovisual media services. This political will is particularly reinforced by the fact that Moldova signed in 2014 an Association Agreement with the European Union (hereinafter, the EU) institutions¹⁴ which includes, among its objectives, “to promote political association and economic integration between the Parties based on common values and close links”, as well as “to support and enhance cooperation in the area of freedom, security and justice with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms”.

However, it needs to be underscored that this legal analysis is only based on the international standards mentioned above. The AVMSD is neither an international, nor a regional norm or standard vis-à-vis freedom of expression. It is solely an “internal” norm within the EU legal system which establishes a particular regulatory system to be necessarily respected only by member States (without prejudice to the possibility of such a system inspiring legal models adopted by other States, particularly those whose aim is to converge with the EU legal system).

The draft Code opens with a chapter on general provisions related to definitions and basic notions, as well as purpose and scope.

Chapter II establishes the principles of audiovisual communication, particularly focusing on freedom of expression, editorial independence, protection of confidentiality of information sources, protection of journalists, respect for fundamental rights in the provision of the audiovisual media services, access to media services, correctness of information, right of reply, protection of minors, protection of persons with disabilities, protection of the national audiovisual area, gender balance, cultural responsibilities, access to events of major importance, transparency of property of media service providers, announcements about state of emergency, state of siege and war, as well as protection of copyright.

Chapter III establishes the regulation applicable to linear audiovisual media services. This regulation covers areas such as organization, licensing, property, and limitations on ownership concentration and audience share.

¹³ Available online at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>

¹⁴ Available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L.2014.260.01.0004.01.ENG>

Chapter IV focuses on the regime applicable to public media service providers, including their mission, legal status, activities, editorial independence, and duties, whereas Chapter V establishes the main legal parameters with regards to the national public media service provider, in terms of functioning, organization, funding, and oversight.

Chapter VI institutes the norms applicable to community sound radio broadcasting service providers.

Chapter VII defines the role and responsibilities of media service distributors.

Chapter VIII incorporates the legal regime vis-a-vis the provision of non-linear audiovisual media services.

Chapter IX contains a set of rules and principles on audiovisual commercial communications.

Chapter X defines the role, responsibilities, membership, functioning and responsibilities (including sanctions) of the Audiovisual Council of Moldova as the regulatory authority in the area of audiovisual media services.

Chapter XI includes all the final and transitional provisions.

Analysis of the provisions of the proposal in light of applicable international standards

- Preamble

As previously mentioned, the preamble of the Code identifies the aim of the legal text, which is to create the framework required for the implementation of the AVMSD. The establishment of this aim is preceded by a declaration of adherence to “the European standards on freedom of expression and access to audiovisual media services”.

The legislature has thus adopted the legitimate political decision to take the EU model as the main guide to draft the provisions comprised in the Code. This political decision is not directly linked to any legal national or international commitment adopted by Moldova. For this reason, it is recommended to broaden up the aim and rather to refer to what is probably the actual and most clear objective of the Code, specifically establishing a complete and comprehensive regulation applicable to the provision of audiovisual media services in Moldova, including the mission and organization of public service media and the role and attributions of the Audiovisual Council, as the independent regulatory authority of the sector.

- Definitions

Chapter I includes a long list of definitions referring to the terms that will be used in the Code. The introduction of such a list at the very outset of the text needs to be welcomed as this will facilitate its interpretation and application. This being said, there are a few comments and recommendations to be made regarding some of the definitions included in this section.

First, the references made to “autonomous public authority” may be confusing as the legal administrative implications of the term “autonomous” are not completely clear, particularly in continental law systems. Therefore, considering the fact that this notion will be applied to institutions that need to be preserved from any form of political or economic influence, it is recommended to instead use the adjective “independent”. It is further recommended that said definition also mentions particularly relevant definitory elements of independence, such as financial independence and no subordination to the economic interests of any stakeholder beyond political actors. In fact, article 2 of the Code actually uses the term independence when referring to the status of the regulatory body and other supervisory entities. Therefore, the Code needs to be consistent in using this term throughout the document.

This section also contains a definition of “hate speech”. Considering the delicate implications of such notion in terms of freedom of expression, the aim of the Code to provide a clear and operative notion needs to be welcomed. In general terms, the definition included in the text would be in line with international standards in this area. However, the interpretation and application to specific cases will always require taking into account the need to avoid using this legal notion as a means of discouraging citizens from engaging in legitimate democratic debate on matters of general interest.

The definition of “protection of the national audiovisual area” refers to a set of measures “aimed at eliminating internal or external, intentional or involuntary factors, which prejudice or may affect the institutional, functional, structural, content, technological or other integrity of the reference space and creation of proper social environment for functioning of the national audiovisual area in legal, political, economic, cultural security or other conditions”. This will also be the object of further comments in this legal analysis, but it needs to be

stressed at this point that such provisions should in no way contradict the basic international principle that protects the exercise of the right to freedom of expression “regardless of frontiers”. In other words, it is recommended that this definition incorporates a reference, as a limit, to such an important element at the core of free expression.

- Purpose and scope

Article 2 defines the purpose and objective of the Code, as well as identifies the subjects to which the Code does and does not apply.

Paragraph 3 of this article refers to the latter by including a series of online services, such as “web services which do not compete with audiovisual media services, the audiovisual content placed on the site, which is only occasional and additional to the main purpose of the service”, and “web services providing audiovisual content that are not mass-media within the meaning of the objective to inform, educate and entertain the general public”. These exceptions are directly taken from the AVMSD. However, the application and adaptation of such general and broad exceptions have been particularly challenging for EU member States since their approval of the AVMSD. In fact, the European Commission had to directly engage in solving the interpretative problems that the text of the Directive has created at a moment when most websites incorporate an important amount of video content¹⁵. Therefore, rather than just replicating the broad, and progressively more difficult to apply and interpret, original text of the AVMSD from 2007, it is rather recommended to take into account the interpretative elements already elaborated by the European Commission itself or the European Regulators Group for Audiovisual Media Services (hereinafter, ERGA), in order to incorporate into the Code clear and applicable criteria in this specific area. In line with this, and in order to avoid further confusions, the implicit reference to video sharing platforms made in indent c) needs to respect the terminology and definition already included in the Code, rather than copying once again the literal words of the AVMSD.

With regards to the subjects to which the Code does apply, indent e) in paragraph 4 of article 2 refers to “video-sharing platform service providers under the jurisdiction of the Republic of Moldova”. This is in frontal contradiction with the provisions mentioned and analysed in the previous paragraph with regards to this kind of services.

- Local programmes and minority languages

Article 4 particularly refers to audiovisual local programmes, and attempts to establish a proper and clear definition of such notion. It also imposes on media service providers a series of obligations to transmit such programmes according to average daily durations (and depending on the territorial coverage of the respective provider). Paragraph 7 of the mentioned article also imposes the obligation, for certain providers, to transmit local programmes in a proportion of at least 80% in Romanian language. On the other hand, paragraph 8 establishes that “Media service providers, whose audiovisual media services are addressed to communities from administrative-territorial units in which an ethnic minority makes up a majority share, must transmit local audiovisual programmes in a proportion of at least 25% in Romanian language, as well as their own audiovisual

¹⁵ See the Evaluation and Impact Assessment available at: <https://ec.europa.eu/digital-single-market/en/news/avmsd-inception-impact-assessment>, as well as the reports and studies from different relevant EU bodies and organizations, available at: <https://ec.europa.eu/digital-single-market/en/reports-and-studies/75977/3466>

programmes in the language of the minority concerned”. Language quotas in order to preserve linguistic diversity in media are accepted by international standards as legitimate reasons to impose certain restrictions and limitations on the right to freedom of expression (particularly in the audiovisual sector). However, such restrictions must aim at providing some protection to minority and non-national languages, but not at guaranteeing the presence of languages with an official status across the whole country and therefore enjoying a preeminent position¹⁶. For that reason, it is recommended to reconsider these provisions by adopting a regulatory point of view aiming at protecting minority languages instead of the national official one.

- Freedom of expression

Article 7 of the Code refers to the right to freedom of expression in connection with the provision of audiovisual media services. Provisions included in this article aim at protecting the mentioned right and avoiding any form of illegitimate interference in its exercise through the use of audiovisual communication means. Therefore, the introduction of such provisions needs to be welcomed. However, the article contains a final paragraph which reads: “Transmission and/or retransmission of audiovisual media services, which have the effect of restricting the freedom of expression, is prohibited”. It is difficult to understand how the provision of media content (that is the exercise of the rights to freedom of expression and/or information) can at the same time restrict these very same rights. The actual wording of this provision is therefore vague and uncertain, and may lead to restrictive interpretations and the imposition of arbitrary restrictions. Therefore, it is recommended to be eliminated.

- Editorial independence and freedom

Provisions contained in article 8, aimed at protecting the editorial independence of media service providers, also need to be welcomed. However, the following should be noted:

a) provisions included in paragraph 2 and 3 are basically reiterative, and it would be advisable to have one single rule instead, establishing the prohibition of censorship and defining it as any form of prior content control, restriction or limitation by the Government or any other public body; and

b) it is perhaps obvious to establish that the regulation adopted and applied by the regulatory authority according to the law is not illegitimate. In fact, the text of the draft wrongly says that such regulation does not constitute an “interference”. However, it is actually a legitimate interference, provided that it respects national and international legal standards.

- Protection of confidentiality of information sources

Article 9 includes some valuable principles vis-à-vis the protection of confidentiality of information sources. However, a more detailed regulation would be advisable, regarding the need to guarantee the application of such safeguards to all media actors, in line with international standards¹⁷, as well as the specific regulation of possible exceptions (or lack of

¹⁶ See the provisions contained in the CoE Charter for Regional or Minority Languages, adopted on 5 November 1992, available online at: <https://www.coe.int/en/web/european-charter-regional-or-minority-languages> as well as the Guidelines adopted by the OSCE on the use of minority languages in the broadcast media (October 2003), available online at: <https://www.osce.org/hcnm/32310>

¹⁷ In a recent report, the UN Rapporteur on Freedom of Expression and Freedom of Opinion has clearly stated that “(l)aws guaranteeing confidentiality must reach beyond professional journalists, including

them) and the procedure and State bodies entitled to apply them, as well as specific protections vis-à-vis so-called whistle-blowers.

- Respect of fundamental rights

Article 11 of the draft Code refers to the need for audiovisual media services providers to respect the fundamental rights while exercising their activities. This is a particularly sensitive area, as media service providers are at the same time exercising the fundamental right to freedom of expression, which cannot be unduly restricted.

Most of the provisions included in this article are in line with international standards. However, indent c) prohibits programmes that “present apologetically totalitarian, Nazi and communist regimes, authors of crimes and abuses of these regimes, and denigrate their victims”. These provisions are excessively vague and broad, as they do not only refer to the apology of certain political regimes but also to authors of crimes, or even “abuses” of these regimes. To mention denigrating the “victims” (another very broad notion) is problematic too. In line with the case law of the European Court of Human Rights, limitations on speech related to human rights should not, in any case, stifle legitimate debates on matters of public interest, including here proper discussions on historical events. The Court only accepts limitations vis-à-vis expressions that promote or justify violence, hatred, xenophobia or other forms of intolerance. In order to make a proper assessment of such circumstances, the Court usually takes into account a series of factors, namely the nature of the statements, geographical and historical factors, and the time factor¹⁸.

The provision now under analysis is too broad and vague and thus falls short of the strict parameters set by the European Court of Human Rights (in line with relevant regional and international legal standards). It is recommended either to replace it with a more precise and limited norm or simply to remove it and subsume the finalities of the legislator under the general hate speech clause already present in the Code.

- Access to audiovisual media services

Article 12 contains a series of principles that promote and protect access by citizens to audiovisual media services. The Code establishes the need for such principles to be developed and specified by the regulator. Although access to media is an aspect that deserves a proper protection by audiovisual legislation, it would be advisable to introduce some safeguards in order to guarantee that this will not, in any case, impose disproportionate or non-justified restrictions on the editorial independence and freedom of media outlets. For this reason, it is also advisable to differentiate, in this article, between commercial and public service media, the latter bearing the most relevant and cumbersome responsibilities in this area.

- Correctness of information

Article 13 of the draft Code consists of a series of very detailed provisions to guarantee the

those who may be performing a vital role in providing wide access to information of public interest such as bloggers, “citizen journalists,” members of non-governmental organizations, authors, and academics, all of whom may conduct research and disclose information in the public interest”. Available online at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ProtectionOfSources.aspx>.

¹⁸ See *Perinçek v. Switzerland*, judgement of 15 October 2015: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-158235"\]}](https://hudoc.echr.coe.int/eng#{)

correctness of information provided through audiovisual media outlets. The provisions are quite specific and cover several areas directly related to reporting. These provisions are in line with international standards, although it is recommended not to use the term “impartiality” but rather “accuracy” and/or “objectivity” in different paragraphs of the article. The requirement of impartiality may hinder the right of private media outlets to disseminate - truthful- information from the specific angle of their own editorial views, whereas the requirement of accuracy is more related to media professionalism and responsible reporting. Therefore, the requirement of impartiality -in addition to accuracy and objectivity- is recommended in principle to be imposed solely on public service media.

- Protection of minors

Article 15 is dedicated to the protection of minors. The provisions that it contains are mostly based on the text of the AVMSD and best comparative practices.

That said, a few observations are needed in this area.

Paragraph 5 states that minors “shall not be used or exposed in the audiovisual programmes by parents, relatives, legal representatives, lawyers or other persons responsible for raising and caring for him/her, in order to obtain any advantages for them or to influence decisions of public authorities”. In line with the previous paragraph, and in order to provide proper and better protection to minors in line with international standards and practices, it is advised to particularly stress the need not to show the image, or identify minors in cases where they are associated with crimes (either as victims, witnesses, or authors), or any other circumstance or event that might affect their development, image and reputation.

With regards to paragraphs 6, 7 and 8, the following should be noted:

a) The radical and unconditioned prohibition of programmes “containing pornography or promoting violence” may represent an unjustified restriction of the right of adults to have access to such type of content. It is advised to prohibit the dissemination of these kinds of programmes only in cases where conditional access and age and identity verification systems are not in place.

b) Programmes that are likely to affect (but not seriously) the physical, mental or moral development of minors can also be provided using conditional access systems, but other systems are usually accepted as well by regulatory frameworks within EU member States, particularly in terms of content classification and airing time restrictions. Otherwise, only programmes suitable for all audiences would be allowed on open television, and the minors’ protection schedule established in paragraph 10 would make no sense whatsoever.

Cultural responsibilities

Article 19 of the draft Code regulates the duties and responsibilities of audiovisual media service providers in connection with reflecting the diversity of the national and European cultural space. This is, once again, a legitimate area for proportionate and adequate regulation. There are, however, two provisions that might need to be re-considered.

The first one is contained in paragraph 3, which establishes that all programmes transmitted in other languages “shall be accompanied by translation into Romanian language (duplication, insonification and/or subtitling)”. This is a very cumbersome obligation, which

may be difficult to fulfil by many small local and minority-addressed media outlets, and therefore does not seem to respect the principle of proportionality. It is also needed to refer again to the observations previously made with regards to the need to protect minority languages rather than the national official one. It is consequently recommended to remove this provision or to reformulate it in a more proportionate manner (as in the case of the adoption of technical measures to facilitate access to media by people with disabilities, included in article 16).

Second, paragraph 5 states that “Sound radio broadcasting services and music television services shall contain at least 30% of musical works in Romanian language, including 10% of musical works originating from composers, performers and producers originating in the Republic of Moldova”. This can be a positive measure to promote local entertainment industry and artists and is probably inspired by similar provisions present in other legal systems (notably in France and some regions of Spain). However, it is recommended that the legislator confirms that the Moldovan musical market has indeed the capacity to serve providers with a sufficient and varied offer permitting to effectively fulfil such an obligation. On the other hand, specific exceptions also need to be introduced for providers specialized in very niche music genres, which either have no production in Moldova and/or incorporate no language (hip-hop, electronic music, classical music, etc.).

- Regulation of linear audiovisual media services

As previously mentioned, Chapter III of the draft Code is devoted to the regulation of linear audiovisual media services, that is to say traditional or conventional radio and television services.

A few observations need to be made with regards to these provisions.

Article 24.4 of the Code establishes that all linear providers are to get a broadcasting license to undertake their activities. This general requirement would not be in line with the principle of proportionality and best comparative practices. Licensing as an *ex ante* control for the provision of audiovisual services would be justified in cases where the prior intervention of State bodies is needed in order to guarantee, notably, a correct use of the spectrum airwaves as part of the public domain. In other cases, a simple communication or notification should be a sufficient and not excessive means of public intervention, in order to properly protect and facilitate the exercise of the right to freedom of expression and safeguard other public interests at the same time. Therefore, it is recommended to circumscribe the licensing requirement to the provision solely of terrestrial broadcasting services and establish a notification system regarding the use of other transmission platforms.

Another relevant issue is related to the licensing procedures (in the case of use of terrestrial radioelectric frequencies). The Code does not contain any indication or regulation on the process and criteria according to which such licenses will be granted. According to the national legislation on electronic communications¹⁹, the provision of broadcast services requires a license granted by the electronic communications authority (National Regulatory Agency for Electronic Communications and Information Technology of the Republic of Moldova, hereinafter ANRCETI), for the use of the frequency only. This frequency license is instrumental for the broadcasting license to be granted by the audiovisual media services

¹⁹ Electronic Communications Act no. 241-XVI of 15 November 2007, available online at: <http://en.anrceti.md/fileupload/1>

regulator. However, as has been pointed out, the Code does not specify the procedures and criteria to be followed in order to grant the latter kind of licenses. Considering the fact that the radioelectric spectrum is a limited space - even after its digitalisation, and in order to properly guarantee a fair and equal access to the terrestrial platforms, as well as to safeguard the existence of an open and diverse broadcast offer, it is recommended to introduce in the Code adequate rules regarding the abovementioned process and criteria. In any case, these processes to adjudicate broadcasting licenses should either aim at granting access to single frequencies (which seems to be, apparently, the current legal scheme) or to full digital multiplexes.

Article 28 establishes a series of limits vis-à-vis the legal regime of property of private media service providers. In particular, and among others, this provision establishes that commercial organizations financed in whole or in part from the State budget cannot be the beneficial owner of such media outlets. This restriction appears to be excessive, as it would expel from the audiovisual sector any company or entity which receives any form of financial support from public bodies (including for example, public aids for the production of certain content, or other possible subsidies which, by their nature, cannot possibly interfere with the editorial independence of the respective media outlet). It is therefore recommended to formulate this provision in order to target only private companies financially and effectively *controlled* by State bodies.

Article 28 establishes the same prohibition vis-à-vis political parties and “socio-political” organizations, trade unions and religious cults. All these organizations represent legitimate interests that need to be included in the diverse and pluralistic debates inherent in any democratic society. Therefore, this radical exclusion (which would not only affect their use of airwaves in order to directly exercise the right to freedom of expression of their members, but also the use of any other alternative platform including the Internet) is disproportionate and needs to be advised against. It is recommended to replace it with a more adequate norm that would for example limit the possibility to obtain a national frequency, but would permit the use of other transmission means. This restriction becomes particularly cumbersome if we consider that article 49 of the Code also includes a ban on these kinds of organizations providing community broadcasting services. The same concerns would apply to provisions like those included in paragraph 8 of the same article 28, with regards to the possibility for such entities to hold shares, voting rights, or stakes.

- Public media service providers

Chapter IV of the Code is devoted to establishing the regime applicable to public service media providers in general, and Chapter V particularly focuses on the national public service media provider, Teleradio Moldova Company.

Both chapters include a comprehensive series of norms aimed at properly defining the objective, mission and activities of public service media in Moldova, as well as to appropriately safeguard the proper functioning of the respective entities on the basis of “editorial independence and institutional autonomy with respect to state authorities and institutions, with political forces and groups of economic and financial interests”.

This general approach can only be welcomed. Only a few remarks would still need to be taken into consideration.

Article 34.2 specifies once again that the intervention of the regulator according to the law “is

not considered an interference”. It is advised to replace this probably redundant provision with a specific reference to the role of the regulator consisting of effectively monitoring and guaranteeing the proper and independent functioning of public service media outlets, according to the objective, mission and activities established in the law and any other relevant instruments.

Article 35 establishes a long list of duties of public media service providers. Indent m) particularly refers to establishing “the prices and rates for the services they provide”. This provision can be problematic. One fundamental and definitory pillar of public service media according to international standards is the universality and accessibility of the content and services to all. These standards do not require that in any case such content and services must be provided entirely at no cost for citizens. However, the legislator needs to clearly state that any price or rate for the provision of the services should be cost-oriented and never represent or impose a barrier or a serious impediment for citizens in order to access to the benefits of the public service.

As for the specific provisions applicable to Teleradio Moldova Company, the following should be noted:

a) further requirements and professional qualifications need to be introduced vis-à-vis the position of General Director, in order to guarantee a fully professional and efficient performance of his/her functions;

b) the inclusion of loss of support of members of the Supervisory Board as one of the causes of the dismissal of the General Director is too vague and broad and therefore needs to be eliminated or replaced with more detailed and objective lack of professional performance reasons;

c) the State budget allocations to fund the activities of Teleradio Moldova Company need to be fixed at 0,9% (the English version of the text is not completely clear on this matter);

d) further requirements and professional qualifications also need to be introduced vis-à-vis the position of the member of the Supervisory Board (5 years of unqualified experience would still be too broad and insufficient to guarantee professionalism); and

e) in order to guarantee the unbiased election of the best candidates to fill the Supervisory Board, a qualified majority vote of the members of the Audiovisual Council is recommended as a requirement (instead of a majority).

- Community broadcasting service providers

Chapter VI of the Code contains a series of rules applicable to the services to be provided by community sound radio broadcasters service providers.

It needs to be noted here that this section refers only to radio services, whereas with the emergence of new digital technologies it shall be possible to have community media services in any format (sound, audiovisual linear or even non-linear). Therefore, a wider regulation in terms of formats and technologies is needed in order for the Code not to become immediately outdated, if it is not already. On the other hand, in the specific cases of the provision of such services via the use of frequencies, international standards require the specific reserve of a portion of the spectrum for this purpose.

The remark already made with regards to the straight prohibition affecting the possibility for political, religious, trade union interests to create their own media outlets also needs to be underscored.

- Media service distributors

Chapter VII of the Code is devoted to the regulation of media service distributors.

Media service distributors are intermediary platforms which transmit and facilitate access to audiovisual media service providers. Obviously, they do not hold the editorial responsibility and thus should not have any liability vis-à-vis the audiovisual content they provide/facilitate access to. In the legal conceptual framework of the Digital Single Market of the EU, media service distributors fall under the exclusive consideration of electronic communications service and network providers.

This EU approach would also be in line vis-à-vis international standards in the area of the role and responsibility of intermediaries. Media service distributors are not intermediary platforms like Facebook, Twitter or YouTube, as the former cannot incorporate user generated content. Plus, they certainly make an *ex ante* choice when deciding the package of audiovisual media services which will be offered to end consumers. However, it has to be underscored that this choice does not imply the exercise of any editorial control over specific content and programmes (which obviously belongs to the respective audiovisual media service provider) and, therefore, cannot justify a general imposition of liability.

For this reason, it is recommended that media service distributors are only subjected to the obligation of obtaining an electronic communications license or authorization and to notify the Audiovisual Council about the number and denomination of services they provide, as well as the respective provider in terms of editorial responsibility. Therefore, provisions and requirements, such as obtaining the so-called “retransmission authorization” (which can be refused by a “reasoned decision”), or the possibility of being sanctioned for the mere retransmission of illegal content (contemplated in article 85 of the Code), need to be removed/deleted.

- The Audiovisual Council

Chapter X of the Code establishes the legal regime applicable to the Audiovisual Council as the independent regulatory authority vis-à-vis audiovisual media services in Moldova. This regime incorporates areas such as the nomination and appointment process of the members of the Council, the principles applicable to its decisions and activities, the organization management and competences of the authority, as well as detailed regulation of the authority’s powers of sanction. In general, these provisions shall be welcomed as they are in line with basic requirements established by international standards, particularly vis-à-vis the guarantee of the independence of the regulator.

That said, there are also a few remarks to be considered by the legislator:

a) once again, further requirements and professional qualifications need to be introduced vis-à-vis the position of member of the Council, in order to guarantee a fully professional and independent performance (5 years of unqualified experience would still be too broad and insufficient to guarantee professionalism);

b) the final appointment of the members of the Council is recommended to require, in any case, a qualified parliamentary majority in order to properly guarantee their independence as well as the broadest consensus on their suitability; and

c) the references to the competence of the Audiovisual Council vis-à-vis video-sharing platforms (particularly in the area of sanctions) are particularly confusing, as the rest of the Code does not contain any particular provision applicable to this specific kind of provider, as according to the definitions provided by the Code itself it cannot be considered an audiovisual media service provider or a media service distributor (moreover, article 2.4.e) clearly establishes that provisions specified in the Code do not apply to such entities).