



LEGAL ANALYSIS OF THE DRAFT AUDIOVISUAL MEDIA CODE OF MOLDOVA

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ABBREVIATIONS

AVMS Directive The European Union Audiovisual Media Services Directive

CFR European Union Charter of Fundamental Rights

CoE Council of Europe

ECHR European Convention on Human Rights

ECJ European Court of Justice

ECTT European Convention on Transfrontier Television

ECtHR European Court of Human Rights

EU European Union

ICCPR International Covenant on Civil and Political Rights

NRA National regulatory authorities

EXECUTIVE SUMMARY

This legal analysis (Analysis) reviews the draft Audiovisual Media Code of the Republic of Moldova¹ (draft Code) as adopted in the first reading by the Parliament of the Republic of Moldova on March 22, 2018 and published on the Parliament's website.²

The draft Code aims to replace the current Audiovisual Code and its subsequent amendments.

The adoption process of the new Code³ is supported through "Development of the new Audiovisual Code," the thematic subgroup no. 1 for the project "Promoting media freedom and media pluralism in the Republic of Moldova" supported by the European Union, the Council of Europe, and the United States Embassy to the Republic of Moldova. The process of elaboration of the draft Code involved law- and policymakers, members and staff of regulatory bodies, and non-state actors, including civil society and media professionals.⁴ A multi-stakeholder⁵ working group (Working Group) was created on June 13, 2017 by decision of the Speaker of Parliament.

This Analysis consists of the following sections:

- Section 1 outlines the relevant international and European legal framework pertaining to key areas targeted for improvement, and
- Section 2 proceeds to propose revisions to the relevant provisions of the draft Code.

The draft Code is analyzed against the international and European regional legal framework applicable to Moldova, namely: the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), to which the Republic of Moldova is a party since 1993 and 1997, respectively; the European Court of Human Rights' case law which is binding to countries that ratified the ECHR;⁶ as well as statements, comments, recommendations, declarations, and reports pertaining to the audiovisual sector and issued by the Council of Europe and special rapporteurs

acting in the sphere of media freedom, including the OSCE Representative on Freedom of the Media. The draft Code is also analyzed against the concluding observations on the Republic of Moldova issued by the UN Human Rights Committee.

As the intent of the legislator was to adopt the draft Code to create a framework required for implementation of the Audiovisual Media Services Directive (AVMS Directive), the draft Code is analyzed against the legal framework of the European Union as well as the latest conclusions of the Council of the European Union on the Republic of Moldova in the sphere of media freedom. Considering that the AVMS Directive is under review, the draft Code is further analyzed against the European Commission's Proposal for the amendment of the AVMS Directive.

Key findings & recommendations

The draft Code presents a significant improvement in comparison to the Audiovisual Code currently in force. As such, it is a major stepping stone in the Republic of Moldova's commitment to strengthening its legal framework in the audiovisual media sector.

The draft Code demonstrates a genuine intent to effectively protect media pluralism against undue media concentrations. The Working Group was mandated to align media legislation with European standards, and it was in particular tasked to adopt the regulatory framework that will "ensure transparency of media ownership and prevention of excessive concentration"⁷ – an issue that was identified by both the Council of the European Union⁸ and the Human Rights Committee⁹ as the major area needed for improvement in the current Audiovisual Code.

There are areas where the draft Code may further benefit from being aligned with international instruments and standards with respect to media pluralism. Key recommendations include: setting forth a clear and concrete measure that shall

1 Code of Audiovisual Media Services of the Republic of Moldova (*Codul Serviciilor Media Audiovizuale Al Republicii Moldova*), as adopted by Moldovan Parliament in the first reading. This Analysis relies on an unofficial translation of the Code dated 20 March 2018 (on file with the author).

2 www.parlament.md

3 Official Gazette of the Republic of Moldova, 2006, No. 131-133, Art.679),

4 "Short Facts Media Project Moldova", on file with author, and <http://parlament.md/Actualitate/%C3%8Embun%C4%83t%C4%83%C8%9Birealegisla%C8%9Bieimassmedia/tabid/255/language/ro-RO/Default.aspx>

5 Members of the Working Group are representatives of the media and human rights NGOs, broadcasters, lawyers, MPs, and public institutions.

6 <https://rm.coe.int/168007ff48>

7 "Short Facts Media Project Moldova," on file with the author

8 2015 Conclusions of the Council of the European Union on Moldova stressed the importance of the freedom of the media in a democratic society and called on the government of the Republic of Moldova: "to improve the national legislation in order to limit the concentration of media ownership and guarantee pluralism" <http://www.consilium.europa.eu/en/press/press-releases/2016/02/15/fac-moldova-conclusions/>

9 In its Concluding Observations on the Republic of Moldova, issued in November 2016, while noting steps taken by Moldova to reform the broadcasting code and to increase media pluralism and transparency, Human Rights Committee expressed concern about: "the continued concentration of media ownership and that the media is heavily influenced by political and private interests that may not reflect public interest" http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5

be applied to eliminate dominant position in the formation of public opinion (article 29(8)), to set forth a sanction for failure of a broadcaster to comply with such measures, and to require identification of ownership down to an ultimate individual owner.

The draft Code exhibits a number of positive features commonly found in the international instruments and national legislation of the Council of Europe countries, such as gradual imposition of sanctions from warning through fine and license suspension, to license withdrawal/revocation, but lacks clarity and clear reference to unlawful conduct in some provisions of article 85 and related articles such as article 17. Clarifications to article 17 and 85 are recommended to ensure full compliance of the Code with its obligations under the ECHR, which stipulate that any measure restricting media freedom should comply with criteria set forth in article 10 of the ECHR, including that unlawful conduct and sanction be clearly and precisely stipulated in the national law so to allow for correlation between the sanction and the unlawful conduct.

With respect to the regulatory authority, the draft Code meets the majority of the criteria set forth in international instruments and standards, including those pertaining to member nomination and appointment, guarantees of fair dismissal, and criteria designed to ensure the Audiovisual Council's independence, including functional and financial independence. There are areas where the draft Code would benefit from being further aligned with international instruments and standards with respect to the independence of the Audiovisual Council. Key recommendations include: to clearly entitle the Council to adopt its own internal rules, and to consider a special review with the aim to adopt a sub-regulation that will establish jurisdictional boundaries between the Audiovisual Council and the Competition Council.

Summary of recommended revisions

- **Article 1 – within the term 'beneficial owner' introduce a definition of an 'affiliate'** – unlike the term 'close persons' the term 'affiliate' is not defined in the draft Code. This leaves it subject to interpretation, including whether the term includes individuals and legal entities alike;
- **Article 17 – sanction violations of art 17(3) only; revise article 17(4) to further strengthen ties between the notion of protection of national audiovisual / broadcast area and freedom of the media.** The provisions of article 17 are not worded in sufficiently clear and precise terms that allow correlation of the actions to the requirement of the law and clearly define the area of the prohibited conduct and the consequences of violating the respective provision. As further discussed in Section 2, this is an obligation of states parties to the ECHR even in areas affecting national security, where the ECtHR held that the wording of the law must be sufficiently clear to give subjects of the law an adequate indication of the legal conduct and the consequences of acting unlawfully;
- **Article 21(1)d) – identify direct ownership down to an ultimate individual owner** – while article 21(1)c) requires full disclosure of all beneficial owners by name, article.21(1)d) falls short, requiring only disclosure of direct owners up to a level of first individual and legal entity. This enables ownership to remain obscure and non-transparent, which is particularly an issue if information on ownership of legal entities is not readily available or easily obtainable through commercial registries or other public catalogues in the country or abroad;
- **Revise article 26(1) to allow for unlimited right to renew license** – the provision of article 26(1) stipulates the right to renew license only once, which in practice has an effect of license withdrawal without cause;
- **Article 27 – include continuous violation of the draft Code following suspension among grounds for licenses withdrawal** – article 85, read in conjunction with article 27, falls short of granting the Audiovisual Council full power to enforce the Code, as multiple repeated violations end in suspension. While the Code pardons a broadcaster that has a clean record for 12 months following a sanction, it fails to deal with a provider who continues to violate the Code following license suspension;
- **Article 28(2) – extend application of the provision in article 28(2)g) to entities listed under article 28(2)h)** to stipulate that a political party may not indirectly (through a commercial organization) own a media service provider;
- **Article 28(7) – extend the application of the threshold to all 'close persons'** (such term defined in article 29(3)) and not only spouses;
- **Article 29 – clearly define providers' audience share thresholds as to their relevant coverage area** – article 29 of the draft Code sets forth audience share thresholds against which to measure the dominant position in forming opinion but the provision is not sufficiently clear – while from article 29(1) it may be presumed that the intent was to limit measurement to respective national, regional, and local coverage, the same principle was not consistently carried along subsequent provisions of article 29;
- **Revise article 29(6) and 30(4)** to grant the Audiovisual Council the right to capture and act on audience share fluctuations more frequently than once a year;
- **Article 29(7) and 85(6)c) – set forth clear and effective measure for eliminating dominant position in the formation of public opinion in article 29(7) and specify failure of the provider to comply with this measure as a ground for sanction under article 85(6) c).** The draft Code sets forth that the Audiovisual Council

- requires 'legalization of the broadcast license holder' in cases where a provider is found in a dominant position under article 29. The term 'legalization' is not defined in the draft Code and is therefore subject to interpretation and discretion as to what this measure entails. Further, article 85 of the draft Code does not specify sanction for failure of the provider to comply with the measure set forth in Article 29(7). Absence of a measure that would effectively eliminate dominant position would render the Code's provisions ineffective;
- **Article 29(8) – review mandates of the Audiovisual Council and the Competition Council with the aim of adopting a sub-regulation that would set forth jurisdictional boundaries between the two institutions;**
 - **Revise article 30(1) and article 30(3)** to stipulate an open and transparent procurement process in selection of a specialized institution tasked with audience share measurement;
 - **Article 74(1) – clarify / correct wording describing the mission of the Audiovisual Council** to avoid any doubt as to application of the international sources of law as stipulated in article 3 of the draft Code and article 75(5) of the draft Code, that entrusts the Audiovisual Council with responsibility to ensure compliance with international instruments;
 - **Article 75(1) – clarify wording describing the status of the Audiovisual Council as an autonomous public authority** – the term 'public authority' could be broadly interpreted to encompass a variety of legal entities, including state entities; the recommendation is to revise article 75(1) to define the Audiovisual Council as legally distinct and functionally independent from any public or private body, as recommended by the European Commission Proposal to amend the AVMS Directive;
 - **Article 74(5) – stipulate obligatory participation of the Audiovisual Council in defining the position of the Republic of Moldova in international negotiations in the field of audiovisual media services** – considering the important role entrusted to the Audiovisual Council under the Code, including its responsibility for implementation of international conventions and treaties in the field of audiovisual media as set forth in article 75(5), participation of the Audiovisual Council in international negotiations in the field under its jurisdiction is instrumental;
 - **Revise article 76(3) and 81(1) and add provision to article 76(3) to clearly stipulate the right of the Audiovisual Council to adopt its own internal rules and procedures** considering that article 81(1) is not clear as to which body is to adopt the Audiovisual Council's "Organization and Functioning Regulation;"
 - **Article 77(2)c) – include reference to legislation defining the term 'public association'** to avoid any doubt as to what the term 'public association' entails and whether it includes civil society organizations;
 - **Revise article 77(3)a) and 77(3)b) so it is clear which party may nominate candidates for a vacant position on the Audiovisual Council;** the way the current proposal of article 77(3) reads, it is not clear who out of the parties entitled may nominate candidates in case of a vacant position, the government or civil society;
 - **Article 78(1) – revise article to clearly state that members of the Audiovisual Council should be free of public and private interests;**
 - **Clarify criteria set forth in articles 77(5)f), 79(1) to (4) and 79(6);** the criteria as to who can be a member of the Audiovisual Council and criteria setting forth incompatible positions with that of a Council's member are not sufficiently clear and/or precise in the draft Code;
 - **Clarify contradiction between article 78(2) and 78(4)** – article 78(2) bans dismissal of the members of the Council, while article 78(4) enlists grounds for their dismissal;
 - **Article 76(4)c) – in line with international standards, clarify and/or limit dismissal ground set forth in article 76(4)c) to serious offence only;**
 - **Limit the scope of the application of sanctions set forth in article 85 to a precise set of violations of the draft Code, by revising and clarifying article 85 to refer to a concrete obligation under the draft Code wherever possible;** this is recommended to ensure that restrictions imposed by law on media service providers and media service distributors leave no doubt as to what conduct is sanctioned under the draft Code. For full set of recommendations in this respect, see articles 85(4), 85(5) a, 85(5)b, 85(5)c), 85(5)j), and 85(14);
 - **Set time limit to suspension sanction set forth in article 85(10)** – Article 85(10) stipulates suspension sanction, but it does not set forth the duration of this measure;
 - considering that part of the Audiovisual Council's budget comes from state subsidies, to further strengthen financial independence of the Council **add paragraph 3 to article 82 to clearly state that no public authorities may use their financial decision-making power to interfere with the Council's independence;** and
 - **Article 88 – revise article to leave no doubt that the Audiovisual Council is responsible to the public,** and that it may only be supervised in respect of the lawfulness of its activities and the correctness and transparency of its financial activities.

SECTION 1. RELEVANT INTERNATIONAL NORMS AND STANDARDS

Section 1.1. International norms on freedom of expression and freedom of the media

1. Article 10 para.1 of the ECHR stipulates:

“Everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

2. The right to freedom of expression includes right to freedom of the media, and protection of the media from undue interference by the state, such as undue license withdrawal.¹⁰ Article 10 para.2 of the ECHR further stipulates exact criteria under which member states may restrict freedom of the media:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.”

Section 1.2. International norms on control and restrictions of media

1. Article 10, paragraph 2 requires that any state interference with the exercise of freedom of media must have a basis in the national law; this requirement also refers to the quality of the law even where adopted by the parliament.¹¹ Furthermore, the ECtHR case law has consistently stated that a law has to be public, accessible, predictable and foreseeable.¹²

“In Rotaru vs. Romania the Court found that the national law was not “law” because it was not formulated with sufficient precision to enable any individual ... to regulate his conduct.” (emphasis added)

Section 1.3. International norms on media pluralism

1. The General Comment No. 34 (2011) calls on the states parties to the International Convention on Civil and Political Rights (ICCPR or the Covenant)¹³ to take:

“appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to adversity of sources and views.”¹⁴

2. At the European level, article 10 of the European Convention on Human Rights (ECHR)¹⁵ fundamentally and comprehensively protects freedom of expression. Even though it does not explicitly mention media pluralism, the need to protect media diversity and pluralism has been reaffirmed by the European Court of Human Rights (ECtHR).

3. ECtHR case law, which is binding to the states parties, recognizes not only the particular importance of audiovisual media in a democratic society and the related need for pluralism, tolerance and openness, but also member states' right to restrict media freedom in order to protect diversity in accordance with Article 10 paragraph 2.¹⁶ In Manole and others v. Moldova (2009),¹⁷ the ECtHR stressed:

“(T)here can be no democracy without pluralism. ... A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention. ... Given the importance of what is

¹⁰ Although Article 10 does not explicitly mention the freedom of the media, the ECtHR has developed extensive case law which is binding on the member states, providing a body of principles and rules granting the media a special status in the enjoyment of the freedoms contained in Article 10.

¹¹ <https://rm.coe.int/168007ff48>

¹² Ibid

¹³ Moldova became party to the ICCPR by accession on 26 January 1993. https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND

¹⁴ <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

¹⁵ Moldova ratified the ECHR on 12 September 1997. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=nSZFd1RJ

¹⁶ ECtHR, *Informationsverein Lentia and Others v. Austria* (1999) (The case concerned the Austrian Broadcasting Corporation monopoly at the time: “The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive ... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.”)

¹⁷ <https://hudoc.echr.coe.int/ENG#%7B%22itemid%22:%5B%22002-3173%22%7D>

at stake under Article 10, **the State must be the ultimate guarantor of pluralism.**¹⁸ (emphasis added)

4. At the European Union, the Article 11 Charter on Fundamental Rights (CFR) specifically calls for respect of the freedom and pluralism of the media.¹⁹ The European Court of Justice (ECJ) recognized media pluralism as an overriding requirement related to the general interest, capable of justifying a restriction on the freedom of media.²⁰

5. Against this backdrop of international norms, market realities in Europe show moderate to high media concentrations. A comparative study commissioned by the European Parliament in 2016 on seven Member States of the European Union: Bulgaria, France, Greece, Hungary, Italy, Poland and Romania concluded that:

*“the media systems in these countries suffer from a web of non-transparent relationships established in an interconnecting network of political and economic power, **which in some countries is provoking systemic failure of the media market and is linked to the dysfunction of democracy.**”²¹ (emphasis added)*

6. Another 2016 research published by European Audiovisual Observatory has found that:

*“Generally national broadcast and distribution markets across Europe are moderately or highly concentrated. This is in some way due to the nature of these industries, with there being significant barriers to entry in terms of investment, and also due to the way in which these markets have developed historically. However, the tendency towards continuous consolidation at the national level is also apparent and this further strengthens the voice/weight of individual groups. This extent to which national media systems are pluralistic **requires further research of each country regarding the links between national media and business or political interests.**”²² (emphasis added)*

7. Furthermore, the above research has found that:

“With regard to distribution, the levels of concentration also vary between countries. Overall these markets are significantly more concentrated than the audience markets for broadcasting.”²³

8. In 2002 the Council of Europe issued Recommendation No. 7 that included a specific set of measures aimed at promoting structural media diversity:

*“Member states should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public, **taking into account the characteristics of the media market, notably the specific commercial and competition aspects.** ... Member states should in particular envisage adapting their regulatory framework to economic, technological and social developments taking into account, in particular, the convergence and the digital transition **and therefore include in it all the elements of media production and distribution.**”²⁴ (emphasis added)*

9. The Council of Europe recommended that in those member states where the application of general competition rules in the media sector are not sufficient to guarantee pluralism of opinion, the member states should adopt specific measures pertaining to the media sector including adapting the regulatory framework paying attention to the need for:

“effective and manifest separation between the exercise of political authority or influence and control of the media or decision making as regards media content.”²⁵

10. Specifically, the Council of Europe advised on adoption of media concentration rules:

*“Member states should consider the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets. These **rules should be adapted to the size and the specific characteristics of the national, regional or local audiovisual media** ... These rules may include introducing thresholds based on objective and realist criteria, such as the audience share, circulation, turnover/revenue, the share capital or voting rights. These **rules should make it possible to take into account the horizontal integration phenomena**, understood as mergers in the same branch of activity – in this case mono-media and multi-media concentrations –, **as well as vertical integration phenomena**, that is, the control by a single person, company or group of some of the key elements of **production, distribution and related activities such***

18 Ibid

19 [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU\(2016\)571376_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf), http://www.europarl.europa.eu/charter/pdf/text_en.pdf

20 ECJ, *United Pan-Europe Communications Belgium v. Belgium* (2007)

21 [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU\(2016\)571376_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf)

22 Cappello M. (ed.), *Media ownership - Market realities and regulatory responses*, IRIS Special 2016-2, European Audiovisual Observatory, Strasbourg, 2016

23 Ibid

24 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3

25 Ibid

as advertisement or telecommunications.²⁶ (emphasis added)

11. Council of Europe Recommendation (1999) 1 further discusses the audience share thresholds:

“Audience share thresholds ... are becoming one of the most favoured regulatory approaches for the protection of pluralism. ... It has been argued that the introduction of a **30% audience share** limit for press and broadcasting organisations in their own transmission/dissemination areas, **plus an upper limit for total media ownership of 10% of the market** in which a supplier is operating, could be acceptable thresholds to safeguard a reasonable level of pluralism as it should ensure a minimum of four suppliers each in the radio, television and newspaper sectors and ten different suppliers in the market as a whole. Nevertheless, **the decision about precisely where upper audience share, capital share or revenue limits should be fixed is to be taken at the national level**, after taking into consideration what level of diversity of ownership is economically viable for the market in question. It is considered that audience share thresholds can be valuable in securing pluralism, although it is also acknowledged that in practice they are difficult to implement. Therefore, **if member States introduce such thresholds for commercial broadcasters, a number of complementary measures should also be foreseen and come into effect once a company has reached the permissible thresholds.**”²⁷ (emphasis added)

12. Furthermore, the European Parliament in its policy document recommended that each member state:

“should create and maintain a **transparent database** containing all **direct and indirect owners** of media companies up to the natural persons” as further detailed in item, with links to **crossownership** in the media sector and in the sector that is affected by public funds. The database should be easily accessible to the public and **searchable** through various filtering and ordering algorithms.”²⁸

13. It is important to stress that legislative measures alone are not sufficient to tackle the issue of media concentrations. Laws are rendered ineffective if violation cannot be sanctioned, and for this an independent body that supervises the implementation and has powers to enforce the legislation is necessary. The Council of Europe’s Recommendation No R (99) 1 discusses this as follows:

“Member States may consider the possibility of creating specific media authorities invested with powers to act

against mergers or other concentration operations that threaten media pluralism or investing existing regulatory bodies for the broadcasting sector with such powers. In the event member States would not consider this appropriate, the general competition authorities should pay particular attention to media pluralism when reviewing mergers or other concentration operations in the media sector.”²⁹

14. This is further elaborated on in the Council of Europe 2007 Recommendation:

“Whether they are, or are not, specific to the audiovisual and written media, the authorities responsible for the application of these rules should be vested with the powers required to accomplish their mission, in particular, the power to refuse an authorisation or a license request and the power to act against concentration operations of all forms, **notably to divest existing media properties where unacceptable levels of concentration are reached and/or where media pluralism is threatened**. Their competences could therefore include the power to require commitments of a structural nature or with regard to conduct from participants in such operations **and the capacity to impose sanctions**, if need be.”³⁰ (emphasis added)

Section 1.4. International norms with regards to National Regulatory Authorities (NRA)

1. The AVMS Directive and ECTT, while having recognized the particular role of NRAs in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape, do not contain specific detailed provisions pertaining to this sector.

2. However, recognizing the increasingly important role of NRAs, the European Commission Proposal for the amendment of the AVMS Directive recommends a higher degree of harmonization among member states through reinforcing the independence of audiovisual regulators:

“This is an important novelty, given the key role of audiovisual regulators in shaping and preserving the internal market. Moreover, it is highly relevant for guaranteeing the pluralism of the media. ... Regulatory authorities of the Member States can achieve the requisite degree of structural independence only if established as separate legal entities. **Member States should therefore guarantee the independence of the national regulatory authorities from both the government, public bodies and the industry** with a view to ensuring the impartiality of

²⁶ Ibid

²⁷ <https://www.state.gov/documents/organization/265662.pdf> and <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680645b44>

²⁸ [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU\(2016\)571376_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf)

²⁹ https://www.ebu.ch/CMSimages/en/leg_ref_coe_r99_1_pluralism_190199_tcm6-4425.pdf

³⁰ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3

their decisions.”³¹ (emphasis added)

3. The Proposal recommends that Chapter IX of the AVMS Directive be rewritten to stipulate, among other, the following:

“Member States shall ensure that (NRAs) **are legally distinct** and functionally independent of any other public or private body. ... Member States shall ensure that national regulatory authorities **exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition**. National regulatory authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. The **competences and powers of the independent regulatory authorities, as well as the ways of making them accountable shall be clearly defined in law**. Member States shall ensure that national regulatory authorities have **adequate enforcement powers to carry out their functions effectively**. Member States shall ensure that independent national regulatory authorities have **separate annual budgets**. The budgets shall be made public. Member States shall also ensure that national regulatory authorities have **adequate financial and human resources** to enable them to carry out the task assigned to them”³² (emphasis added)

4. In light of the new challenges to the regulation of the broadcasting landscape resulting from increasing concentration in the broadcasting sector and technological developments, the credibility of NRAs more so than ever rests on the heads of NRAs, or the members of the collegiate body of multi-member NRAs.³³

5. Their appointment and dismissal is therefore a process that must be carefully executed, eliminating any sources of political, economic or other interference. In that respect, the Proposal to amend AVMS Directive stipulates that members of NRAs:

“may be dismissed only if they no longer fulfill the conditions required for the performance of their duties which are laid down in advance in national law.”

6. The Council of Europe as well has a carefully developed set of recommendations and declarations developed on the NRAs. In 2000, the Council of Europe passed Recommendation (2000) 23 which stated that:

„**The rules governing regulatory authorities for the**

broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests. For this purpose, **specific rules should be defined as regards incompatibilities** in order to avoid that: - regulatory authorities are under the influence of political power; - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority. ... Furthermore, rules should guarantee that the members of these authorities: - are **appointed in a democratic and transparent manner**; - may not receive any mandate or take any instructions from any person or body; - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them. ... **Arrangements for the funding of regulatory authorities - another key element in their independence - should be specified in law** in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently. ... **Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.**”³⁴ (emphasis added)

7. Due to a growing concern, in 2008 the Council of Europe has issued a Declaration on NRAs:

“that the guidelines of Recommendation Rec(2000)23 and the main principles underlining it are not fully respected in law and/or in practice in other Council of Europe member states due to a situation in which the legal framework on broadcasting regulation is unclear, contradictory or in conflict with the principles of Recommendation Rec(2000)23, the political and financial independence of regulatory authorities and its members is not properly ensured, licences are allocated and monitoring decisions are made without due regard to national legislation or Council of Europe standards, and broadcasting regulatory decisions are not made available to the public or are not open to review.”³⁵

8. The Declaration lays out shortcomings in regulating NRAs in CoE member states, and reiterates guidelines on NRA, in particular:

“Most Council of Europe member states have rules that prohibit members of regulatory authorities from holding

31 http://europa.eu/rapid/press-release_IP-18-3567_en.htm

32 http://europa.eu/rapid/press-release_IP-18-3567_en.htm

33 <http://mediainitiatives.am/wp-content/uploads/2017/01/Council-of-Europe-Declaration-on-the-Independence-and-Functions-for-the-Broadcasting-Sector-in-English-1.pdf>

34 <https://rm.coe.int/168008eb70>

35 <http://mediainitiatives.am/wp-content/uploads/2017/01/Council-of-Europe-Declaration-on-the-Independence-and-Functions-for-the-Broadcasting-Sector-in-English-1.pdf>

*political office; the number of states that also ban them from having commercial interests in the media sector is lower. Indeed, in certain cases, the incompatibility rules for members of regulatory authorities go beyond the guidelines appended to the recommendation and members of regulatory authorities are not permitted to work in the media business or engage in politics for several years after the expiry of their mandate. **To prevent members from signing over their commercial interests in a media business to a family member, the law in some member states also requires that close relatives of members give up commercial interests in the media. This requirement extends on occasion to relatives holding political office.***"

9. As to dismissal of members of the NRAs, the Declaration stipulates that dismissal should only be possible in case of lack of respect of the rules of incompatibility, duly noted incapacity to exercise a member's functions and conviction (by a court of law) for a serious criminal offence.³⁶

10. As to the funding of NRAs, the Declaration states:

"It is common practice amongst many regulatory authorities in Council of Europe member states to receive their funding directly through fees in order to be independent from public authorities' decision making. Nonetheless, the laws of a large number of member states specify that the regulatory authority is to be financed by the state budget. In some member states, the law mentions clearly that public authorities must not use their financial decision-making power to interfere with the independence of the regulatory authority; however in most countries where the regulatory authority is financed by the state budget no such precautions are laid down in the law."

³⁶ "Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure. ...In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court." <https://rm.coe.int/168008eb70>

SECTION 2. KEY REVISION PROPOSALS

GENERAL PROVISIONS

Article 1, “beneficial owner,” item b)

Recommendation: within the term ‘beneficial owner’ introduce a definition of an ‘affiliate’

Rationale: The definition of the term ‘beneficial owner’ refers to ‘affiliates.’ Unlike the term ‘close persons’ the term ‘affiliate’ is not defined in the draft Code. This leaves it subject to interpretation, including whether the term includes individuals and legal entities alike.

Revision proposal to definition of ‘beneficial owner’ item b)

Article 1. Meaning of terms and expressions used

“beneficial owner – a natural person who, under the law and/or a contract, is in one or more of the following situations:

- b) holds, directly or indirectly, through one or more affiliates, control (as defined further below in Article 1) over a media service provider or media service distributor; for the purpose of this Code, ‘affiliate/s’ shall mean any of the following: “close persons”, as defined below in article 29(3), any legal entity, its subsidiary or parent company, related directly or indirectly through one or more intermediaries to a beneficial owner by common ownership, control, management, membership, or otherwise, as well as legal successors and predecessors;”

PRINCIPLES OF AUDIOVISUAL COMMUNICATION

Article 17

Recommendation: limit application of sanctions (as stipulated in article 85(9) and (16), 27f) and 54(7)) only to violation of provision prohibiting hate speech (17(3)) and not to violation of other provisions of article 17; further strengthen ties between the notion of protection of national audiovisual / broadcast area and freedom of the media as guaranteed under international instruments and standards by revising article 17(4).

Rationale: article 27.f) and article 54(7) of draft Code stipulate that – to protect the national broadcast area – a

broadcast license and retransmission authorization may be withdrawn if a media service provider and media service distributor, respectively, violate article 17 of the draft Code. Provisions of article 17 (except 17(3)) are not sufficiently clear and precise to allow correlation of the actions to the requirement of the law and they do not define clearly the area of the prohibited conduct and the consequences of violating the respective provision. This is a necessary requirement of any measure restricting freedom of the media, as further detailed in Section 1.2 of the Analysis.

Additionally, provision of article 17(4) read in conjunction with article 27 and 85 give too much latitude to the Council as to application of the sanctions – as neither the Code or article 17 indicate with reasonable clarity the scope and manner of what protection of national broadcast area entails. As such, protection of national broadcast area may not qualify as a legitimate ground for restricting freedom of the media. The list of possible grounds for restricting freedom of expression is detailed in article 10 paragraph 2 of the ECHR and it is exhaustive. Member states may not legitimately apply any other ground falling outside the list provided for in Article 10, paragraph 2 of the ECHR.³⁷ Furthermore, the ECtHR held that the requirement that a measure restricting freedom of expression must be “prescribed by law” implies that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded. *“Even in areas affecting national security or fighting organised crime where the foreseeable character of the law can be weaker (for the effectiveness of the investigations, for instance), the wording of the law must be nevertheless sufficiently clear as to give individuals an adequate indication of the legal conduct and the consequences of acting unlawfully,”* the ECtHR held.³⁸

Revision proposal to art. 17(4)

“Article 17. Protection of the national audiovisual area

- (4) The Audiovisual Council establishes regulations and undertakes, within its legal competences and in accordance with this Code and international instruments and standards, the necessary actions in order to protect the national broadcast area.”

³⁷ <https://rm.coe.int/168007ff48>

³⁸ Ibid

Article 21(1) and 21(1)d

Recommendation 1: identify direct ownership down to an ultimate individual owner, by deleting words ‘and legal’ in provision of article 21.1(d)

Rationale: While art.21(1)c) requires full disclosure of all beneficial owners by name, art.21(1)d) falls short, requiring only disclosure of direct owners up to a level of first individual and legal entity. This is at odds with the spirit of the provision 21 and the general spirit of the draft Code. If a media service provider is owned by a legal entity, the provider should identify individual owners of that legal entity, and so on until the ultimate individual owners are revealed. Otherwise, direct ownership remains obscure and non-transparent if such information is not readily available or easily obtainable through commercial registries or other public catalogues in the country or abro ad. This revision would comply with the recommendation issued by the European Parliament in its policy document that recommends that each member state *“should create and maintain a transparent database containing all direct and indirect owners of media companies up to the natural persons”* as further detailed in Section 1.3.12.

Recommendation 2: add “and keep up to date” to art.21(1)

Rationale: to avoid doubt in interpretation, clarify the language of article 21 paragraph 1 to require information be kept up to date.

Revision proposal to art.21(1) and 21(1)d)

“Article 21. Transparency of property of media service providers

- (1) Media service providers must ensure simple, direct and permanent access for recipients of an audiovisual media service to, and keep up to date, at least the following categories of information:
 - d) the list of shareholders and members up to the level of natural person, with the exception of shareholders and members that are joint-stock companies with bearer shares or are listed on international stock exchanges;”

Article 26(1)

Recommendation: delete text ‘once’ in article 26(1)

Rationale: The provision of article 26(1) stipulating the right to renew broadcast license only once. This in practice has an effect of license withdrawal without cause. The Code has sufficient protections under article 27 to ensure that a license may be withdrawn in case of violations of the Code specified under article 85. Therefore, to ensure full legal certainty of

business environment in which broadcasters operate, the article shall be revised to grant media service providers unlimited right to apply for renewals.

Revision proposal to art.26(1)

“Article 26. Extension of the broadcast license by law

- (1) The broadcast license may be extended by law for a new term at the request of the holder in accordance with the provisions of this Article. The media service provider submits a request for extension at the Audiovisual Council, up to 6 months, but not less than 3 months before the end of the term, for which the broadcast license was issued.”

LINEAR AUDIOVISUAL MEDIA SERVICES

Article 27

Recommendation: add paragraph g) to article 27

Rationale: Article 85, read in conjunction with article 27, falls short of granting the Audiovisual Council full power to enforce the Code, as multiple repeated violations end in suspension. That is – while the Code pardons a broadcaster that has a clean record for 12 months following a sanction, it fails to deal with those providers who continue to violate the Code even after their licenses is suspended. Suggested revision is to consider a proposed measure in article 27g).

Revision proposal to article 27:

“Article 27. Withdrawal of broadcast license

The broadcast license may be withdrawn in the following cases:

- g) the media service provider or the media service distributor whose license has been suspended under the Art. 85(10) fails to remedy the violation for which it was sanctioned with suspension and/ or is sanctioned more than twice in the course of the 12 months following the expiry of the suspension sanction.”

Article 27e)

Recommendation: add “or otherwise failed” to article 27e)

Rationale: To avoid doubt and / or circumvention of the rule imposed in article 27e).

Revision proposal to art.27e)

"Article 27. Withdrawal of the broadcast license

The broadcast license may be withdrawn in the following cases:

- e) the media service provider refused or otherwise failed to submit to the Audiovisual Council information on the legal regime of property in the field of audiovisual media services;"

Article 27f)

Recommendation: replace "Art.17" with "Art.17(3)"

Rationale: provided under Article 17

Revision proposal to Article 27f)

"Article 27. Withdrawal of the broadcast license

The broadcast license may be withdrawn in the following cases:

- f) the media service provider repeatedly violated the provisions of Article 11 para.(2) and Art. 17(3) after having been gradually sanctioned as provided for in Art. 85 para.(9) of this Code."

Article 28(2)g

Recommendation - extend application of the provision of article 28(2)g) to entities listed under article 28(2)h)

Rationale: If article 28(2)g) remains as is, article 28(2)h) would be easy to circumvent. That is – a political party may indirectly (through a commercial organization) own a media service provider.

Revision proposal to art.28(2)g:

"Article 28. Legal regime of property

- (2) Private media service providers shall not have as beneficial owner:
 - g) a commercial organization, whose founders or co-founders are one or more of the subjects referred to in let. a) to f) and h);
 - h) a political party or a social-political organization;"

Article 28(7)

Recommendation: in line with the spirit of the Code, extend the upper limit of 20% of the market threshold in article 28(7) to not only a spouse of a natural person but all 'close persons' as defined under article 29(3).

Rationale: The spirit of the Code is to capture all 'close persons' as defined in article 29(3).

Revision proposal article 28(7):

"Article 28. Legal regime of property

- (7) Any natural person, and his or her close person (as defined below in article 29(3), or a legal person that is the sole founder/member/owner or holds more than 50% of the shares, voting rights or the authorized capital of a legal person in the field of audiovisual media services, cannot hold more than 20% of the shares, voting rights or authorized capital of a legal person in the field of audiovisual media services under the jurisdiction of the Republic of Moldova."

Article 29(1)a), c) and d), 29(6)

Recommendation 1: define providers' audience share thresholds as to their relevant coverage area in article 29(1) a), c) and d)

Rationale: Broadcasted licenses are issued for specific coverage areas which commonly include local, regional, and national. Likewise, audience shares are measured with respect to relevant markets/coverage/geographical area. Article 29 of the draft Code sets forth audience share thresholds against which to measure dominant position in forming an opinion, but the provision is not sufficiently clear – while from reading article 29(1)a) it may be presumed that the intent was to limit threshold to respective national, regional, and local coverage, the same principle was not consistently carried along subsequent provisions of the article 29. As a way of example, consider Council of Europe's Recommendation (1999) 1 as a guideline: *"It has been argued that the introduction of a 30% audience share limit for press and broadcasting organisations in their own transmission/dissemination areas, plus an upper limit for total media ownership of 10% of the market in which a supplier is operating, could be acceptable thresholds to safeguard a reasonable level of pluralism"*³⁹

Recommendation 2: revise article 29(6) to replace text "annually" with "quarterly"

Rationale: Article 29(6) of the draft Code provides for

39 As detailed in Section 1.3.11 of the Analysis

determination of the audience share on a once a year basis. Audience shares are measured and may fluctuate more frequently than once a year. Therefore, revision of the article 29(6) is recommended so to entitle the Audiovisual Council to capture audience share fluctuations more often, for example on a quarterly basis. Following the same line of arguments, the provision of the article 30(4) should be strengthened to require more frequent delivery of audience share data.

Revision proposal to article 29(1)a, c) and d), 29(6)

“Article 29. Limitation of audience share

- (1) For the purposes of this Code and in order to determine the audience share of audiovisual media services, it is considered that:
 - a) the market of linear audiovisual media services with national, regional and local coverage, includes all the audiovisual media services of the national, regional, local media service providers, respective to their coverage area, under the jurisdiction of the Republic of Moldova;
 - c) the significant market comprises all the linear audiovisual media services set out in let. b), of the national, regional, local media service providers, respective to their coverage area;
 - d) the audience share is the market share of a particular linear audiovisual media service in their respective coverage area determined under the terms of this Article.
- (6) The audience share of each national, regional and local linear audiovisual media service in their respective area of coverage is determined quarterly, through the average of the audience share recorded during the previous quarter.”

Article 29(7)

Recommendation: set forth a clear and effective measure for eliminating dominant position in the formation of public opinion in article 29(7)

Rationale: When a media service provider is found in a dominant position under article 29, the draft Code sets forth that the Audiovisual Council requires ‘legalization of the broadcast license holder.’ The term ‘legalization’ is

not defined in the draft Code. This provision is therefore subject to interpretation ranging from total discretion as to what measures the Audiovisual Council may impose on the affected broadcaster, to leaving it up to the broadcaster’s discretion to bring its unfair market practice in line with the law. Absence of a measure that would effectively eliminate dominant position would render the Code’s provisions ineffective. Common measures include limiting market position until audience share drops below required thresholds including divestiture.⁴⁰ This revision would ensure compliance with the 2007 Council of Europe Recommendation as detailed in Section 1.3.14 of the Analysis which among other stipulate that the NRAs should be “vested with the powers required to accomplish their mission, in particular, the power to refuse an authorisation or a license request and **the power to act against concentration operations of all forms, notably to divest** existing media properties where unacceptable levels of concentration are reached and/or where media pluralism is threatened.”⁴¹ (emphasis added)

Revision proposal article 29(7):

“Article 29. Limitation of audience share

- (7) The Audiovisual Council assesses the dominant position in formation of public opinion of a natural or legal person if there are reasonable indices related to reaching the limit provided in para.(4). In the case of determination of the dominant position in formation of public opinion, the Audiovisual Council requests divestiture until the dominant position is eliminated, or alternatively that the market position is reduced below set threshold.”

Article 29(8)

Recommendation: clarify mandates between the Audiovisual Council and the Competition Council

Rationale: Article 29(8) of the draft Code sets forth that if “the Competition Council finds out an anti-competitive practice within the meaning of para.(2) – (5), it notifies the Audiovisual Council, which proceeds according to the provisions of para. (7).” This effectively transfers from the Competition Council to the Audiovisual Council the power to adjudicate and sanction cases of dominant position. Certain coordinated actions between actors acting in competing and/or non-competing audiovisual media market is further prohibited in articles

40 As a way of example see German Interstate Treaty on Broadcasting and Telemedia (*Staatsvertrag für Rundfunk und Telemedien*), under which in case of a dominant position a NRA (Commission for the Determination of Concentrations in the Media (*Kommission zur Ermittlung der Konzentration im Medienbereich*)) suggests the undertaking to choose from applicable measures, including to give up its participating interests in the broadcasters attributable to it until the audience share of the undertaking falls below the relevant threshold, to limiting its position on the media-relevant market. https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RSTV_20_english_version.pdf

41 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3

28(4) and (5) and the Audiovisual Council is also entrusted to sanction such violations (art.85(6)c)). Article 86(3) further stipulates that *“The Audiovisual Council cooperates with the competition authority to ensure fair competition on the audiovisual media services market, to prevent and exclude dominant positions in public opinion formation through audiovisual media service providers.”*

It is not uncommon that broadcasting regulatory authorities are entrusted with powers to act against mergers or other concentration operations that threaten media pluralism. As further detailed in Section 1.3.13 and 1.3.14 of the Analysis, the Council of Europe has recommended such option, or alternatively – that the general competition authorities should pay particular attention to media pluralism when reviewing mergers or other concentration operations in the media sector.⁴²

The intention of the draft Code is to transfer some but not all jurisdictions from the Competition Council to the Audiovisual Council. Given that the institutions are set up to have parallel powers over the same markets,⁴³ a special review with the aim to adopt a sub-regulation is recommended to establish clear jurisdictional boundaries and mandates between the two institutions (for example as to investigation, prosecution, adjudication, and sanction), to allow for their cooperation, and avoid legal uncertainty, costs and delays, double competencies, and inconsistent decisions.

Revision proposal: not applicable

Article 30(1) and 30(3)

Recommendation: insert text ‘open’ before text ‘competition’ in article 30(1), further strengthen provision of article 30(3)

Rationale: for the avoidance of doubt revise article 30(1) and 30(3) to adhere to best practices for an open and transparent procurement process in selection of a specialized institution tasked with audience share measurement.

Revision proposal to art.30(1) and 30(3):

“Article 30. Measurement of audience shares

- (1) Measurement of audiences and market shares is carried out in accordance with international standards and practices by specialized institutions selected by open competition.

- (3) The competition is organized on the basis of an ad hoc regulation developed and approved by the Audiovisual Council, which shall allow for open, transparent and in line with international procurement standards and best practices.”

Article 30(4)

Recommendation: revise article 30(4) to grant the Audiovisual Council the right to capture audience share fluctuations more frequently than once a year.

Rationale: provided under article 29(6)

“Article 30. Measurement of audience shares

- (4) The service procurement contracts with select specialized institutions shall oblige specialized institutions to deliver to the Audiovisual Council the results of the measurements carried out under this Article on a regular quarterly basis.”

MEDIA SERVICE DISTRIBUTORS

Article 54(7)

Recommendation: replace “Art.17” with “Art.17(3)”

Rationale: provided under Article 17

Revision proposal to article 54(7)

“Article 54. Retransmission authorization

- (7) The retransmission authorization may be withdrawn if the media service distributor repeatedly violated the provisions of Art. 11 para. (2) and Art. 17(3) after having been gradually sanctioned as provided for in Art. 85 para.(9) of this Code.”

THE AUDIOVISUAL COUNCIL

Article 74(1)

Recommendation: replace “norms, recommendations and international goods practices in the field” with “and international norms, standards and best practices in the field” in art.74(1)

⁴² https://www.ebu.ch/CMSImages/en/leg_ref_coe_r99_1_pluralism_190199_tcm6-4425.pdf

⁴³ As a way of example see: <https://www.oecd.org/competition/sectors/1920556.pdf>

Rationale: The order of words in the English translation of the Code gives doubts as to how this article will be interpreted in practice. Recommendation is therefore to revise 74(1) slightly to align the provisions with article 3 of the Code (hierarchy of sources of law) and article 75(5) of the draft Code, that entrusts the Audiovisual Council with responsibility to ensure compliance with international instruments.

Revision proposal to art.74(1):

“Article 74. Mission of the Audiovisual Council

- (1) The Audiovisual Council is guarantor of the public interest in the field of audiovisual media services and has the mission to contribute to their development in accordance with the principles of audiovisual communication provided for by the present Code, and international norms, standards and best practices in the field.”

Article 75(1)

Recommendation: add “legally distinct and functionally independent of another public or private body” to art.75(1)

Rationale: For full legal certainty and due to the use of term ‘public authority’ which could be broadly interpreted to encompass a variety of legal entities, including state entities, the recommendation is to define the Audiovisual Council as a legally distinct and functionally independent entity. The same is recommended by the European Commission’s Proposal for the amendment of the AVMS Directive that says: “Member States shall ensure that (NRAs) are legally distinct and functionally independent of any other public or private body” as further discussed under Section 1.4.3 of this Analysis.

Revision proposal to art.75(1)

“Article 75. Statute of the Audiovisual Council

- (1) The Audiovisual Council is an autonomous public authority, legally distinct and functionally independent of any other public or private body responsible for the implementation of the provisions of this Code.”

Article 75(4)

Recommendation: replace ‘may’ with ‘shall’ in art.75(4)

Rationale: Considering the important role entrusted to the Audiovisual Council under article 75(5), namely the Council’s

responsibility “for implementation of international conventions and treaties in the field of audiovisual media services to which the Republic of Moldova is a party,” the Council’s participation in international negotiations in the field under its jurisdiction is instrumental.

Revision proposal to art.75(4)

“Article 75. Statute of the Audiovisual Council

- 4) The Audiovisual Council is consulted in defining the position of the Republic of Moldova in the international negotiations on the field of audiovisual media services and shall participate in them through its representatives.”

Article 76(3)

Recommendation: add “k) internal rules and procedures as set forth in article 81 para 1” to art. 76(3)

Rationale: Article 76(3) enlists types of sub-regulation that the Audiovisual Council may adopt in order to perform its duties under the Code. The same article does not contain specific reference to internal rules and procedures. This is a requirement under the 2008 Council of Europe Declaration on NRAs which stipulates that: “the legislator should entrust the regulatory authority with the power to adopt regulations and guidelines concerning broadcasting activities as well as internal rules.”⁴⁴ Furthermore, Article 81(1) stipulates that the Audiovisual Council acts on the basis of its own “Organization and Functioning Regulation.” The Code does not define who adopts such regulation. To avoid any doubt and further strengthen provisions ensuring functional independence of the Council from the government, the recommendation is to clarify the text of article 81 to say that the Council is the body that adopts its “Organization and Functioning Regulation” and to further add item k) to article 76(3) granting the Audiovisual Council the right to adopt internal rules and procedures as set forth in article 81(1).

Revision proposal to art.76(3):

“Article 76. Duties of the Audiovisual Council

- (3) In order to perform its duties, the Audiovisual Council develops and implements:
- (k) internal rules and procedures as set forth in article 81 para.1.”

⁴⁴ <http://mediainitiatives.am/wp-content/uploads/2017/01/Council-of-Europe-Declaration-on-the-Independence-and-Functions-for-the-Broadcasting-Sector-in-English-1.pdf>

Article 76(4)a)

Recommendation: add “in line with article 7(5) of the Code” to art.76(4)a)

Rationale: Prior content control is prohibited under the Code in article 7(5). Therefore, for the avoidance of doubt, the recommendation is to revise article 76(4)a) to specifically refer to the article 7(5) of the Code.

Revision proposal to art.76(4)a)

“Article 76. Duties of the Audiovisual Council

- (4) The Audiovisual Council:
- (a) exercises control over the manner in which media service providers and distributors fulfil their obligations undertaken under this Code. The control over the contents of audiovisual media services and the audiovisual programmes is exercised only after their provision, in line with article 7(5) of the Code;”

Article 77(2)c)

Recommendation: add “(as defined in the Law on Public Associations)” to art.77(2)c)

Rationale: include reference to legislation defining the term ‘public association’ in order to avoid any doubt whether it includes civil society organizations.

Revision proposal to art.77(2)c)

“Article 77. Membership of the Audiovisual Council

- (2) The membership of the Audiovisual Council consists of:
- c) six members nominated by public associations (as defined in the Law on Public Associations) selected by means of a public contest.”

Article 77(3)a) and b)

Recommendation: add “or” in between provisions of article 77(3)a) and 77(3) b), and add “depending on whose nominee position becomes vacant, as the case may be” at the end of the provision.

Rationale: The way the current proposal of article 77(3) reads, it is not clear who should nominate candidates in case of a vacant position, the government or civil society. To avoid any doubt as to how these nominations are carried out and to maintain a proportion as to number of parties entitled to

propose nominees, recommendation is to clarify the text of article 77(3) as proposed below.

Revision proposal to art.77(3)a) and b)

“Article 77. Membership of the Audiovisual Council

- (3) Nominees for the position of member of the Audiovisual Council are selected by the specialized parliamentary commission. 60 days before the end of the term of member of the Audiovisual Council, the chair of the specialized parliamentary commission:
- a) requests the entities listed in para.(2), let. a) and b), to propose two nominees, of different sex, per vacant position of member of the Audiovisual Council; or
- b) announces a public contest for selection of the nominees proposed by public associations, making public the regulation for organization and conduct of the contest and the deadline for submission of nominees’ files, depending on whose nominee position becomes vacant, as the case may be.”

Article 77(5)f), 79(1)-(4) and 79(6)

Recommendation: add “through one or more affiliates” to article 77(5)f), further clarify text of article 79(1)-(4) and 79(6)

Rationale: the criteria as to who can be a member of the Audiovisual Council and criteria setting forth incompatible positions with that of a Council’s member is not sufficiently clear and/or precise in the draft Code. On one hand, in article 77(5), the legislator intended to ban individuals holding positions in government or political office, and individuals that have held such position in the political office for the past three years, as well as those that hold – directly or indirectly – interest in media industry – from applying for the position of a member the Audiovisual Council.

Article 79(3) on the other hand, limits the application of article 77(5) to individuals holding shares, either directly or indirectly, in a media entity.

While article 77(5) does not explicitly mention ‘close relatives,’ article 79 does so in para.3.

Under the assumption that the legislator’s intent is to comprehensively prohibit political or economic influence over any member of the Audiovisual Council, revisions are recommended to both article 77(5) and 79 to avoid any doubt as to the interpretation of these rules.

These revisions would align the draft Code with recommendation issued in 2008 CoE Declaration that sets forth: “To guarantee the independence of members of

regulatory authorities from political and economic pressure, the recommendation calls on member states to ensure that regulatory bodies have incompatibility rules, preserving their members from being under the influence of political powers or prohibiting them from holding interests in enterprises of other organisations in the media or related sectors.⁴⁵

Revision proposal to article 77(5)f, 79(1) to (4) and 79(6)

“Article 77. Membership of the Audiovisual Council

- (5) Nominees for the position of member of the Audiovisual Council shall meet all of the following requirements:
- f) they do not hold, directly or indirectly through one or more affiliates, interests or financial interest in the media service providers, media service distributors, electronic communications companies or advertising companies;”

“Article 79. Incompatibilities with the position of member of the Audiovisual Council

- (1) The position of member of the Audiovisual Council is incompatible with any other public or private position as defined further in this article, with the exception of teaching and scientific ones, provided they do not give rise to conflicts of interest.
- (2) During their term, members of the Audiovisual Council and their close persons can not hold position in the government or be members or otherwise engaged by political parties or other socio-political organizations.
- (3) Members of the Audiovisual Council and their close persons within the meaning of Art. 2 of the Law on Conflict of Interest, do not have the right to own or otherwise control, directly or indirectly, in companies that carry out activities in the fields where they may be engaged in a conflict of interest with the position of member of the Audiovisual Council
- (4) Members of the Audiovisual Council and their close persons can not be members of councils of administrations or of management bodies of media service providers and media service

distributors, and can not hold positions, or own or otherwise control a legal person that has a broadcast license or a retransmission license.

- (6) The member of the Audiovisual Council, who or whose close person at the time of his/her appointment is in one of the situations provided for in para.(1)-(4), has at most 30 days to remove or cause the close person to remove the cause for incompatibility, during which he/she does not have the right to vote in the Audiovisual Council.”

Article 78(1)

Recommendation: add “or private”

Rationale: According to the international standards, national regulatory authorities should be free of any influence, including state but also private, non-state, business, or economic influence. This is for example a requirement under the 2008 Council of Europe Declaration on NRAs which stipulates that: “rules governing regulatory authorities in the broadcasting sector should secure their independence and protect them against any interference, in particular by political and economic interests.⁴⁶ Article 78(1) only guarantees the independence of the Audiovisual Council from a state / public influence. The recommendation is to add reference to private interests as well.

Revision proposal:

“Article 78. Members of the Audiovisual Council

- (1) Members of the Audiovisual Council do not represent the entity that appointed them and perform their duties in accordance with the law, being free from the inappropriate influence of any other public or private body.”

Article 78(2)

Recommendation: add ‘unless as set forth in para.4 below”

Rationale: Article 78(2) bans dismissal of the members of the Council. Article 78(4) enlists grounds for their dismissal, hence the two provisions are in contradiction. The recommendation is to clarify the wording as proposed below:

45 <http://mediainitiatives.am/wp-content/uploads/2017/01/Council-of-Europe-Declaration-on-the-Independence-and-Functions-for-the-Broadcasting-Sector-in-English-1.pdf>

46 <http://mediainitiatives.am/wp-content/uploads/2017/01/Council-of-Europe-Declaration-on-the-Independence-and-Functions-for-the-Broadcasting-Sector-in-English-1.pdf>

Revision proposal to art.78(2):

"Article 78. Members of the Audiovisual Council

- (2) Members of the Audiovisual Council cannot be dismissed during their term unless as set forth in para.(4)."

Article 78(4)c)

Recommendation: in line with international standards, clarify and/or limit dismissal ground to serious offence only

Rationale: Article 78(4)c sets forth the following ground for dismissal of members of the Audiovisual Council: *"The position of member of the Audiovisual Council becomes vacant in case of: ... c) criminal conviction by a final judgment."* As further detailed in Section 1.4.9 of the Analysis, the 2008 Council of Europe Declaration on NRAs stipulates that such dismissal should only be limited to *"conviction (by a court of law) for a serious criminal offence."*⁴⁷ The criminal code of the Republic of Moldova classifies criminal offences from minor to extraordinarily serious. Recommendation is to consider limiting and/or clarifying the provision of article 78(4)c to bring it in further alignment with the Council of Europe's recommendations.

Revision proposal: not applicable

Article 78(4)g)

Recommendation: add "as set forth in article 79 of this Code" to art.78(4)g)

Rationale: Article 78(4) sets forth grounds for dismissal of members of the Audiovisual Council. The paragraph g) sets 'incompatibility with the position of member of the Audiovisual Council' as a ground for dismissal. Incompatible positions are set forth in article 79 of the draft Code. To avoid any doubt article 78(4)g) should make reference to article 79.

Revision proposal to art.78(4)g)

"Article 78. Members of the Audiovisual Council

- (4) The position of member of the Audiovisual Council becomes vacant in case of:

- g) incompatibility with the position of member of the Audiovisual Council as set forth in article 79 of this Code;"

Article 81(1)

Recommendation: add "adopts and" to art.81(1)

Rationale: provided under article 76(3)

Revision proposal to art.81(1)

"Article 81. Organization and functioning of the Audiovisual Council

- (1) The Audiovisual Council adopts and acts on the basis of its own Organization and Functioning Regulation."

Article 82

Recommendation: add paragraph 3) to article 82

Rationale: Article 82 sets forth Councils' budget. Considering that part of it comes from the state subsidies, in order to further strengthen provisions of the Code that guarantee the Council's functional and financial independence, the recommendation is to add paragraph to article 82 clearly stating so. This is in line with Recommendation (2000) 23 passed by the Council of Europe which stated that: "Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities."⁴⁸

Revision proposal to art.82:

"Article 82. Financing of the Audiovisual Council

- (3) No public authorities may use their financial decision-making power to interfere with the independence of the Audiovisual Council. "

Article 85(1)

Recommendation: limit the scope of application of sanctions set forth in article 85 to a precise set of violations of the draft Code

⁴⁷ "Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure. ...In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court." <https://rm.coe.int/168008eb70>

⁴⁸ <https://rm.coe.int/168008eb70>

Rationale: To comply with article 10 of the ECHR that requires that any state interference must have a basis in the national law, and that any unlawful conduct and sanction be clearly and precisely stipulated, as further detailed in Section 1.2. of the Analysis, it is recommended that only violations explicitly set forth in Article 85 be sanctioned. Therefore, it is recommended that the wording "as set forth explicitly in this Article" is added at the end of the provision of article 85(1).

Revision proposal to art.85(1)

"Article 85. Sanctions

- (1) Every media service provider, video-sharing platform service provider and media service distributor shall be held liable for their violation of the legislation in the field of audiovisual media services as set forth explicitly in this Article."

Article 85(4)

Recommendation: delete reference to article 55(1) and 55(11) in article 85(4)

Rationale: Article 55(1) and 55(11) do not place obligations on media service distributors. Sanctions imposed on media service distributors should therefore be limited to violations of obligations stipulated in article 55 para (2) to (10).

Revision proposal to art.84(5)

"Article 85. Sanctions

- (4) The media service distributors that violated for the first time the provisions of Art. 55 para.2 to 10 of this Code are punished with a public warning."

Article 85(5)a

Recommendation 1: replace "refusal to accept to be controlled" with "violation of Art.76(4)a)" in art.85(5)a)

Rationale: prior content control is prohibited under the Code, therefore, for the avoidance of any doubt, replace "refusal to accept to be controlled" with reference to exact behavior that should be sanctioned.

Recommendation 2: clarify "refusal to allow access to the premises in which they operate" in art.85(5)a)

Rationale: Considering that grounds for inspection are not defined in the draft Code, the provision of article 85(5)a) gives broad authorization to the Council. The recommendation is therefore to revise wording of article 85(5)a) to limit the

Audiovisual Council's right to inspect only when necessary to perform its duties under the Code.

Recommendation 3: clarify "refusal to create conditions for watching the retransmitted media services offer" in art.85(5) a)

Rationale: this unlawful conduct is not sufficiently clear in the English version of the draft Code. Recommendation is to clarify the language as proposed below:

Revision proposal to art.85(5)a

"Article 85. Sanctions

- (5) Fines of 5,000 MDL to 10,000 MDL are imposed on the media service providers and media service distributors that committed the following violations:
 - (a) violation of art.76(4)a) refusal to allow access to the premises in which they operate such access requested at least 3 business days in advance to the inspections that are reasonable and necessary in order to the Audiovisual Council to carry on with its duties under this Code, refusal to enable retransmission of media services offer or to make the requested documents and records of broadcast programmes available to authorized representatives; "

Article 85(5)b)

Recommendation: clarify the grounds for sanction set forth in 85(5)b)

Rationale: The current article 85(5)b) is not sufficiently clear as it does not link the sanction to violation of a particular draft Code provision to either refer to a specific obligation set forth under the draft Code, and/or to clarify the distinction between the grounds for sanction set forth in article 85(5) b) and the grounds for sanction set forth in article 85(4) and 85(5)k).

Revision proposal: not applicable

Article 85(5)c)

Recommendation: add "of the media service provider" and "in accordance with article 56 of the Code" to art.85(5)c)

Rationale: The current article 85(5)c) is not sufficiently clear as it does not link the sanction to violation of a particular draft Code provision.

Revision proposal to art.85(5)c)**“Article 85. Sanctions**

- (5) Fines of 5,000 MDL to 10,000 MDL are imposed on the media service providers and media service distributors that committed the following violations:
 - c) failure of the media service provider to submit by 1 February each year the annual activity reports in accordance with article 56 of the Code, and contracts for retransmission of audiovisual media service”

Article 85(5)j)

Recommendation: add “as set forth in Art.64 para(3), para (4) and para(5), and Art.65” to art.85(5)j)

Rationale: The current article 85(5)j) is not sufficiently clear as it does not link the sanction to violation of a particular draft Code provision.

Revision proposal to art.85(5)j):**“Article 85. Sanctions**

- (5) Fines of 5,000 MDL to 10,000 MDL are imposed on the media service providers and media service distributors that committed the following violations:
 - j) failure to comply with the conditions for provision of audiovisual commercial communications as set forth in Art.64 para(3), para.(4) and para.(5) and Art.65, where the fine is imposed for each case of established violation;”

Article 85(6)c)

Recommendation: add “and Art.29(7)” in provision of art.85(6)c)

Rationale: Article 85 of the draft Code does not specify sanction for failure of the provider to comply with the measure set forth in Article 29(7), rendering the measure ineffective. This revision would ensure compliance with the 2007 Council of Europe Recommendation as further detailed in Section 1.3.14. of the Analysis which among other stipulate that the NRAs should be: “vested with the powers required to accomplish their mission, in particular, the power to refuse an authorisation or a license request and the power to act against

concentration operations of all forms, notably to divest existing media properties where unacceptable levels of concentration are reached and/or where media pluralism is threatened. Their competences could therefore include the power to require commitments of a structural nature or **with regard to conduct from participants in such operations and the capacity to impose sanctions**, if need be.”⁴⁹

Revision proposal to article 85(6)c:**“Article 85. Sanctions**

- (6) Fine of 10,000 MDL to 15,000 MDL is imposed on the media service providers and media service distributors that committed the following violations:
 - c) failure to fulfil the obligation to ensure transparency of property of the media service providers, referred to in Art. 21, and the legal regime of property set out in Art. 28 para.(2)-(12) and Art.29(7);”

Article 85(9) and (16)

Recommendation 1: replace “Art.17” with “Art.17(3)” in art.85(9) and 85(16); delete “in order to protect the national broadcast area”

Rationale: provided under Article 17

Revision proposal to 85(9) and (16)**“Article 85. Sanctions**

- (9) Media service providers and media service distributors that violated the provisions of Art. 11 para.(2) and Art. 17(3) are punished with a fine of 40,000 MDL to 70,000 MDL. If these provisions are violated repeatedly, the fine makes up 70,000 MDL to 100,000 MDL.
- (16) The court will examine the disputes arising from breach of the provisions of Art.11 para.(2) and Art. 17(3) within 30 days. The appeal or the second appeal will be filed within 3 days of delivery of the decision and will be examined within 10 days.”

49 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3

Article 85(10)

Recommendation: add “for 30 to 60 days” to article 85(10)

Rationale: Article 85 stipulates the gradual imposition of sanctions from warning through fine and suspension, to license withdrawal. Article 85(10) stipulates suspension of the license, but it does not set forth the duration of this measure. However, it could be presumed that the legislator’s intention was to limit suspension to 30 to 60 days, as such suspension duration is explicitly set forth in article 26(c) of the Code.

Revision proposal to article 85(10) and 27:

“Article 85. Sanctions

(10) The media service provider or the media service distributor that repeatedly committed, within 12 months, the violations referred to in para.(8) is punished with suspension of the broadcast license or of the retransmission authorization for 30 to 60 days. The broadcast license or the retransmission authorization is suspended after the sanctions set out in para.(4)-(8) were gradually imposed.”

Article 85(14)

Recommendation: add “and the retransmission license is withdrawn under provisions of Art.54(7)” in art.85(14)

Rationale: While both broadcasting and retransmission license may be withdrawn under the draft Code, as set forth in article 27 and 54 respectively, Article 85(14) only refers to broadcast license withdrawal (art.27). For the avoidance of doubt, recommendation is to add reference to article 54(7) as well, as proposed below:

Revision proposal to art.85(14):

“Article 85. Sanctions

(14) The broadcast license is withdrawn under the provisions of Art. 27 and the retransmission license is withdrawn under provisions of Art.54(7).”

FINAL AND TRANSITIONAL PROVISIONS

Article 88

Recommendation: separate paragraph 1 of art.88 into two paragraphs; add paragraph 5 to art.88

Rationale: Article 88 sets forth that the Council is “accountable to the public by presenting its annual activity report in the Parliament’s plenary session.” International standards require that national regulatory authorities be accountable to the public, and not governmental authorities. The 2008 CoE Declaration recommends that “regulatory authorities should be accountable to the public for their activities, for example by means of publishing annual reports.” It further recommends that NRAs may be only supervised “in respect of the lawfulness of its activities and the correctness and transparency of its financial activity, in line with international best practices and standards.”⁵⁰

Revision proposal to art.88:

“Article 88. Accountability of the Audiovisual Council

- (1) The Audiovisual Council is accountable to the public by means of publishing its annual report on its website.
- (2) The Audiovisual Council also presents its annual activity report in the Parliament’s plenary session.
- (3) The annual activity report of the Audiovisual Council is submitted to the Specialized Parliamentary Commission by 1 March.
- (4) The annual activity report of the Audiovisual Council is published on the official website of the Audiovisual Council before 1 March.
- (5) The Audiovisual Council should only be supervised in respect of the lawfulness of its activities and the correctness and transparency of its financial activity.”

⁵⁰ <http://mediainitiatives.am/wp-content/uploads/2017/01/Council-of-Europe-Declaration-on-the-Independence-and-Functions-for-the-Broadcasting-Sector-in-English-1.pdf>, item 37