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**ANALYSIS AND COMMENTS**

**ON THE DRAFT AUDIOVISUAL CODE  
OF THE REPUBLIC OF MOLDOVA**

**by**

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## *The Broadcasting Code of the Republic of Moldova*

### **INTRODUCTION**

This analysis prepared for the Council of Europe is based on an English translation of the draft Broadcasting Code received in Strasbourg in May 2011. It takes into account the points raised by the previous expertise carried out by Eve Salomon and Karol Jakubowicz in May 2006. (“CoE S/J”)

The draft Code represents a further stage on the journey undertaken by the Republic of Moldova towards a legislative framework for audiovisual media that is in accordance with best international practice and reflects the requirements of both the European Convention on Transfrontier Television (ECTT) as well as the Audiovisual Media Services Directive (AVMSD) 2010/13/EU of the European Parliament and of the Council which came into force in April 2010.

### **Analysis Standards**

Our analysis is primarily based on the European instruments which provide the legally binding framework for audiovisual media services in Europe, namely

- the European Convention on Human Rights (ECHR), in particular Article 10, and the relevant judgements of the European Court of Human Rights;
- the European Convention on Transfrontier Television (ECTT);
- the Charter of Fundamental Rights of the European Union (EU), in particular Article 11;
- the AVMSD and relevant decisions of the European Court of Justice.

Where necessary, we have also referred to other conventions which bind Moldova such as the Framework Convention for the Protection of National Minorities.

Article 10 ECHR is the cornerstone of media freedom in Europe. Over many years, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have developed (and are still developing) numerous recommendations and declarations which have put it into practical effect and have shaped the standards for European media as well as influencing – though not legally binding – the drafting of the ECTT and the AVMSD as well as national media laws.

This set of recommendations and declarations includes in particular:

- Recommendation No. R (91) 5 of the Committee of Ministers to member states on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context;
- Recommendation No. R (96) 10 of the Committee of Ministers on the guarantee

- of the independence of public service broadcasting;
- Recommendation Rec (2000) 23 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector;
  - Recommendation No. R (2000) 7 of the Council of Europe Committee of Ministers on the right of journalists not to disclose their sources of information;
  - Recommendation Rec (2003) 9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting;
  - Recommendation Rec (2004) 16 of the Committee of Ministers on the right of reply in the new media environment;
  - Declaration Decl-27.09.2006 of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states;
  - Recommendation CM/Rec (2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content;
  - Recommendation CM/Rec (2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society;
  - Declaration Decl-31.01.2007 of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration;
  - Recommendation CM/Rec (2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns;
  - Recommendation CM/Rec (2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet;
  - Declaration Decl-26.03.2008 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector;
  - Declaration Decl-11.02.2009 of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue;
  - Recommendation CM/Rec (2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and to promote their active participation in the new information and communications.

We have also checked the draft Audiovisual Code with the provisions of several West European media laws and regulatory codes which have proven their suitability in practice.

At present, the ECTT and the AVMSD differ in several respects. Most important is the difference in scope: the current ECTT only covers television broadcasting services whereas the AVMSD has extended its scope to audiovisual media services. Within the Council of Europe, work has stopped on adjusting the ECTT to the new provisions of the AVMSD as the European Commission has declared that the European Union has exclusive competence for the issues covered by the draft revised Convention and that EU member states are not allowed to become party to the Convention on their own. The European Commission has also made it clear that the EU does not intend to become a party to the Convention as this would constrain the speed and scope of any future policy response in the areas covered.

This creates a difficult situation for parties to the ECTT who are already members of the

EU as well as for those intending to become a member state in the future such as Moldova. The introduction to the draft Broadcasting Code expressly declares that it will create the framework necessary to enforce the AVMSD. Therefore, in cases of differences with the ECTT we have only applied the standards of the AVMSD for our analysis.

### **General Assessment**

The draft clearly builds on the European framework and reflects many of the recommendations and suggestions made in the previous Council of Europe expertise. We welcome some significant achievements, for example, in the area of media concentration (Arts 105-109) and the place accorded to community broadcasters, as well as the attempts to clarify the roles and respective functions of the Council and the Public Service Broadcaster (PSB). But, as in the previous law, the new draft includes many detailed and complex requirements that, while in line with European standards, add unnecessary depth and detail to primary legislation and would normally be found in the codes of the regulatory body or the statutes of the PSB (this is especially true for the detailed rules on advertising and sponsorship, the provisions around the protection of minors, and the role, duties, powers and management structure of Tele-Radio Moldova (TRM)).

Sometimes the draft Code is not quite in alignment with the European texts and we suggest ways in which that can be addressed.

We have some doubts about the appropriateness of a requirement for a 50% quota of “native programmes” in Article 7.

There remains a lack of clarity about the independence of the regulatory body and TRM through the method of appointment and the role of the President and Parliament in relation to both bodies (Article 82 (1) says that “Parliament exercises control over the work of the Broadcasting Council” and Article 128 implies a similar role in relation to TRM). This suggests that political control over broadcasting continues to be a challenge. Again we make recommendations for change.

We also recommend a clear requirement for both the Council and the Supervisory Board to reflect the diversity of Moldovan society and seek a gender balance, and for greater involvement of civil society in the appointment process.

### **European standards**

The AVMSD is the most specific element of EU law to be observed in the area of audiovisual media services. However, other parts of general EU law also shape the legal framework for these services. One of the most important of these is competition law, in particular the law relating to state aid which has to be complied with when regulating the relations between public and private audiovisual media service providers in order to ensure fair competition in the dual system.

These rules are set out by the EU Commission in its Communication on the application of state aid rules to public service broadcasting<sup>3</sup>. This Communication replaces the Commission's former Communication 2001<sup>4</sup> and intends to adjust the state aid rules to the changing media landscape in the online environment.

The 2009 Communication requires for the admissibility of state funding *inter alia*:

- a clear and precise remit of PSB defined by an official act (legislation, contract, binding terms of reference);
- activities financed by state aid bring added value in terms of serving the social, democratic and cultural needs of society;
- a transparent and effective monitoring of the fulfilment of the remit by an appropriate authority or appointed body effectively independent of the PSB-management;
- clear separation of public service and non-public service activities and their financing (no cross-subsidies);
- no overcompensation for the fulfilment of the public service remit;
- effective and regular financial control mechanisms to be in place, executed by an external body;
- objective *ex ante* control of significant new services launched by public service broadcasters, balancing the market impact of such new services with their public value (3-step-test), carried out by a body independent of PSB-management;
- respect for market principles when pursuing commercial activities.

The draft Broadcasting Code foresees state aid for Moldovan PSBs (Art. 120). It provides clear rules on the remit of PSB, requires transparency and allows the use of new technologies for transmitting programmes (Art. 111, 113). It is less clear whether the necessary precautions for introducing an objective *ex ante* control of significant new services are in place.

We recommend checking to see whether Moldovan law already covers all the requirements of the 2009 Communication though Moldova is not yet fully bound by EU law.

A number of provisions also require amendment to comply with European standards:

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<sup>3</sup> OJ C 257, 27.10.2009, p. 1

<sup>4</sup> OJ C 320, 15.11.2001, p. 5

- Article 2 (2), Subjects of this Code
- Article 3, Terms employed
- Article 4 (2), Application, Purpose and Scope
- Article 6 (1), (5), European Audiovisual Works
- Article 11 (4), Protection of Minors
- Article 17 (7), Access to Events of Major Importance
- Article 28 (2), General Requirements on Airing Audiovisual Commercial Communications
- Article 29 (2), Protection of Minors in Area of Audiovisual Commercial Communications
- Article 38 (4), Insertion of Advertising and Teleshopping in TV and Radio Programme Services
- Article 47 (2), The Right to Place Goods and Services
- Article 50, Interdiction Concerning Placement of Products and Services
- Article 53, General Requirements Regarding Advertising and Teleshopping for Alcoholic Beverages
- Article 67 (5), Advertising and Teleshopping for Food Supplements, Nutrient Supplements, Vitamins and Nutrients
- Article 74, Statute of the Council
- Article 82 (1), Parliamentary Control
- Article 88 (6), General Provisions
- Article 97 (3), Free Retransmission
- Article 113, Tasks of the Public Broadcaster
- Article 114 (1), Rights of the Public Broadcaster
- Article 129, Independent Producers

### **Translation issues**

From time to time, the English translation is unclear so where we are unsure what is meant we seek clarification.

## **Articles without comment**

We do not refer in the detailed analysis to those articles where we have no comment to make.

## **DETAILED ANALYSIS**

### **TITLE**

The draft Code now covers not just broadcasting (i.e. television and radio – cf. its definition in Art. 3) but also on-demand audiovisual media services.

We suggest that this extended scope be reflected in a new title for the Code, e.g. “The Audiovisual Media Services Code of the Republic of Moldova” or the title “Audiovisual Code” of the Code still in force should be kept.

The final text should also mirror the official title of the AVMSD as published in the Official Journal of the EU:

*“The law creates the framework necessary to enforce Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), published in the Official Journal of the European Union no. L 95 of 15 April 2010.”*

## **CHAPTER I. GENERAL PROVISIONS**

### **Art. 1. Object of regulation**

(2 b) The formulation is misleading and should be more narrowly aligned to Art. 2 (6) of the AVMSD which refers to the reception “**by the public in**” one or more member states of the EU, not by the member states themselves. Since the current draft Broadcasting Code intends to extend its non-applicability to all audiovisual media services which are exclusively meant for reception by the public in non-parties to the ECTT, the terms of this Convention should also be used.

Furthermore, as not all member states of the EU are parties to the ECTT, we suggest including in this provision the audiovisual media services which are exclusively meant for reception by the public in the member states of the EU.

### **We propose:**

*“The audiovisual media services exclusively meant to be received by the public in States which are not Member States of the European Union or Parties to the European Convention on Transfrontier Television and which are not received, directly or*

*indirectly, with standard consumer equipment by the public in one or more Member States of the European Union or in one or more Parties to the European Convention on Transfrontier Television;”*

## **Art. 2. Subjects of this code**

The relationship between Art. 1 (2) (b) and Art. 2 (2) is unclear.

Art. 1(2) (b) exempts audiovisual media services meant to be received by the public in states which are not parties to the ECTT (and, possibly, not member states of the EU) under certain conditions from the application of the draft Broadcasting Code, whereas Art. 2 (2) exempts some of those service providers, namely broadcasters, from the application of the draft Broadcasting Code if their programmes are “exclusively devoted to *foreign countries*”. The term “foreign countries” includes parties to the ECTT and member states of the EU.

**Insofar as television broadcasters are concerned, Art. 2 (2) as it stands now is contrary to Art. 3 ECTT (see also Art. 5 (6) ECTT) and is also not in conformity with the AVMSD (radio broadcasters are not covered by these instruments).**

### **We propose:**

Either the deletion of Art. 2 (2), or adjusting the wording to the proposed revised wording of Art. 1 (2) (b) or limiting this provision to radio broadcasters.

## **Art. 3. Terms employed**

*Audiovisual media service.* This definition is identical to the one used in the AVMSD but has a different meaning since the draft Broadcasting Code includes radio programmes within its scope. This might lead to misunderstanding. The common understanding of the word “*audiovisual*” does not encompass pure sound transmissions – at least not in the European legal sphere. For reasons of clarity it might therefore be advisable to exclude radio programmes from the definition of “*audiovisual media service*” and define them separately. This would require adjustments also to the subsequent definitions and additional definitions.

*Generalist television or radio service.* We suggest the insertion of the word “*mainly*” before “*informing, educational or entertaining content*”. This insertion would be in line with several West-European media laws and would avoid a too restrictive or narrow definition of the mission of broadcasters – especially private broadcasters – and discussion of the admissibility of certain programmes including audiovisual commercial communication.

*Topical television or radio service.* We assume that “*certain area*” refers to a limited and mainly similar content of programmes, not to a geographic area. We suggest checking whether the original text is clear in this respect.

*Transmission.* We recommend redrafting this definition so that it is more in accordance with the definitions used in Art. 2 of the ECTT and its draft revision<sup>5</sup> (Art. 2 (b)). Since the term “audiovisual media services” now also covers on-demand audiovisual services, the use of the word “broadcasting” no longer seems appropriate.

**We propose:**

*“provision of audiovisual media services meant to be received by the public, by a terrestrial transmitter, cable, satellite, internet or other technical means.”*

*Retransmission.* In line with the proposed changes to the definition of “transmission”, the term “*transmission*” should be replaced by “*provision*”.

The definition used in the draft Broadcasting Code seems to be stricter than its counterpart in Art. 2 (b), ECTT where the retransmission of television programme services *or important parts of such services* has to be complete and unchanged whereas the draft Broadcasting Code demands “*preserving their integrity and not modifying the content*”. In our understanding, this would not allow agreements between broadcasters and services distributors to retransmit a shortened but otherwise unchanged version of a linear audiovisual media service. Is this limitation of the contractual freedom of broadcasters and service distributors intended by the authors of the draft Broadcasting Code?

*Audiovisual commercial communication.* This definition uses the first part of the definition used in Art.1 (1) (h) AVMSD supplemented by sound announcements. However, it deletes the following sentence which makes clear that audiovisual commercial communication is provided *in return for payment* or for similar consideration as well as the examples given for audiovisual commercial communication in this sense. By not including the prerequisite of “*payment*” it could be suggested (as it was during the drafting of the AVMSD) that, for example, charitable appeals which were broadcast without payment had to be included in the time limits for advertising (Recital 31 AVMSD now clearly states that public service announcements and charity appeals broadcast free of charge are not regarded as audiovisual commercial communication). Furthermore, it also raises the question whether product placement should be regarded as audiovisual commercial communication.

**We propose:**

That the Moldovan code uses the full definition set out in Art. 1(1) (h) AVMSD.

*Surreptitious audiovisual commercial communication.* This definition follows the one in Art. 1 (1) (j) AVMSD but, again, it deletes the last sentence of the AVMSD definition.

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<sup>5</sup> Draft Council of Europe Convention on Transfrontier Audiovisual Media Services Doc. T-TT(2009)013FIN

Though this last sentence and the indicators given there (payment or similar consideration) for intentional surreptitious audiovisual commercial communication is not absolutely necessary for deciding whether a certain programme item falls into this category (audiovisual commercial communication always needs payment or a similar consideration) using the complete AVMSD-definition would avoid any suggestion that because of this deletion the draft Broadcasting Code intends to change the meaning of the AVMSD definition.

**We propose:**

For reasons of clarity, to incorporate the full definition of Art. 1(1) (j) AVMSD.

See, for example, the Ofcom Code in the UK: *“Surreptitious advertising involves a reference to a product, service or trade mark within a programme, where such a reference is intended by the broadcaster to serve as advertising and this is not made clear to the audience. Such advertising is likely to be considered intentional if it occurs in return for payment or other valuable consideration to the broadcaster or producer.”*

*Advertising.* The meaning of “area of activity” is unclear. The last words “*in return for payment*” of the AVMSD definition have not been used. Is this intentional and, if so, why? It should be noted that the definition of “advertising” in the ECTT – which is still in force – is wider than in the AVMSD. Art. 2 (f) ECTT contains the elements “to advance a cause or idea, or to bring about some other effect” in addition. The draft Council of Europe Convention on Transfrontier Audiovisual Media Services did not change that.

*Subliminal announcement.* This may be a translation issue but the Ofcom Code is clearer: “Broadcasters must not use techniques which exploit the possibility of conveying a message to viewers or listeners, or of otherwise influencing their minds without their being aware, or fully aware, of what has occurred”.

| *Sponsorship.* The definition proposed uses Art. 1(1)(k) AVMSD but omits the words “services or” after “to financing audiovisual media”. Consequently, the scope of “sponsorship” in the draft Broadcasting Code is more restrictive than in the AVMSD and not in conformity with it.

**We propose:**

To insert the words “services or” into the definition of the draft Broadcasting Code

*Events of major importance.* Both the ECTT and AVMSD demand not only mere “interest” but “major importance” of the event for society. This qualification (which is contained in the Audiovisual Code 2006) should also be reflected in the definition of the draft Broadcasting Code.

**We propose:**

To insert “major” before “interest”.

*Retransmission licence.* “An offer of” has been inserted when compared to the Audiovisual Code 2006. The meaning of this insertion is unclear.

*Technical licence.* Are the words “use of” contained in the part “legalizes the use of **technical means** of air and cable telecommunications...” of the definition in Art. 2 (s) Audiovisual Code 2006 intentionally deleted in the draft Broadcasting Code?

*Licence of using radio frequencies in terrestrial digital system* – Does this require the insertion of “conferring” so that it reads: “The legal act issued to a natural or legal person, authorised under law by the specialised authority of the central public administration to provide electronic communication networks and electronic communication services to the public, conferring the right to use, for a preset period, radio frequencies, in a terrestrial digital system;”

*Encrypting.* The use of “uncertain” is unclear. Is the meaning “unsafe”? So: “The modality of modifying a flow of information in an electronic format according to a preset algorithm, in order to protect it when transmitted through uncertain (unsafe) media, as the reconstitution of the initial information is possible only by using an adequate decrypting algorithm;”

| *European audiovisual works.* This definition (which is identical with the wording of Art. 2 (e) ECTT) is much wider than the one given in Art. 6(1) of the draft Broadcasting Code which is based on Art. 1(1)(n) 2 – 4 AVMSD. Therefore, it would be contrary to the AVMSD. This was one of the reasons why the draft Council of Europe Convention

on Transfrontier Audiovisual Services Art. 2 (e) was adjusted.

**We propose:**

Replacing the present definition by the one set out in paragraphs 1 – 6 of Art. 6 of the draft Broadcasting Code would probably overload the already very lengthy Art. 3. We therefore suggest leaving out a definition of European audiovisual works in Art. 3 and simply keeping Art. 6. There is no perfect solution!

*Native programmes.* Neither the ECTT nor the AVMSD define or use the term “*native programmes*” nor do these legal texts contain any provisions on the broadcasting of domestically produced programmes. The Republic of Moldova is free to introduce provisions of this kind, provided they do not violate other international or European law binding for the Republic of Moldova.

*Own programmes.* See comments on “*native programmes*” *mutatis mutandis*.

**Art. 4. Application, purpose and scope**

(1) This statement on the aim of the Code is welcomed. However, it is rather general and short. We suggest specifying here the important aims and rights the Code seeks to pursue and to protect (e.g. the right to receive accurate and objective information, contribute to the free formation of opinion, the right to editorial independence and freedom of expression, the safeguarding of pluralism, support of national culture and creativity). See also CoE S/J.

(2 c) This provision does not seem to be in line with Art. 2 (3) (b) AVMSD: according to its present formulation an audiovisual media services provider falls under the jurisdiction of the Republic of Moldova even if the editorial decisions are taken in Moldova while the headquarters as well as a significant part of the workforce of the provider are in an EU member state. Between EU member states, Art. 2 (3) (b) 1. AVMSD would apply and the EU member state would claim jurisdiction where the headquarters and a significant part of the workforce is situated. If one of the parties is a third country (as the Republic of Moldova is at present), Art. 2 (3) (c) AVMSD would apply and again the EU member state would have jurisdiction according to the AVMSD. In order to avoid potential conflicts, we recommend deleting the second part (“*or in a Member State of the European Union in which the media services provider is quartered*”) of Art. 4 (2) (c).

(4 c) Even though there are no jurisdiction criteria for services distributors provided for in the AVMSD, this provision might raise conflicts with the general establishment law (Art. 49 – 55 Treaty on the Functioning of the European Union - TFEU). It can be assumed that an EU member state would claim jurisdiction if a services distributor has its headquarters on its territory and a significant part of the workforce works within its boundaries. Cf. comments to 2 c above.

**Art. 6. European Audiovisual Works**

(1 c) This provision and the corresponding paragraph 4 limit the scope of the term “European works” as used in the AVMSD by stipulating that these works need to have their origin in *European* states. The AVMSD abolished this requirement by deleting Art. 6 (1) (c) (3) of the Television without Frontiers (TWF) Directive and replacing these provisions by Art. 1 (1) (n) (iii), AVMSD. The “*agreements related to the audiovisual sector*” mentioned there can also be concluded with non-European states with the consequence that – depending on the content of the individual agreement – works co-produced with producers from these non-European states can be regarded as “*European works*”.

**We propose:**

Replacing the present text by the wording of Art. 1 (1) (n) (iii) AVMSD.

(3) (c) A typing error: “*authors*” should be “*co-producers*”.

(4) This text is based on Art. 6 (3) TWF Directive which has not been retained by the AVMSD. Cf. comments above.

**We propose:**

Deleting this paragraph.

(5) Art. 1 (4) AVMSD requires a co-producer from the EU to supply “*a majority share*” of the total costs of production, not just a “*major percentage*”.

**We propose:**

Replacing “*major percentage*” by “*majority share*”.

(6) This provision is based on Art. 6 (5) TWF-Directive. This article has not been kept by the AVMSD.

**We propose:**

Deleting this paragraph.

(7) With regard to the term “*providers of linear audiovisual media services*” see comments on Art. 7 (6).

The meaning of “*entertaining programmes*” is wider than the word “*games*” used in Art. 16 (1) AVMSD. We suggest sticking to the wording of the AVMSD.

We welcome the clear and strong intention of the draft Broadcasting Code to promote the broadcasting of European works. However, the requirement to broadcast European works

75% of broadcasting time (with the exception of certain programmes) is a high threshold. The average percentage of televised European works broadcast in the EU member states is about 63% at present<sup>6</sup>.

Experience has shown that for those public-service television stations with a stable and secure income from subscription fees, subsidies and so on, the achievement of percentages even higher than 75% is not a problem. But the situation in the private sector is different: there are many stations which for economic reasons find it difficult to reach a “majority (i.e. 50 plus %) of their transmission time” as required by Art. 16 (1) AVMSD. The introduction of a 75% threshold could endanger the sound, sustainable and economically viable development of the private broadcasting sector (including radio) in the Republic of Moldova.

Art. 16 (1) AVMSD requires the achievement of the majority percentage for European works only “where practicable and by appropriate means”. This provision takes into account the characteristics of certain specialised channels which focus on the broadcasting of non-European works. Art. 6 (7) does not take up this AVMSD exception and thereby aggravates the situation of Moldovan broadcasters.

We also draw attention to Art. 18 AVMSD which stipulates that the chapter on Promotion of Distribution and Production of Television Programmes shall not apply to television broadcasts that are intended for local audiences and do not form part of a national network.

**We propose:**

A reconsideration of the level proposed including the possibility of different targets for public-service and private broadcasters as well as the exclusion of local television broadcasters.

**Independent Producers**

The Code does not do enough to transpose Art. 17 AVMSD, which requires broadcasters to commission at least 10% of their transmission time or of their programming budget from European works created by producers who are independent of broadcasters. Art. 129 of the draft Law only imposes this obligation on public broadcasters, not on private broadcasters, and it fails to require that an adequate proportion of this share consists of recent works.

**We propose:**

Supplementing and adjusting Art. 6 of the draft Broadcasting Code so that it is in line with the AVMSD.

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<sup>6</sup> Cf. Communications by the European Commission ( e.g. Ninth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC and Directive 2007/65/EC for the period 2007-2008)

## **Art. 7. Native Programmes**

The term “*native programmes*” (as well as the term “*own programmes*” in Art. 8) is not defined nor specifically covered by the AVMSD or the ECTT. The Republic of Moldova is free to require media service providers under its jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with EU law (Art. 4 (1) AVMSD). When drafting these rules, the national legislator is also entitled to draw on legal provisions of the Directive which are no longer in force (see comments to Art. 6 draft Broadcasting Code) provided these rules comply with other EU law. In this respect, questions could be asked about whether the 50% threshold for native programmes could be deemed as unjustified discrimination against works from EU member states which do not fulfil the criteria of paragraph 3. We believe that there are policy arguments, such as the promotion of national culture or cultural diversity, which could justify this quota, at least for the moment. However, this problem requires in-depth analysis (which cannot be done here for reasons of time) at some point in the future when the Moldovan legal framework is further aligned to the *acquis communautaire*.

(2 c) In Art. 6 (3) (c) and Art. 8 (2) (c) there is reference to the requirement for a “*preponderant*” contribution but here only a “*significant*” contribution is asked for. Is this difference intended?

(6) This provision (as well as Art. 8 (6)) uses the term “*television/radio programme services*” whereas Art. 6 (7) speaks of “*providers of linear audiovisual media services*”. If, as we assume, the same services are meant, identical terms should be used.

## **Art. 8. Own Programmes**

See our comments on Art. 7. We do not believe that the doubts mentioned there concerning the 50% quota for native programmes would also apply to the 25% quota for own programmes. There seems to be enough room for the transmission works produced in other EU member states.

## **CHAPTER II. PRINCIPLES OF AUDIOVISUAL COMMUNICATION**

This is a clear statement of the principles but we would suggest that what are currently Articles 20 and 21 are advanced to become Articles 11 and 12 as that would establish a clear framework in which freedom of expression is set alongside freedom of information and access, underlined by the importance of editorial independence and freedom. It would also be helpful in the new Article 11 to make clear that neither the Council nor any other body has any pre-transmission power. It is stated later in Article 75 (f) but could usefully be set out here too.

**We propose:**

That the current Articles 20 and 21 become Articles 11 and 12 with consequential renumbering and that Article 20 is revised as follows:

**“Freedom of Expression**

(1) The providers and distributors of audiovisual media services put at the public’s disposal offers of programme services in conformity with the provisions of this code and of the Law on the freedom of expression.

(2) The Broadcasting Council shall act, *ex officio* or on notification, in order to ensure the freedom of expression.

(3) Neither the Broadcasting Council nor any other body shall have any powers to preview programmes before transmission.”

We also make a general suggestion that some of the detail in the current Articles 11, 12 and 13 could be better placed in the Council’s own content code. (See our comments on Art.\_10 below)

**Art. 9. Access to pluralist audiovisual media services**

**(1 b) We propose:**

The addition of “social” between “*political*” and “*religious*”.

We assume that “free to air” services are meant but suggest a clarification.

**Art. 10. Respecting human dignity and fundamental human rights**

In general, Art. 10 is aligned to the relevant norms in the media laws of many European states and with European law. However, several of the terms used are rather vague and leave wide room for interpretation. In many European states, this problem is reduced by the existence of longstanding jurisprudence and/or codes of conduct issued or approved by the regulator. Moldova does not have this legal tradition. Therefore it is of utmost importance that codes of conduct are developed to guide providers and ensure consistent interpretation of the requirements of the law.

It is unclear from the draft law whether the Broadcasting Council is competent to issue and/or approve codes of conduct. Art. 40 (1) f of the Audiovisual Code 2006 entitled the Broadcasting Council to “approve broadcasters’ Code/Line of Conduct policy in view of developing and broadcasting the programme services according to the present Code and European standards”. This provision has been deleted in the present draft Broadcasting Code. The first of the competences in the list enumerated in Art. 75 of the draft Broadcasting Code states that the Council: “regulates the work of media services providers and of services providers”. It could be argued that this new (or at least newly drafted) general rule includes the ability and the power to issue or approve codes of conduct. This, however, is not clear.

**We strongly recommend** that the draft law makes clear that the Council has the power either to issue codes of conduct or approve the codes developed by providers. It is for the drafters of the law to choose which they prefer. If the former, it will be necessary to include in the draft Broadcasting Code the requirement that the Broadcasting Council consult with the audiovisual media services providers during the drafting process of the code. If the latter, an obligation will be needed on the audiovisual media services providers to draft these codes and seek their approval from the Broadcasting Council. The choice will depend on the degree of independence Moldova wants to concede to its audiovisual media services providers.

(2 c) “*Contrary to good morals*” could be considered a vague term. Would it be helpful to consider “*the cultural norms of Moldova*” or “*accepted community standards*”?

(3) This could be a translation issue: would it be better to say that providers and distributors “*are required to respect*”?

#### **Art. 11. Protection of Minors**

We welcome the insertion of this provision into the draft Broadcasting Code and the intention to provide comprehensive protection of minors. However, Art. 11 (as well as Art. 12 and 13) is very detailed. These details would be better placed in a code of the Broadcasting Council.

(3) The term “*minor in a difficulty*” is vague. It should be further explained, preferably in a code.

(4) Art. 27 (1) AVMSD absolutely prohibits any programme which might seriously impair the physical, mental or moral development of minors in all television broadcasts provided these television broadcasts are mass media, i.e. they are intended for reception by a significant proportion of the general public (recital 21). Art. 11 (4) of the draft Broadcasting Code exempts television (and radio) services which need prior individual authorisation to be received from the application of Art. 27 (1) AVMSD. We assume that encrypted services are regarded as falling into this category. However, encryption alone is not a decisive criterion for exempting a service from the applicability of Art. 27 (1) AVMSD<sup>7</sup>. More is required in order to qualify a service as not being “intended for reception by a significant proportion of the general public”. Age verification systems or additional decryption systems are normally necessary to categorise a service as closed circuit television with a restricted audience falling outside the scope of the AVMSD.

#### **We propose:**

Clarification as to whether programmes of such a kind are only permissible in encrypted services and have to fulfil further safeguarding requirements set by the Broadcasting Council.

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<sup>7</sup> Cf. Advisory Opinion of the EFTA Court in case E-8/97 (TV 1000 Sverige AB) of June 12, 1998

(4 b) It is unclear what “*unjustly highlight violence*” might be: would it be better to say “*glamorise or promote*”?

**We propose:**

The replacement of “*exaggerated*” by “*gratuitous*” (cf. the wording of Art. 27 (1) AVMSD).

(4 c) “*Licentious language*” is an unknown term: Would it be better to say “*offensive language*”?

(4 d) As suggested in CoE S/J, it is important to distinguish between material which “*might seriously impair*” and material which is “*likely to impair*”.

**We propose:**

Redrafting as follows: “*The transmission of TV and radio programme services without prior individual authorisation of programmes other than the ones provided for in paragraph (4) which are likely to impair the physical, mental or moral development of minors may be broadcast when children are not normally in the audience subject to the following:*”

(5) Art. 27 (2) AVMSD has less strict requirements than Art. 27 (1) AVMSD for the protection of minors. In this case, encryption alone seems sufficient to fulfil these requirements.

(7 a) We welcome the approach to co-regulation in order to promote the protection of minors. This provision is in line with Art. 4 (7) AVMSD and is a good starting point for gaining experience in this field. Experience from other European states demonstrates that co-regulation (and even self-regulation) can be a more effective tool than direct regulation.

(7 b) We refer to Art. 12 AVMSD: the Broadcasting Council has to ensure by its regulation that minors will not normally hear or see on-demand audiovisual services which might seriously impair their physical, mental or moral development.

**Art. 12. Protection of Handicapped Persons** (Usually “*Disabled*” in English)

This article is very much in line with the EU policy regarding people with disabilities and, in the audiovisual field, particularly with the demands of the European Parliament. Art. 12 is an adequate transposition of Art. 7 AVMSD. But the European Parliament has recognised that because this can impose a heavy burden for audiovisual media services providers they can take a gradual approach. We therefore recommend a staged approach to allow providers some time to implement this obligation. It should also be noted that the obligation enshrined in Art. 7 AVMSD is not limited to certain programme items but

encompasses “services” at whole, nor does it exempt regional or local TV broadcasters. This means that more will be required in future.

### **Art. 13. Political and Social Balance and Pluralism**

The intention of the article is admirable but is unclear in its expression and the detail is better found in the Regulator’s code. In Clause 1 “*accurate*” would be better and more achievable than “full and truthful”. Both Clause 1 and 2 are really helpful statements of principle rather than expressed as a legal requirement. Clause 3 confuses principle and requirement and could be better if redrafted as fundamental obligations, for example:

*“Accuracy and fairness are essential to the presentation and dissemination of news. Reports must be well sourced, presented factually and provide a reliable and unbiased account of events with an appropriate reflection of different views. The presentation of news must clearly distinguish comment and opinion from fact and be presented fairly.”*

### **Art. 14. Protection of Information Area**

We suggest replacing “*information area*” by a clearer term and to consider the replacement of “*national heritage*” by “*public good*”.

### **Art. 15. Protection of Language and National Cultural Heritage**

The Council of Europe analysis of the draft Audiovisual Code 2006 noted with regard to the corresponding provision:

*“These language and production quotas are clearly motivated by an understandable desire to protect the national culture and language and promote domestic audiovisual production.*

*However, many are possibly excessive and too expensive for broadcasters. Moreover, they are incompatible with European Union rules (which do not allow discriminating against other Member States, which is exactly the effect that domestic production quotas have) and will create a problem if further alignment of Moldovan broadcasting legislation with EU rules is intended in the future.”*

We welcome the considerable change to the language requirements but concerns still persist, in particular with regard to the high quotas for native programmes which might not be in line with EU law and European audiovisual works which are a heavy burden for broadcasters (cf. comments on Art. 6 and 7).

(2 b) (2 c) The requirement from the regional coverage frequency network and of the local coverage frequencies for 75% of transmission of TV programmes to be in the state language seems too strict as it might hinder the fulfilment of the needs of large language minorities.

**We propose:**

The insertion of a clause providing for the possibility of exceptions according to the linguistic make-up of the area.

(4 a) (4 b) The requirement for own and native programmes to consist of 50% of works created in the 5 years before transmission adds a further burden to the transmission quotas for these programmes.

**We propose:**

The reconsideration of this additional burden for broadcasters.

(5) The implementation of this provision as it is now drafted remains difficult to achieve (cf. CoE S/J). In TV, 7 hours daily are classified as prime time so the implementation of the 75% quota for European audiovisual works would need – depending on the transmission time which does not count for the calculation - up to 18 hours per day when the broadcasting station transmits 24 hours daily.

**We propose:**

The redrafting of this provision by wording such as: *“The majority of prime time shall be used for the transmission of own programmes, native programmes and European audiovisual works, in accordance with the regulations of the Broadcasting Council.”*

(6) The present wording of this provision includes broadcasters transmitting in a minority language. Is this intended? If yes, what is the relationship between paragraph 6 and paragraph 12? Is a double quota foreseen for broadcasters transmitting in a minority language: i.e. 20% of transmission time in the state language for general programmes and 80 % for news and current affairs?

**Art. 17. Access to Events of Major Importance**

(1) In accordance with the wording of Art. 14 (1) AVMSD and Art. 9a (1) ECTT the words *“for society”* should be inserted after *“major importance”*.

(2) We recommend using the wording of the AVMSD and the ECTT: *“substantial proportion”* instead of *“significant part”*.

(6 a) See comment on paragraph 2.

(7) Again, see the comment on paragraph 2 for the wording.  
With regard to the substance of this clause, Art. 9a (2) ECTT and Art. 14 (3) AVMSD are nearly identical in their wording. The Republic of Moldova is a party to the ECTT. Therefore it should transpose Art. 9a (2) ECTT by including the parties of the ECTT into Art. 17 (7) of the draft Broadcasting Code.

**We propose:**

To adjust Art. 17 (7) accordingly.

(8 - 10) Paragraph 8 and the following paragraphs establish the right to short reporting in Moldova and provide rules for how it is done. These provisions are based on Art. 15 AVMSD; however, they do not transpose each element of Art. 15 AVMSD into the draft Broadcasting Code. Some transposition work is left to the Broadcasting Council – for instance the transposition of Art. 15 (2) AVMSD. We recommend including this task into the catalogue in paragraph 10. Recitals 54 – 57 of the AVMSD are an important source for interpreting the wording of Art. 15 AVMSD. We suggest taking these recitals fully into account when drafting the regulation.

Paragraph 8 restricts the right to short reporting to broadcasters established in Moldova or in an EU member state. Broadcasters established in a non-EU member state party to the ECTT do not enjoy this right. This different treatment can be justified (in contrast to the regulation concerning exclusivity rights). Art. 9 ECTT only requests parties to introduce a right to short reporting. This provision is not comparable with the binding and detailed rule on EU level.

#### **Art. 18. Participation in Checking Observance of Audiovisual Legislation**

It is not clear whether a specific legal right is conferred by this provision on citizens seeking to take part in this monitoring and checking process and how this legal position is framed. Or does it simply mean that citizens have the right to complain to the Broadcasting Council if they feel the requirements of the Broadcasting Law are not being observed?

The article needs greater clarity. If there is a general legal procedure for this kind of citizen's participation in Moldova, a reference to it should be added. If not, the basic elements of such a procedure should be set out here.

Normal European practice would simply be for those who feel a violation has occurred to have the right to complain to the regulator who then investigates and comes to a finding.

#### **Art. 19. Transparency of Broadcaster's Ownership**

In general, this provision is in line with Art. 5 AVMSD. However, Art. 5 AVMSD uses the term "*accessible to the recipients of a service*" whereas Art. 19 speaks of "*access of the public*" which widens the group of information recipients. This stricter rule is admissible (Art. 4 (1) AVMSD). The same is true for the additional requirements e) list of published publications and f) list of the other programme services.

#### **Art. 20. Freedom of Expression**

This article should be placed before Art. 10 and revised (cf. comments to Chapter II).

## **Art. 21. Editorial Independence and Freedom**

This article should also be placed before Art. 10 (cf. comments to Chapter II).

## **Art. 22. Protection of Copyright**

Art. 22 as drafted is simply a general reminder to audiovisual media services providers as to their obligations under copyright law. It does not create a new and specific copyright framework for audiovisual media services providers, as such it could be deleted.

## **Art. 24. Protection of Journalists**

(1) This provision is addressed to “*the competent public authorities*” rather than the Council alone. How will the enforcement of this law be secured?

It also requires the protection of journalists and of the offices of media service providers. But the working places of journalists are not always identical with the offices of media service providers; they might be situated in their homes or other private premises. So these should also be included (cf. the comments in CoE S/J)<sup>8</sup>. This might be done by including “*and their working places*” after “*journalists*”.

We also favour the transfer of this provision to the press law.

## **Art. 26. Airing Announcements about State of Emergency**

(1) The previous Council of Europe expertise in 2006 also criticized the vagueness of the notion “*threat to public security or constitutional order*” and pointed to possible abuses for political purposes and strongly recommended that at the very least the meaning of the term “threat” should be restricted by a qualification such as “*serious*” or “*grave*”. We repeat that recommendation.

Further protection from abuse could be established by additional clarifications. An example taken from a German media law is the following: “*In cases of disasters or in similar cases endangering severely public security or (constitutional) order...*”.

## **CHAPTER III. AUDIOVISUAL COMMERCIAL COMMUNICATION**

### **Section 1. General Provisions regarding the Audiovisual Commercial Communications**

In general, this section complies with the relevant AVMSD and ECTT provisions. In some respect the drafters of the Broadcasting Code propose more detailed and stricter rules than required by these legal instruments. This is allowed by Art. 4 (1) AVMSD

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<sup>8</sup> Cf. Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, Principle 6 a.

provided that such rules are in compliance with EU law. The draft is compatible with EU law but there are a few minor deficiencies in the transposition of the AVMSD which are referred to in the specific comments below.

In many cases the wording used in the English draft is not identical with the AVMSD wording (this might be a problem of translation). But this use of different terms could raise the question whether there is a different regulatory intent. For the avoidance of doubt, we recommend using the AVMSD wording in order to avoid any uncertainty.

#### **Art. 27. Right to Provide Audiovisual Commercial Communications**

This Article confers the right to provide audiovisual commercial communications to audiovisual media service providers. The other side of the coin is the responsibility of those providing these communications. It should be made clear in the law that the audiovisual media service provider carries the editorial responsibility for commercial as well as editorial content.

(4) The meaning of this provision is unclear.

## **Art. 28. General Requirements on Airing Audiovisual Commercial Communications**

The basic requirements for audiovisual commercial communications are fairness and honesty and that these communications do not mislead. The importance of these requirements is stressed in the ECTT by putting these principles in the first place in the chapter on regulating advertising and sponsorship (Art. 11 (1) and (2) ECTT). Moldova should follow this approach.

### **We propose:**

The insertion of these principles in the first paragraph of Art. 28.

(The following list is not complete and serves only as an example for different wording)

(2 b) AVMSD wording: “*subliminal techniques*”.

(2 c) AVMSD wording: “*prejudice respect for human dignity*”.

(2 d) AVMSD wording: not “*include or promote...*”, furthermore, the criterion “*age*” has been left out (intentionally?).

(2 i) AVMSD wording: not “*encourage behaviour grossly prejudicial to the protection of the environment*”.

## **Art. 29. Protection of Minors in Area of Audiovisual Commercial Communications**

(2 a) The AVMSD term “*unreasonably*” should be inserted after “*represent*”; otherwise the scope of this provision would be too wide.

(2 c) The words “*or hire*” after “*buy*” should be inserted (Art. 9 (1) g AVMSD).

(2 f) The draft provision seems to have a different meaning than Art. 9 (1) e AVMSD which reads: “*Audiovisual commercial communication for alcoholic beverages shall not be aimed specifically at minors...*”.

## **Art. 32. Language if Broadcasting Audiovisual Commercial Communications**

We assume that this provision does not apply to minority language audiovisual media services. This important rule should be stated in this law. (Cf. Art. 9 Framework Convention for the Protection of National Minorities)

### **Section 2. Sponsorship**

This section is in compliance with European law. But we suggest adjusting the wording to the terms used in Art. 10 AVMSD. (Cf. comments to Section 1)

### **Art. 33. General Provisions on Sponsoring Programmes**

(1) The meaning of this paragraph is not clear. We assume it means there shall be no sponsoring of TV/radio programme services, only of individual programmes.

### **Art. 34. Announcements on Sponsorship of Programme**

(6) This provision allows for the transmitting of sponsorship announcements during the sponsored programme, provided the announcements do not exceed 30 or 60 seconds, respectively. It is not clear whether during a programme only one announcement up to the maximum duration given can be transmitted or whether several short announcements are allowed provided the combined duration does not exceed the time limit. The airing of many very short announcements (e.g. 5 seconds) could be very intrusive and is not consumer-friendly. It is also not common practice in Europe. We suggest clarification.

### **Section 3. General Provisions regarding Advertising and Teleshopping**

In general, this section is in line with the requirements of the AVMSD. In some aspects it differs slightly from the wording of the AVMSD with the result that the respective provisions of the draft Broadcasting Code are more onerous for media service providers than those contained in the AVMSD. This is legally possible but it is not clear whether this is the intended consequence. Numerous stricter requirements are set up in addition to those of the AVMSD but they seem to comply with EU law.

This section is also very detailed. A concentration on basic requirements would improve the text. Less important rules would be better placed in the Regulator's code.

#### **We propose:**

The redrafting of this section to concentrate on basic requirements.

### **Art. 38. Insertion of Advertising and Teleshopping in TV and Radio Programme Services**

(4) The exception provided for in Art. 20 (2) AVMSD only applies to films made for television, cinematographic works and news programmes. Series, serials and documentaries are exempted from the category "*films made for television*". Paragraph 4 changes the meaning of this exception by omitting "*serials*" and replacing it by the much wider term "*entertainment programmes*". Furthermore, it does not use the term "*scheduled duration*". The insertion of "*scheduled*" into the AVMSD was motivated by the fact that sometimes because of cuts by the seller/producer the actual length of a film delivered differs from the bought version. However, the media service provider has planned and sold the advertising breaks according to the original length and is unaware of the shortened version until transmission. The shortened version might not allow for the actual number of breaks broadcast. This unintended violation of rules should not lead to fines for the media service provider.

**We propose:**

To use the wording of the AVMSD.

(5 a) and (5 b) Most European laws and regulatory rules differentiate between minors and children. The age limit for minors is usually lower than for children. The AVMSD wanted to protect this younger group whereas paragraph 5 b extends its protection to people who are nearly adults. Is this really necessary?

In addition, paragraph 5 allows only one advertising break in newscasts and programmes for minors even if these programmes are much longer than 30 minutes. This restriction makes the financing of this kind of programmes more difficult and could have the consequence that they are not broadcast as often as is desirable for either society or the legislator. The AVMSD allows one advertising break for each scheduled period of at least 30 minutes.

**We propose:**

To follow the approach taken by the AVMSD.

**Art. 40. Teleshopping Programmes**

(5) (6 a) The term “*personalised goods and/or services*” is unclear.

**Art. 41. Broadcasting Advertising Spots**

(3) It is not clear when information giving the identity of the radio broadcaster should be aired. Is it before or after the advertising break or both?

**Art. 42. Insertion of Advertising in Sports Transmissions**

(1 b) It appears that the drafters of this Code were motivated by the rules for football matches when they allowed two minispots during half-time. But what about other sports matches where the rules on breaks are different?

(1 d) What does a “*mostly*” visible sign mean and what are the reasons for this unclear exception (see also Art. 43 (1) (b))? We assume that this provision only applies to television broadcasters. This should be made clear by starting this sentence: “*In television broadcasts, ...*”.

**Art. 43. Insertion of isolated Advertising Spots**

(1 b) Cf. comment on Art. 42 (1) (d).

**Art. 44. Forbidden Advertising and Teleshopping**

(1 a) (1 b) It is not necessary to repeat here the requirements and prohibitions already spelled out in Art. 28, 29 and 30.

#### **Art. 46. Offers of delivery of products or Services**

(3) Being solely a definition, this provision could be better placed in Art. 3.

#### **Section 4. Placement of Goods and Services**

During the drafting of the AVMSD, the question of allowing product placement was much debated between the EU Council, Parliament, Commission and the broadcasting industry. Everyone involved acknowledged that product placement could endanger the responsibility and the editorial independence of broadcasters. However, there were different views on the best ways to avoid the danger. Some considered that the threats inherent in product placement could only be overcome by its total prohibition. Others were convinced that regulation could ensure the necessary protection. The compromise solution was to prohibit product placement (Art. 11 (2) AVMSD) but allow for derogations from this general rule (Art. 11 (3) AVMSD). We suggest the draft law follow the Directive's approach.

#### **We propose:**

The insertion before Art. 47 of a new article prohibiting product placement.

#### **Art. 47. The Right to Place Goods and Services**

In accordance with the proposed Article 47 (new) the title should be changed: "*The right to place*" should be replaced by "*Exceptions to the prohibition of product placement...*".

(1) Paragraph 1 should start: "*By way of derogation from Art. 47, the media service providers...*".

(2 a) The word "*serials*" has to be replaced by "*series*".

(3) Again: "*minors*" should be replaced by "*children*" (cf. comments on Art. 38 (5)).

#### **Art. 48. Programmes not Liable for Placement of Products and Services**

(1 c) We suggest replacing "*prominence in an exaggerated way*" by the term "*undue prominence*" which is widely used in European legal and regulatory texts.

#### **Art. 50 Interdiction Concerning Placement of Products and Services**

We draw attention to recital 93 AVMSD which states that thematic placement should be forbidden.

## **Section 5. Advertising and Teleshopping for Alcoholic Beverages**

### **Art. 53. General Requirements Regarding Advertising and Teleshopping for Alcoholic Beverages**

(a) Art. 22 a) AVMSD only *requires* that television advertising and teleshopping for alcoholic beverages may not be aimed “*specifically*” at minors.

## **Section 6. Advertising and Teleshopping for Food**

This is very detailed. It could be shortened by simply allowing for a general requirement for warning announcements in the Code on audiovisual commercial communication.

### **Art. 60. Informing and Educating in Health and Healthy Feeding**

This reads like an exhortation to healthy living rather than a matter suitable for a broadcasting law. See comments above. If our comments are followed paragraph 1 should be redrafted as a (general) requirement for airing announcements.

## **Section 7. Advertising and Teleshopping for Medicines and Medical Treatments**

The comments to Section 6 are also applicable to Section 7.

### **Art. 67. Advertising and Teleshopping for Food Supplements, Nutrient Supplements, Vitamins and Nutrients**

(1) Are these alternative or cumulative requirements (“*or*” or “*and*”)?

(5) This paragraph prohibits audiovisual commercial communication for certain foods and beverages “*during the time period of protecting minors*”. Art. 9 (2) AVMSD is less strict. EU member states are only obliged to encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication in this area. This provision is motivated by the idea of self-regulation. Media service providers should be given the chance to prove that they are capable of regulating this sensitive matter themselves.

#### **We propose:**

To redraft this paragraph accordingly.

## **Section 8. Advertising and Teleshopping Concerning Exercise of Certain Professions**

### **Art. 70. Advertising and Teleshopping Concerning Exercise of Certain Professions**

(1 d) Is “*legal expert*” a clearly defined profession in Moldova?

## **CHAPTER IV. The Broadcasting Council**

Given that this law now deals with the audiovisual sector as a whole, should the title of the regulatory body not reflect that fact: “*Council for Audiovisual Media*”?

### **Art. 73. The Mission of the Council**

Again, better to use “*audiovisual*” rather than “*broadcasting*”?

### **Art. 74. Statute of the Council**

Clause 1 describes the Council as “*autonomous*” but in Article 82 Parliament is said to “*exercise control over the Council*”. Which one is correct?

#### **We emphasise: The Council needs to be independent of political control and autonomous.**

As before, in (4) “*audiovisual*” rather than “*broadcasting*”.

## **Art. 75. Competences of the Council**

It would be helpful to clarify a number of matters. What is the role of the Council in respect of the PSB and its supervisory board and the extent of its powers? It is important for the PSB to be editorially independent but it could be subject to any content code produced by the Council (cf. earlier comments on Art. 10).

Will the Council have the explicit duty to produce a content code so that providers are clear about their responsibilities and the issues against which they will be judged to be in compliance? Or will the providers be required to produce codes for the approval of the Council?

Will the Council have a duty to monitor?

(j) It is one thing to remind broadcasters of their obligations to respect copyright and intellectual property rights in Article 22 but it is a different level of requirement to put the Council in the position of potentially regulating them on this issue. A register of contracts will only make sense if the Council is properly resourced, staffed and equipped to deal with it. It would be difficult for the Council to act as an enforcer (see later comments on Article 85 (4) (b) and (f)) or collect fines. A breach of copyright harms the rights holder not the government so any fine should logically be paid not to the regulator or the government but to the rights holder.

(q) We do not understand what this means. What is the relationship between the regulator and the courts?

## **Art. 76. Structure of the Council**

We still have a number of concerns about the method of appointment of Council members (see also CoE S/J). The key requirement should be to ensure that a wide pool of candidates is available, which represents the diversity of Moldovan society and strikes an appropriate gender balance, and that the appointment process is de-politicised. We would suggest that posts should be advertised and nominations sought from major civil society organisations.

The appointment of members and of the Chair should be by the same objective selection process. According to the current draft, the presidential appointment has no process and moreover becomes the Chair (Article 79). This is not acceptable as a guarantee of the independence of the Council. The parliamentary process also does not specify the number of votes required for a successful candidate. This should be at least two-thirds to avoid the danger of domination by the majority party.

**We therefore propose:**

To insert a new clause 2: *“The members of the Broadcasting Council shall represent the diversity of Moldovan society with an appropriate representation of both genders.”*

To insert a requirement for advertising the posts, not simply issuing “invitations”, and that nominations are sought from major civil society organisations.

(3) and (4) What is the Observers Council? Is it the same as the Supervisory Board of the PSB? If not, there should be some mention of it in the chapter dealing with the PSB and a definition of its role.

We also have doubts as to whether performance in a public TV debate is necessarily a useful criterion for selection.

(7) In line with our comments above about depoliticising the process,

**We propose:**

The required majority in Parliament for appointment is at least two-thirds.

**Art. 77. Members of the Council**

See our comments above on independence, diversity and gender. It is also important that members of the Council are seen to be people of proven independence, competence and probity.

For clarity, **we propose** a redrafting: *“The members of the Council are guarantors of the public interest. Their role is to implement their duties according to the law, free of improper influence from any other public body.”*

(5) (d) For clarity, **we propose** a redrafting: *“A criminal conviction for dishonesty or imprisonment, bankruptcy, physical or mental incapacity”*.

(8) What is meant by *“public dignity”* beyond Article 77 (1)?

(9) It would be helpful to supplement this clause with the requirement for the Council to keep a Register of Interests of members for public inspection. This would be compatible with Article 78 (5).

**Art. 78. Incompatibilities**

This is a good statement but we would also suggest that it is important to make clear that members should not derive any financial benefit other than their fees as members.

**Art. 79. Administration of the Council**

See our earlier comments about the appointment of the Chair. Our concerns are strengthened by Article 79 (2) which gives the President an unfettered right to appoint a

Chair within 30 days if the post becomes vacant. Any appointment of a Chair should be by the same process as members and removed as far as possible from the political process. Perhaps the President could select a Chair from those agreed by Parliament by due process.

We are concerned by this and 82 (6) as there are clear dangers here of political interference.

**We propose:**

The removal of this clause.

(4)(a), (b) and (j) It would be helpful to be clear that this is a matter of status and pay and is not a political or ministerial post.

In (b), a reference back to the redrafted 77 (1)?

In (j), a reference to either “*broadcasting*” or “*audiovisual media*” rather than “*radio and television*”?

(7) Is this simply dismissal from the role of vice chair or from the Council? If the former, should it suggest “*loss of confidence*”? If the latter, to avoid any suggestion of improper dismissal or bias, it should be made clear that this should be done on the same basis as 77 (5) and 78.

**Art. 81. Organisation of the Council**

(4) While it should be normal practice for the Council to either sit in public or publish minutes of its meetings, there may be occasions where commercial confidence or personnel matters require a private meeting. Why are no abstentions allowed?

**Art. 82. Parliamentary Control**

We return to the challenge of independence. This article should be better expressed as the accountability of the Council to Parliament which is not the same as Parliament controlling the regulator. 82 (6) is not acceptable as it destroys any notion of autonomy or independence. Parliament could simply be acting for political reasons and a simple majority again reinforces the dominance of the majority party.

So in (1) **we propose:**

Redraft as follows: “*The Council is accountable to Parliament through the presentation of its annual report.*”

Parliament could question the Chair and Council in a specialised committee through the hearing process in (3) but a general debate or discussion again raises the danger of interference.

We would also suggest that the report is required to cover more than simply two subjects (see CoE S/J) to help manage expectations.

**We propose:**

Article 82 (6) be removed. Parliament can criticise but not reject.

**Art. 83. Funding**

The five year subvention is good practice as it provides certainty and supports independence. Should there be a provision for inflation? What are the grants mentioned in 83 (1) (c)?

**Art. 84. Supervision and Control**

While these provisions make sense and are consistent generally with European standards in providing a transparent and accountable process for the Council, we would suggest that the law states the principle (Clause 1) and that the rest is part of the Council's published procedures. In (4), the time limits given are too short for complex cases.

**Art. 85. Responsibility for Violation**

The setting out of violations and sanctions is valuable though again this could be dealt with in detail in the Council's published procedures and sanctions policy. But it is important that sanctions should be targeted and proportionate. We suggest that the law gives the Council the necessary powers but that the Council works out and publishes its own sanctions policy.

(4) (b) and (f) See our earlier comments on the copyright issue. We doubt that this is a matter for the Council rather than the courts and, in any event, the "fine" should go to the rights holder.

(7) The sanction proposed is too strict. U.S. imports will contain this material and the provider can do nothing about it.

(9) (b) It is disproportionate to suspend a licence (a very high sanction) for failure to provide information on audience share or property data.

**Art. 87. Cooperation with other authorities**

(5) Begs the question if these intellectual property authorities exist why does the Council need copyright enforcement powers.

**Chapter VII Licensing Activity**

Is this Chapter V? Does it need “*broadcasting*”?

#### **Art. 88. General Provisions**

(2) A clear process would be preferable to “ad hoc” regulation.

(6) We suggest the wording of the AVMSD as a model.

#### **Art. 90. Audiovisual Licence**

In (4), we welcome the nine-year licence as this gives a better chance to recover investment.

#### **Art. 91. Content of Audiovisual Licence**

We suggest that it would be helpful to also include in the content of the licence a requirement to abide by the law and the Council’s content code, to provide the Council with information as required, and maintain and retain recordings.

There is also a need in this article to require the Council to give reasons as to why it has granted or not granted a licence and for the right of appeal to be given to disappointed licensees if this is not provided for in Article 86 (1).

#### **Art. 92. Contest on Issuing Audiovisual Licence**

We suggest it would be helpful to include in (f) the need to demonstrate how the proposed service contributes or adds to the diversity and plurality of programme services currently available, and again in Article 92 (10) (c); and to make clear the need for the applicant to be able to demonstrate their technical ability as well as financial ability to achieve the service in (h).

(9) The time period given is too short to allow for a proper consideration. We suggest it is lengthened to at least 3 months with a provision for extension in very complex cases.

(12) The time given for a new service to start is too short. In Germany, the period is up to 3 years! We would suggest a minimum of one year.

#### **Art. 94. Rightful Prolongation of Audiovisual Licence**

Automatic prolongation is problematic. We suggest that the process require an assessment of whether the provider is continuing to meet the original licence remit and a consideration of whether the service is still contributing to diversity and plurality of provision. We would also suggest there should be a limit to the number of times a licence can be prolonged without competition. It can, of course, be re-awarded but subject to competition.

#### **Art. 96. Annulment of Audiovisual Licence**

**We propose:** the insertion of “*may*” before “*annul*” as this should be a discretionary process.

96 (b) should be a reference to Article 92 (12) not (13). Should this article also not include a reference to “*persistent failure to comply with the Council’s codes or other requirements of the law*”?

#### **Art. 97. Free Retransmission**

The references in (3) (a) and (b) to Articles 10 and 11 of the Broadcasting Code go further than Article 3 of the AVMSD.

**We strongly recommend** deleting this reference and replacing it with the criteria and wording of Article 3 AVMSD in order to avoid non-compliance with the Directive.

#### **Art. 101. Modifying Technical Licence**

Given the significant modification to the licence, we suggest, in line with CoE S/J, that this article needs to include a minimum notice period of at least six months so the provider can notify its audience.

#### **Art. 102. Withdrawal of Technical Licence**

We suggest that (a) is modified to make clear this is for major and persistent breaches.

### **Section II. Legal Regime of Property in Broadcasting**

#### **Art. 105. Limiting Property Concentration in Broadcasting**

To make clear the importance of the Council encouraging and ensuring competition, we suggest replacing “*protect*” with “*encourage while protecting*”.

There seems to be a repetition of (4) in (5).

#### **Art. 107. Auction for Measuring Audience Shares**

There seems to be a typo in (3). Two mentions of 5.

### **CHAPTER VI. Public Broadcasters**

#### **Art. 109. Mission of the Public Broadcaster**

We welcome the clear statement of the mission and the role of the PSB but again suggest that there is too much complex detail in this whole chapter both about content and the management structure of the PSB. Much could be set out as principles and the detail left to the supervisory board to set out and implement in policy.

In this clause **we recommend** that the present (f) become (b) as it sets out the important basis of information, education and entertainment.

In (c) **we suggest** replacing “*maintaining and developing national conscience*” with “*reflecting and supporting Moldovan culture*” as this would be a clearer remit.

#### **Art. 111. Activity Object of the Public Broadcaster**

In line with CoE S/J, **we propose** that (a) include children’s programmes and programmes reflecting the cultural diversity of Moldova.

#### **Art. 112. Editorial Independence of Public Broadcaster**

Again, another important statement but we are unclear in (3) what “*access of specialised employees to information*” might be.

#### **Art. 113. Tasks of the Public Broadcaster**

This again sets out a clear statement of expectation and obligations but we suggest some changes to ensure greater clarity in line with European standards.

**We propose** that (b) would be better in Article 109 as it relates more clearly to mission than tasks.

**We propose** in (a) replacing “*ensuring the complex, impartial, equidistant information of the public, observing the political balance*” with “*ensuring accurate, impartial and objective information*”. Impartial implies balance.

In (c) we are not sure how any broadcaster can promote civilisation so we **propose** instead: “*Contribute to development and broadcasting of intellectual and artistic creativity and of social, economic, scientific and civic knowledge*”.

In (d) **we propose** deleting “*loyally*” as we are not convinced that this wording is compatible with impartiality and objectivity.

In (e) **we propose** replacing “*civic journalism*” with “*journalism in the public interest*”.

Should there be a requirement on the PSB to recruit staff reflecting the diversity of Moldovan society?

#### **Art. 114. Rights of the Public Broadcaster**

In (1 a) we are unclear if this is meant to reflect Article 15 of the AVMSD. If it is, it falls short and raises the question whether commercial broadcasters have similar rights.

#### **Art. 115. Functioning of the Public Broadcaster**

This and the following sections relating to organisation and management provide a lot of detail that is better left to the PSB.

In (6), it seems unwise for reasons of business continuity to have every senior figure step down at the end of the general manager's term of office.

#### **Art.116. Tasks of the Managerial Committee**

No comment save that this is very detailed for a law and could be left to the Supervisory Board to specify.

#### **Art. 117. General Manager**

Again, too much detail. In (3) how does (b) relate to (a)?

In (10) we are again concerned about the independence of the PSB. It is wrong in principle for the General Manager to be dismissed if the Annual Report is rejected by Parliament. Parliament should only have the power to question and criticise not fire.

**We propose** this clause is deleted.

#### **Art. 118. Task book**

In (3), we suggest the inclusion of a requirement to set out a statement of programme policy for each of the different PSB services.

#### **Art. 119. Property of the PSB**

In (c), the prohibition seems too strict. In Germany and the UK public service broadcasters play an important role in cultural life by organising competitions for young authors, musicians and so on and awarding (cash) prizes.

#### **Art. 120. Budget of the Public Broadcaster**

In (5), we are unclear about the meaning of "*the insurance of protection*".

How is the programme budget to be covered? There is no mention here.

Would it be helpful to have some provision for inflation?

(f) and (i) are repetitive.

How will (h) be audited and enforced?

### **Art. 121. Subscription Fee**

There will be inevitable challenges around self-declaration and non-payment without a complex monitoring and collection regime. Are there too many concessions for non-payment in (5)?

### **Art. 123 Constituting Supervisory Board of the Public Broadcaster**

Again, we have concerns over the process, the qualifications of candidates and their independence.

#### **We propose:**

In (1) inserting wording that requires candidates to be reflective of Moldovan society, strike an appropriate gender balance and, in this case, include educators.

In (2) (a) that vacancies are advertised and nominations sought from major civil society organisations and (b) that the period is extended - 15 days is too short if there are a number of candidates. We are also concerned that in (c) the committee is not dominated by the majority party.

In (5) (c), we assume it means not reaching retiring age.

### **Art. 125. Powers and Tasks of Supervisory Board**

Again this is very detailed and (1) (e) misses the important point that the Board needs to provide strategic leadership not micro management of the PSM in the public interest.

This article also needs to require the keeping of a public register of interests of Board members.

### **Art. 126. Organisation and Functioning of Supervisory Board**

A useful but very detailed set of requirements. Presumably it should be made clear that the incompatibility provisions in Article 124 also apply. We have major concerns about (9) and (10). See comments on Article 128.

### **Art. 128. Control of Supervisory Board's Work**

Again, a major concern about independence: as with the Council, the PSB should be accountable to Parliament but not controlled by it. Therefore the Annual Report should be presented to Parliament which can discuss it and question the Board and make strong

criticisms for the Board to consider but not reject the report and by implication dismiss the Chair.

**We propose** that this clause is either deleted or completely rewritten in the light of the above.

#### **Art. 129. Independent Producer**

This is normally a requirement on commercial broadcasters too.

**We propose** an adjustment in line with Art. 15 AVMSD.

#### **CHAPTER IX. Community Broadcasters**

Should be VII? No other comments.

#### **CHAPTER X. Final Provisions**

Should be VIII? No other comments.