COMMENTS ON THE DRAFT BROADCASTING CODE OF THE REPUBLIC OF MOLDOVA ("THE CODE")

Opening remarks

The following comments should not be seen as a comprehensive, expert opinion on the Code. Rather, they focus on a number of perceived weaknesses and make recommendations on how the Code could be further improved. To avoid any misperception or misinterpretation, it should be stressed from the onset that the Code is generally of high quality, reflects "state of the art" broadcasting regulation, and does not shy away from exploring new approaches or covering new ground, e.g. as regards the sensitive issue of protecting journalists (Art. 24) or giving individuals a right to complain about lack of pluralism (Art. 9). Moreover, the comments hereafter should always be checked against the economic, social and cultural characteristics of the audiovisual market in Moldova. Sometimes, the English translation of the Code may have led to uncertainties or misunderstandings.

1. Quantitative content requirements (Art. 6 - 8, 12, 15, 129)

As currently drafted, the provisions of the Code seem to result in a considerable degree of overregulation.

Whereas the EU Audiovisual Media Services (AVMS) Directive foresees two quantitative requirements (50% European works and 10% European works by independent producers) to which some Member States have added a linguistic quota (works originally produced in the national language, with a percentage significantly lower than the quota for European works, so to comply with EU law), the draft Code goes much further, by introducing five different quotas:

- Art. 6 and Art. 15(4)(c) - *European audiovisual works* (75% for terrestrial channels)
- Art. 7 and Art. 15(4)(b) and (7) - *Native programmes* (50% for terrestrial channels, half of which created within the last 5 years, 60% for topical, cultural and music programmes in prime time). This covers in effect domestic programmes produced in the country, a category not foreseen in the AVMS Directive (which gives equal treatment to national and European programmes).
- Art. 8 and Art. 15(4)(a) - *Own programmes* (25% for terrestrial channels, half of which created within the last 5 years)
- Art. 15(2) and (6) - *Programmes in the State language* (80% for news and current affairs). Moreover, 75% of the available terrestrial frequencies will be reserved for TV services in the State language
- Art. 129 - *Independent productions* (10% for public broadcasters)

Such a system raises a number of concerns:

First, it seems overly complex and burdensome, especially for a small and economically weak country, and may create unnecessary bureaucratic burdens, for broadcasters as well as for the supervisory authority. Not only are there additional quotas compared to European standards, but the requisite percentages are much higher (75% for European works compared to 50% in the AVMS Directive).

Second, there is the question of whether broadcasters would be able to afford such a high ratio of domestic audiovisual productions, given the financial and other resources available on the market. In general, domestic programmes and own productions are significantly more expensive than imported programmes, which have often already been amortised in bigger markets. Therefore the domestic content requirements may turn out to be impossible to fulfill in practice, a development which would undermine the effectiveness of the Code and negatively affect the quality of domestic productions and the level of media pluralism (since only few broadcasters - if any - would be able to fulfill the domestic programme requirements).

Third, apart perhaps from the quota for independent productions, the quotas lack the necessary flexibility to match economic and market realities. In contrast, the AVMS Directive uses terms such as "where practicable" and "should be achieved progressively".

Fourthly, the requirements for domestic programmes ("native programmes") appear overly protectionist and discriminate against programmes produced in EU/EEA States, thus going against EU rules. To bring the Code in line with EU rules it would also be necessary to apply the 50% quota for European works to *all broadcasters* (and not only to terrestrial channels) and the 10% quota for independent productions to all broadcasters (and not only to public broadcasters).

The requirements for accessibility services for handicapped persons (Art. 12) also seem to be extremely detailed and rigid. Quantitative requirements may best be left to regulations by the Broadcasting Council, which is likely to be in a better position to gradually improve the offer of accessibility services in line with new technological developments and the financial capacities of the broadcasters.

Recommendation:

Reduce the number of different quotas; bring them in line with EU rules; adapt the requirements to a level which the Moldovan market can afford/finance; increase flexibility.

2. Qualitative content requirements (Art. 9 - 17)

As currently drafted, there is a risk that a number of imprecise terms used in the Code could be interpreted and applied in supervisory and quasi-judicial proceedings. This might lead to undue restrictions of journalistic and media freedom, and particularly if the terms were to be interpreted and enforced by bodies which do not have the necessary resources or which are not completely independent, pluralistic, neutral and objective.

Principle of "pluralist audiovisual media services"

Art. 9 aims to ensure a high level of pluralistic content, which is certainly an important and laudable objective, and especially in view of past experience in Moldova (see European Court of Human Rights, Case of Manole a.o. v. Moldova, No. 13936/02). However, making it "operational" by defining it as a legal requirement for individual media service providers may be a double-edged measure. Moreover, the formulation "anyone has the right to access pluralistic audiovisual media services" implies that anyone can legally enforce such a right to pluralistic content. This seems to be confirmed by the complaints procedure before the Broadcasting Council, foreseen in Art. 84(3)(a) and (5)(g), intended to enforce that provision. Again, this would appear to be a double-edged measure as long as there is no guarantee that the Broadcasting Council is itself fully independent, pluralistic, neutral and objective - which is far from being achieved under the draft Code. In other words, what is supposed to be a useful instrument to give civil society a means to ensure that broadcasters provide pluralistic services could be turned into an instrument to limit media freedom by a supervisory authority which lacks political independence or has its own political agenda.

Moreover, the procedure does not seem realistic, and it is unclear how it could work in practice. Given the complexity of measuring the "pluralistic" character of services - which normally requires an assessment of the overall programme offer - it is practically impossible that this could be properly achieved within the foreseen procedure, and especially given the tight deadlines (15 days maximum) in Art. 84(4), and the limited resources of the Broadcasting Council. It would hardly be feasible to gather all relevant facts in such a short period. It also needs to be borne in mind that the assessment of "pluralism" criteria would involve subjective judgments, with a high risk of bias or abuse. Consequently, it would be highly problematic to entrust the Council with assessing the pluralistic character of media services if the Council itself is not composed in a pluralistic way. (See also point 3 below.)

An important point in this regard is that the procedure is supposed to lead to binding decisions and sanctions by the Council (Art. 84(12-15)). This increases the risk that complaints will eventually lead to limitations of journalistic and media freedom. A less risky alternative might be to limit the powers of the Broadcasting Council in this field and to empower it merely to issue opinions and recommendations in cases where it considers that the principles of Art. 9 have been violated.

Another option might be to set the promotion of pluralism as an *objective for the Broadcasting Council* instead of formulating "pluralism" as a legally enforceable *obligation for operators*. The Council should thus contribute to this objective within its sphere of competence, e.g. when selecting broadcasters for terrestrial frequencies, by comparing their programme schedules and their commitment to pluralism.

The current draft also empowers the Broadcasting Council to set up regulations in this area (Art. 9(2)). The way this has been done raises an issue: as a minimum, the Code should include provisions against possible restrictions of freedom of expression and clearly stipulate the content, purpose and limitations of such regulations. (See also point 3 below.)

Human dignity and "good morals"

Art. 10 has the important objective of ensuring respect for human dignity and fundamental human rights. However, the prohibition of programmes which are "contrary to good morals" (Art. 10(2)(c)) goes beyond this purpose, and the vague and subjective character of the term "good morals" gives rise to concern. The question of "good morals" is better left to self-regulation and, in particular, to codes of journalistic ethics.

Protection of minors

Art. 11 breaks new ground for the protection of minors, going beyond the minimum requirements in the AVMS Directive. However, putting the "watershed" for programmes which are unsuitable for minors at 24.00 (rather than, for example, at 21.00 or 22.00) appears extremely strict. Some of the other requirements may also be seen as examples of over-regulation, and raise the question of whether the regulation of such details is not better left to broadcasters themselves (or - subject to certain precautions - to regulation by the Broadcasting Council).

Principle of "full and truthful information"

According to Art. 13, truthfulness of information is a legal requirement. Here again, as in the case of the pluralistic character of content, the formulation ("anyone has the right to full and truthful information") gives the impression that anyone has a right to enforce such a requirement, and indeed the complaints and sanctioning regime (Art. 84-85) obviously applies to this provision. That would be highly problematic, since in practice it could easily lead to abuses and severe restrictions of journalistic and media freedom. More generally, the complaints procedure foreseen in Art. 84(3-4) does not appear to be an appropriate instrument for establishing truthfulness of information, and such should not be the role of the Broadcasting Council.

In cases of defamation and violations of privacy, victims can always turn to the civil courts to defend their rights and obtain damages. In case of factually false statements, there is a right of reply (Art. 23), which could be defined in more concrete terms, taking into account the specificity of audiovisual media. In cases where these existing mechanisms are insufficient, it would be possible to envisage a complaints procedure, organised by the broadcasters/media themselves (for example, as part of a self-regulatory code of conduct). If, nevertheless, this task is entrusted to the Broadcasting Council, it would be preferable, in view of the sensitivity of such matters, to avoid binding decisions in individual cases by the Council (which should not assume the role of a Court) but rather to have recourse to softer instruments, such as proposals for out-of-court settlement, opinions or recommendations.

As with the term "pluralism", great care has to be taken with terms such as "full and truthful information", "social and political balance", "equidistance and objectivity". It would be more suitable to use such terms in the form of objectives (recognising the fact that they can rarely be completely achieved) rather than as legal requirements. It should also be borne in mind that the application in practice will require some (necessarily subjective) assessment. Consequently, such legal requirements carry with them the risk of being abused in order to limit freedom of expression and to intimidate journalists, who often work under time pressure and with some uncertainty. This does not, of course, imply doing away with the obligation of journalists to process information with diligence and to weigh the interest of the public in being informed in a timely manner of the risk involved in spreading false information.

Access to events

Regarding events of major importance to society (Art. 17), the formulation "international music contests" may be too vague, and the formulation "European and world sports championships" might go too far if it were to cover all sports without exception or qualification (e.g. irrespective of society's interest in the sport, the location of the event and/or whether a national team is participating in the match/competition). Such criteria should be used in the Code to provide guidance to the Broadcasting Council when it establishes the list of events of major importance.

Recommendation:

Avoid using vague terms such as "pluralism of services", "truthfulness of information" or "good morals" as legal requirements rather than as objectives; leave more scope for self-regulation (as regards pluralism of opinion, quality of information, protection of minors, respect of good morals, etc.); reduce the "policing" role of the Broadcasting Council; consider alternative mechanisms to improve pluralism of opinion and quality of information (e.g. an obligation for the sector to draw up a code of conduct, accompanied by a complaints procedure); provide for clear guidance and limitations when the Broadcasting Council is empowered to adopt general regulations, including the list of events of major importance to society.

3. The Broadcasting Council (Art. 73 - 87)

While the transparency rules figuring in the Code and a number of safeguards for independence are to be welcomed, additional safeguards for independence are necessary. The tasks of the Council (which sometimes appear overambitious) and the manner in which it intervenes, in particular as regards the complaints and sanctioning systems, need some rethinking.

Independence and pluralistic composition of the Council

While the Council is described as an autonomous public authority (Art. 74) and its members enjoy a number of safeguards for their independence (long, non-renewable terms, incompatibility requirements, some protection against removal, no binding link to the organisation appointing them), weaknesses still remain with regard to the pluralistic composition of the Council and the protection of its independence.

As currently drafted, the Code does not ensure a *pluralistic composition* of the Council.

While some transparency requirements and the holding of public TV debates with candidates may have a positive influence on the quality of the selection process, it does not in itself ensure that the Council is composed of individuals who jointly reflect the various components of civil society. It is also not clear what real impact the public debate with candidates on TV will have on the election in Parliament. Will members of Parliament participate in the TV debate, will there be a public rating of the candidates' performances? A provision in the Code, clearly stating that Parliament should seek to ensure a pluralistic composition of the Council (for example, in terms of professional and cultural background of the members, equal representation of men and women, balanced representation of different groups and their affinities to the political majority or opposition, etc.) is missing. The rule that four members are appointed by Parliament and one member (plus the Chairperson) by the President does not guarantee pluralism in this sense, especially since the President may belong to the same political party which holds the majority in Parliament. A key weakness of the draft Code is that the election in Parliament is done by simple majority vote, without any mechanism to ensure that candidates supported by the opposition may also be elected. A possible solution could be to require a three-quarters majority for the election, so that a broad consensus within Parliament, beyond political boundaries, would be required.

Moreover, under the draft Code, the *Chairperson* of the Council, who plays a preponderant role (Art. 79), would be particularly *exposed to political influence*. The President may have a strong hold over the Chairperson due to the fact that he appoints him, rather his being elected by and within the Council. This may lead to the Chairperson's allegiance being toward the President and its party rather than to the Council. The provision that the Chairperson can be (or even has to be) revoked by the President if the Parliament rejects the annual report (Art. 79(2)(l) in conjunction with Art. 82(6)), does not allay these concerns but rather reinforces them. It allows for a dismissal of the Chairperson on purely political grounds. Such a possibility would clearly be in contradiction with Council of Europe Recommendation Rec (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector, and specifically Guidelines 6 and 7 appended to the Recommendation. In particular in situations where the President belongs to a party which is part of the Parliamentary majority, the Chairperson would always be at the mercy of the President and the majority parties, which would completely undermine his or her independence. At an absolute minimum, any (demand for) revocation of the Chairperson by Parliament should require at least a high qualified majority (e.g. three-quarters majority).

Recommendation:

Devise a mechanism which ensures a minimum level of pluralistic composition of the Council (for example, by providing concrete criteria for the composition, giving nomination rights to different groups, ensuring election by a three-quarters majority in Parliament or by a system of proportional representation); strengthen the independence of the Chairperson by giving up the President's right for appointing and revoking him or her.

Tasks and objectives

Some of the tasks and competences of the Council, as laid out in the draft Code, seem too vast. The diversity of tasks may also divert the Council from its primary objectives, which are to support a free, pluralistic and economically viable audiovisual media system in Moldava, to grant licenses to broadcasters in a transparent and objective manner, to ensure broadcasters' respect of basic content obligations, to encourage self-regulation, etc.

An area where the draft Code seems to be overly ambitious is the *complaints and/or litigation procedures* mentioned under Art. 75(h),(i) and (q), in particular in reference to alleged violations of Art. 9, 10 and 13. As already explained under point 2 above, the Council should not hold a quasi-judiciary role and resolve litigations between the media and third parties by taking binding decisions. This is particularly important in cases where complaints concern violations of personality rights or of intellectual property rights. Nor should it be the Council's role to establish the truthfulness of information relayed by the media. At any rate, the procedure foreseen under Art. 84(3) and (4) is not appropriate for such tasks (see point 2 above). Last but not least, as explained under points 1 and 2 above, some of the quantitative and qualitative content obligations of broadcasters are extremely far reaching, and combined with the strict supervisory and sanctioning regime foreseen under Art. 84 and 85 of the Code, could stifle the media and put journalistic and media freedom at serious risk.

Another example where the draft Code clearly overreaches concerns the *registry of contracts* (Art. 75(j)). It is not clear why such a registry is needed in Moldova, in contrast to other countries. Apart from data protection concerns related to business secrets and other sensitive data contained in such contracts, the task for the Council to operate the register, and for broadcasters to provide the information, would be enormous, since broadcasters normally conclude thousands, if not tens of thousands of contracts with potential rights holders every year. At any rate, the burden for operators is likely to be out of proportion with regard to the pursued objective.

In a number of areas the Council is empowered to adopt *general regulations* (see Art. 75(1), 9(2), 12(4), 15(5), 17(4) and (10), 29(3)). To ensure the legitimacy of such regulations and the rule of law, the purpose, content and limits of the regulations need to be more clearly defined in the Code; if not, broadcasters are not in a position to effectively challenge such regulations. (It is assumed here that Art. 86 also applies to general regulations adopted by the Council.)

On a more general level, a number of provisions in the Code (e.g. Art. 5(3), 75, 84 and 85) give the impression that the main role of the Broadcasting Council is to "enforce" the Code and to "police" broadcasters and other media service providers. However, a more modern concept of media regulators does not so much view the regulatory authority as a law enforcement body sanctioning broadcasters, but as an independent agency that plays a positive, supportive role, by guaranteeing media freedom and pluralism, and by helping the audiovisual media sector to develop, keeping a number of well-defined public policy objectives in mind (such as promoting cultural diversity, protecting minors, improving access by handicapped people, supporting media literacy, etc.). Such an approach would imply that the Council take non-regulatory initiatives (such as providing incentives or financial support measures), which may sometimes make regulatory measures superfluous. This in turn would require that the setting of objectives for the Council have a more important place in the legal framework.

The "policing" approach in the Code is also quite strong if one looks at the *sanctioning regime* (Art. 85). While efforts have obviously been made to introduce a graduated system, starting with warnings in certain cases, the sanctions foreseen often remain quite harsh and disproportionate. In particular, the full or partial suspension, or even withdrawal, of licenses (Art. 85(7), (8) and (9)) should only come into play as a very last resort, in cases of repeated violations of a serious character, since such measures severely restrict media freedom and risk destroying the economic basis of the broadcaster concerned, to the detriment of media pluralism. Further, the obligation to broadcast the text of all penalties "at least 3 times, in prime

time, of which once in the main newscast" (Art. 85(13)) would seem to be disproportionate in many cases, and could be used to pillory certain broadcasters.

Recommendation:

Review overall tasks and powers (in particular regarding complaints/litigation procedures and copyright register); put more emphasis on the positive role for media freedom rather than on policing broadcasters; better define and limit powers for the adoption of regulations; design a more proportionate sanctioning system.

Funding

As long as the Broadcasting Council's main role is to enforce the law and to police broadcasters, there is no reason for the related sector to provide up to 60% of its funding through the payment of licensing taxes (Art. 83). Depending on the financial resources required for the Council (especially if it has far-reaching responsibilities) this could also become a disproportionate burden for broadcasters, and could hamper the development of the audiovisual market in the country. It could distort competition between operators which are obliged to pay these taxes and others who are not (for example those licensed abroad or not subject to a licence). Therefore, it might be better to adapt the tasks of the Council in line with the level of public funding which the State is prepared to accord to it. It may be noted in this respect that sufficient public funding is generally considered a precondition for the independence and effective functioning of regulatory authorities in the broadcasting sector (see the above-mentioned Recommendation Rec (2000) 23, and specifically Guidelines 9-11).

4. Public broadcasters (Art. 38, 109 - 129)

Independence and appointment procedures for the Supervisory Board and General Manager

Ensuring the independence of public service broadcasters from government and other political and economic powers must be a key objective of the regulatory framework. Basic European standards in this field have been set by Council of Europe Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting.

It is certainly very welcome that Art. 109 mentions the "independence from the state authorities and institutions, from political and economic forces" as one of the principles of public service broadcasting, and that Art. 112(1) prohibits any outside interference with its editorial independence.

However, this independence must also be underpinned by appropriate appointment procedures for the Supervisory Board and for the General Manager, and so far this has only been partially achieved.

The appointment of the members of the *Supervisory Board* raises concerns which are similar to those expressed under point 3 above, regarding the composition of the Council. The nine members of the Board are elected by Parliament by (simple) majority. Apart from the individual qualification requirements mentioned in Art. 123(1), there do not seem to be any requirements or procedures to guarantee a pluralistic composition (for example, in terms of the professional and cultural background of members, their gender, their political affinities, etc.).

The procedure in Art. 123(2), by which the Broadcasting Council preselects the candidates (with a list of candidates exceeding twice the number of vacancies) does not in itself ensure pluralism and balance - even if the Broadcasting Council were a pluralistically composed body, which is not ensured under the draft Code. The same applies to the list of candidates proposed by the specialised Committee of Parliament for the vote in plenary. The vote in

plenary, which is decisive, is by simple majority. This means that there are no safeguards in place against a parliamentary majority pushing through its candidates, without regard for a pluralistic composition and balance.

There are different ways of improving the composition and voting procedure, for example by giving different groups of society the right to propose candidates or by requiring a qualified majority (for example, a three-quarters majority) for the vote in plenary.

As with the Chairperson of the Broadcasting Council, the provision that the rejection by Parliament of the annual report (or, more precisely, the part thereof concerning the activity of the Supervisory Board) leads to the dismissal of the *Chairperson and the Secretary of the Supervisory Board* (Art. 128(3)) poses a serious problem: it allows for a dismissal on purely political grounds (see point 3 above). Dismissal should only be possible on clearly defined grounds (e.g. non-respect of incompatibility rules, incapacity to exercise the functions) and should require a qualified (e.g. three-quarters) majority.

The *General Manager* is the key figure in the organisation, not least since he appoints and dismisses the members of the Managerial Committee (Art. 117(2)(d)). The provision that he/she is appointed by the Supervisory Board is not in itself a problem. However, this presupposes that the Supervisory Board itself is independent and composed in a pluralistic manner. Moreover, there should be safeguards, for example through the requirement of a qualified majority, to ensure that the General Manager has broad support in the Supervisory Board.

Once appointed, the General Manager must feel free to act in the best interests of the organisation, without the fear of being dismissed for political reasons. The principle should therefore be that the General Manager cannot be dismissed during his or her term of office, apart from exceptional circumstances. A dismissal of the General Manager by the Supervisory Board should be envisaged only in clearly defined exceptional circumstances, and not simply because the annual report had been rejected by the supervisory body (as foreseen in Art. 117(10)(c)). A dismissal could also be envisaged where the General Manager has lost all support across different components of a pluralistically composed Supervisory Board, in which case the Supervisory Board could elect a new General Manager with a qualified (at least two-thirds) majority (see, for example, Art. 13 of the Model Public Service Broadcasting Law by Werner Rumphorst[1]).

Recommendation:

Introduce a mechanism to ensure a minimum level of pluralistic composition of the Supervisory Board (for example, by providing concrete criteria for the composition, giving nomination rights to different groups, ensuring election by a qualified majority in Parliament or by a system of proportional representation); protect the Chairperson and the Secretary of the Supervisory Board against dismissal for political reasons; require a qualified majority in the Supervisory Board for the appointment and dismissal of the General Manager.

Editorial independence vs. obligation to broadcast "non-commercial advertising"

A lesser but still significant problem for the public broadcaster's editorial independence arises from the provision in Art. 113(s), which requires the public broadcaster to broadcast free of charge "non-commercial advertising with the duration not exceeding 6 minutes of a clock hour" on the basis of a “first come - first served” principle.

[1] See http://www.ebu.ch/CMSimages/en/leg_p_model_law_psb_210207_tcm6-50150.pdf

This provision leaves many questions open. Who would be the authors or beneficiaries of such "non-commercial advertising" - public authorities, political parties, religious communities, trade unions, industry associations, special interest groups, civil society, etc.? How can a "first come, first served" principle work in practice, in view of the great number and the variety of beneficiaries? How to avoid a bias in favour of particular opinions and interests? How long can individual messages be? How can it be ensured that they do not offend certain parts of society? How can it be ensured that the quantity and the content/quality of non-commercial advertising messages does not damage the integrity, quality and attractiveness of the public broadcasting service?

In addition to these open questions, the provision raises a number of concerns. First of all, 6 minutes per clock hour is a lot, almost as much as is allowed for commercial broadcasting on public radio and TV. Secondly, if "non-commercial advertising" allows for political messages to be made, it could undermine the overall editorial balance of public service channels, since it is more difficult for viewers to distinguish such messages from editorial content (as compared to the distinction between editorial content and commercial advertising). Moreover, providing this opportunity "free of charge" would certainly require an overriding public interest, since it is a kind of subsidy provided to the beneficiaries.

In view of all these difficulties, public service broadcasters are normally only obliged under exceptional circumstances to broadcast messages which are not under their editorial control. Such cases are public service *announcements in case of natural disasters and similar emergencies* (Art. 26) and sometimes *party political broadcasts during election campaigns* (see Council of Europe Recommendation CM/Rec (2007)15 on measures concerning media coverage of election campaigns). Some countries have also introduced a regulatory framework for paid political advertising.

If public broadcasters decide, on a voluntary basis and under their own editorial control, to disseminate communications for altruistic purposes/initiatives (e.g. collecting money for disaster relief) they would naturally be under an obligation to observe neutrality, meaning that they must take their decisions on a non-discriminatory basis. To ensure a coherent treatment of such requests, it may be useful if the public broadcaster sets out and publishes general rules in this respect.

Recommendation*:*

Abolish or at least restrict the obligation to broadcast non-commercial advertising.

Remit

The Council of Europe Recommendation Rec(2007)3 on the remit of public service media in the information society recommends that Member States include "provisions in their legislation /regulations specific to the remit of public service media, covering in particular the new communication services, thereby enabling public service media to make full use of their potential and especially to promote broader democratic, social and cultural participation, inter alia, with the help of new interactive technologies". And, "In the information society, relying heavily on digital technologies, where the means of content distribution have diversified beyond traditional broadcasting, Member States should ensure that the public service remit is extended to cover provision of appropriate content also via new communication platforms." (Guiding Principle No. 2, appended to the Recommendation).

The Code integrates the principle of technological and platform neutrality to some extent, for example by mentioning "other technical means" with regard to the distribution of (linear) broadcasting services in Art. 111(1)(b). It somewhat extends the public broadcaster's remit to new media, by mentioning the implementation of "new technologies" in Art. 113(i) and the provision of "non-linear media services" in Art. 113(o). This is in line with the Council of Europe

Recommendation. However, for reasons of consistency, the extended role of public broadcasters in the new media environment needs to be expressed more clearly in Art. 109 (mission of PSB) and in Art. 111 (activity object of PSB). These provisions could undoubtedly be enriched by taking up more elements from the Guidelines in Recommendation Rec(2007)3.

The question also arises of which procedures, if any, should be followed in cases where the public broadcaster wishes to introduce new services not explicitly mentioned in the Code.

Currently, the Code does not specify the number of (national, regional) radio and television channels and other services which should be provided as a core minimum. Including this in the law would be helpful, not only for the provision of the necessary frequencies, but also to allow for a better calculation of the financial needs (see below).

The "Taskbook", foreseen under Art. 118, is an instrument which could play a useful role also with regard to additional services, for example in the new media field. This Taskbook is drawn up by the Managerial Committee and submitted to the Supervisory Board for endorsement. However, Art. 118 lists only a statement of editorial policy and a financial plan as components of the Taskbook, and not a list of services or activities. If a list of services were to be added, and thus a procedure for the endorsement of new services were put in place, it would allow for further development, perhaps at a later stage, to fully comply with requirements under the EU State aid rules, including prior assessment of the public value and market impact of significant new services (ex ante test, see Communication from the Commission on the application of State aid rules to public service broadcasting, 2009/C 257/01).

Recommendation:

Clarify the public service remit with regard to existing channels and new media services and consider the introduction of a procedure for prior endorsement of significant new services.

Funding

The Code provides for a mix of funding sources for the public broadcaster (Art. 120-121), which in principle is fine. However, some improvements are necessary to ensure that the level of funding covers the financial needs to fulfil the public service remit, and that the decision-making on public funding is organised and rationalised in such a way that it avoids any abuse and political influence. Moreover, the obligation for citizens to pay the subscription fee should be formulated in a technologically neutral way.

According to European standards, Member States have to provide the funding needed by a public service broadcaster to fulfil its remit (see, for example, Guideline 29 of the above-mentioned Recommendation Rec(2007)3: "Member states should secure adequate financing for public service media, enabling them to fulfil their role in the information society, as defined in their remit.") In other words, the funding has to follow the remit.

In an ideal world, for a proper implementation of this principle, it would be necessary to establish, as a first step, the overall funding which the public broadcaster needs to fulfil its remit. The costs currently occurred in the provision of the public broadcasting services may serve as a starting point, taking into account the changing costs due to developments in the audiovisual sector, possible savings through rationalisation or other measures, and additional costs for modernisation or extension of services, for example in the new media field. As a second step, the public funding requirement would need to be calculated by deducting the expected commercial revenue, in particular from advertising and sponsorship.

The funding system established in the Code is complicated by the fact that public funding comes from 4 different sources: the State budget (Art. 120(5)), the subscription fee (Art.

120(7)(b)), taxes on importing radio and TV equipment (Art. 120(7)(g)), and taxes on the commercial advertising revenues from the private broadcasters (Art. 120(7)(h)). This diversification of public funding is not a problem in itself; on the contrary, it should be seen as a positive element since it contributes to the stability of the public funding and helps to protect the independence of the public broadcaster. On the other hand, there must at least be one source of funding which is periodically adjusted to the financial needs of the public broadcaster, to ensure that, over a certain period, there is no underfunding but also no overfunding (the latter would also be necessary to comply with EU State aid rules).

Among the different sources of public funding, the subscription fee is probably most suitable to be subject to *periodic reevaluation and adaptation, in line with financial requirements*. This would imply that decisions on the amount of the subscription fee are taken on the basis of an assessment of the level of funding required to fulfil the public service remit, but also in view of the development of other funding sources. This in turn would make it necessary to further develop the procedure foreseen in Art. 121(3).

The logic leading to the list of the specific costs identified in Art. 120(5), which have to be borne directly from the State budget is questionable. Such direct payments are problematic if they risk exposing the broadcaster to undue political influence. As no direct programme costs are included in this list, this likelihood appears to be limited. However, the inclusion of salary costs of employees may lead to arguments about the remuneration of top journalistic or creative staff, about staffing levels in different areas, the distinction between employees and freelance staff, and other questions which may have a direct impact on journalistic and creative performance. Other categories of costs may be more suitable to be borne directly from the State budget, such as restructuring costs, costs for pension funds or costs for maintaining the archives (preservation of programmes with historic and artistic value, see Art. 113(m)).

As regards the obligation to pay the *subscription fee* (Art. 121(1)) it is important to choose a formulation which is future-proof and technologically neutral. Thanks to technological convergence in the digital environment, audiovisual programmes are increasingly distributed on-demand, and broadcasting services can be received not only through traditional radio and TV sets but through an evolving set of multi-purpose devices, including personal computers, tablets and smartphones.

If the obligation to pay the subscription fee is linked to the possession of a reception device (an approach still pursued by a majority of European countries) it is important to use a generic notion which includes all new devices which may be used for the reception of audio or audiovisual media services; otherwise the obligation to pay the fee could easily be circumvented and may soon become obsolete. (Other countries such as Germany have gone a step further and have separated the obligation to pay the broadcasting fee from the possession of receiving equipment.)

The prohibition in Art. 38(8) of *advertising* breaks within programmes on public channels, irrespective of the programme category, also raises some concerns. While it is not uncommon that quantitative advertising restrictions which go beyond those for commercial channels are placed on public service broadcasters (the restriction to 8 minutes per hour in Art. 39(2), compared to 12 minutes for commercial channels, is such an example), it should be borne in mind that a general ban on advertising breaks on public channels would have distortive and probably unwanted effects. It would discourage the public broadcaster from broadcasting programmes with a long duration, in particular feature films, and during prime time, and it could make it almost impossible for the public broadcaster to acquire and refinance expensive and popular programmes, for example sports rights for the transmission of events of major importance to society. It is difficult to find a reason why the special rules which the Code has put in place for feature films (Art. 38(4)) and sports programmes (Art. 42) should not apply to commercial *and public* broadcasters. Moreover, even the advertising restriction to 8 minutes

per hour for public channels might need to be reconsidered insofar as particularly expensive (sports) programmes are concerned.

Recommendation:

Introduce a procedure which ensures that the public service broadcaster receives the funding which is necessary to fulfill its public service remit (for example, in determining the amount of the subscription fee); formulate the obligation to pay the subscription fee in a technologically neutral and future-proof way; review the list of costs borne directly by the State budget to avoid indirect interference in programme matters; review rules for advertising breaks on public channels, in particular as regards feature films and sports programmes.