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**Opinion of the Directorate General of Human Rights and Rule of Law Directorate of
Information Society and Action against Crime
Information Society Department**

**Prepared by the Secretariat on the basis of the expertise by Independent Council of
Europe expert Dr Bissera Zankova**

ON

**Draft Law supplementing the Audiovisual Code of the Republic of Moldova and
Draft Law amending and supplementing the Audiovisual Code of the Republic of
Moldova (No. 260-XVI dated 27 July 2006)**

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Executive Summary

The Council of Europe received an official request from the President of the Parliament of the Republic of Moldova Mr Andrian Candu, dated 27 June 2015 to provide a legal expertise of two draft laws amending the Audiovisual Code of the Republic of Moldova (no. 260-XVI, dated 27 July 2006). The submitted amendments included **Draft Law supplementing the Audiovisual Code of the Republic of Moldova** (hereinafter referred as **Proposal 1**) and the **Draft Law amending and supplementing the Audiovisual Code of the Republic of Moldova** (hereinafter referred as **Proposal 2**). Proposal 1 provides draft amendments to two articles of the Audiovisual Code (Art. 11 and 38). Proposal 2 proposes amendments and supplements to seven articles (Art. 2, 4, 9, 11, 27, 38, 66).

The DGI (Directorate of Information Society and Action against Crime, Information Society Department) requested the Council of Europe Expert Dr Bissera Zenkova to provide an expert opinion on the compatibility of the aforementioned drafts with the European Convention on Human Rights (ECHR) and other Council of Europe standards.

The following conclusions and recommendations were provided in the Expert Opinion:

1. The protection of freedom of expression and freedom of broadcasting as provided by the Council of Europe instruments and particularly by the ECHR and the jurisprudence of the European Court of Human Rights has to be unconditional. With regard to this, proposals have to be better designed taking in-depth account of a range of human rights principles and criteria.
2. It has to be clear that vague and restrictive provisions may easily amount to censorship and that hate and false speech is best counteracted by more speech, by pluralism of views, an open debate and a clear position.
3. Local production of audiovisual works has to be strengthened and a system of measures has to be put in force for its promotion and support.
4. Sanctions have to be better systematized and be proportionate to the offence. It is necessary for procedural guarantees for the right of the broadcasters to fair hearing and due process to be put in place.
5. New amendments impact the overall philosophy of the law and the activities of the media regulator as well and this has to be reflected in the draft.

I. Introduction and Scope of the Expertise

Two proposals for amendments to the Audiovisual Code of the Republic of Moldova – one called supplement and the other amendment and supplement have been put forward by members of the Moldovan Parliament. They treat one and the same matter in a more or a less detailed manner – broadcasting and re-broadcasting of foreign programmes, broadcasting of information and analytical programmes and domestic shares of such programmes, local audiovisual production and sanctions. The two drafts are presented with attached information notes.

According to these explanatory notes the purpose of the amendments is rooted both in the dynamic contemporary media environment and in the sensitive situation in which Moldova is placed at present. Broadcasting media in particular continue to be the most important source of information for the majority of the population in the country through which it can follow regional and global events and make an informed opinion on the basis of diversity of viewpoints and comments.

Fostering local programming and developing local audiovisual markets in Moldova proves most desirable in a situation when plenty of foreign channels are re-broadcasted and their impact on the national media landscape can be controversial. Local broadcasters have to receive broader

opportunities to expand their production to contribute to pluralism and diversity and thus to enrich the European audiovisual production.

Another reason for the amendments as stated in the explanatory documents pertains to the current situation in the country and more specifically to the propaganda war launched on Moldova by Russia. A large part of broadcasts as explained are transmitted by Russian channels representing a threat for the sovereignty and territorial integrity of the country. Further it is claimed that “this has been possible, both due to the limited capability to create local content, permissive laws and, more importantly, the tolerance displayed by the broadcasting regulatory authority”. Within this context the explanatory notes underline that “the harmonization of the national legal framework with international standards” is an important goal for the Republic of Moldova.

The constitutionality of the amendments proposed is proven by reference to Article 32, para. 3 and Article 34, para. 2, 3, 4 of the Constitution of Moldova. The importance of the two Council of Europe instruments - the European Convention on Transfrontier Television (ECTT) and the European Convention on Human Rights (ECHR) is also stressed.

The task set is to evaluate the compliance of the amendments with the Council of Europe standards regulating broadcasting and especially with ECHR in the light of the interpretation of the European Court of Human Rights (ECtHR), with ECTT and with other acts. The compliance with the Constitution of Moldova and other national pieces of legislation falls out of the scope of the present opinion.

II. Comments on the proposed amendments

i. Amendments to Article 2 (Proposal 1)

Letters b), c) and j) shall be restated as follows:

“b) rebroadcasting – the simultaneous capture and broadcasting of programme services or important parts thereof, by any technical means, in their entirety and without any modification, broadcasted by service distributors and meant to be received by the public;”

The new definition reproduces the respective definition in ECTT, namely “*Retransmission*” signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public.”

All essential elements are in place – simultaneity of receiving and transmitting, entirety of programmes or important parts of them without any modification, technical neutrality and reception by the public.

“c) broadcaster – legal entity, titleholder of a broadcasting license issued by the Coordinating Council of Audiovisual, bearing full responsibility for the transmission of programme services meant to be received by the public;”

This definition is more or less in compliance with the definition in the ECTT but further clarification is needed.

According to Article 2 (c) of the ECTT, “*broadcaster*” means the natural or legal person who composes television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party”. The European Audiovisual Media Services Directive (2010) also provides for a natural and a legal person that can be media service providers. Both options can be included in the new definition.

According to an Opinion of the Standing Committee on Transfrontier Television "*the guarantees offered by Article 4 of the Convention (freedom of reception and retransmission) only apply to broadcasting organisations which have a lawful status under the domestic law of a transmitting Party*". This status is verified by the transmitting state and if there is no evidence of the lawful status of the transmitting broadcaster, the receiving party can deny reception and retransmission. The rationale is that transmission and retransmission under the convention are free but in order to benefit from the guarantees of art.4 (free reception and no restriction on retransmission) there must be evidence for the lawful status of the broadcaster (license(s)).

According to the Audiovisual Code of Moldova, in order to be a broadcaster a person should receive broadcasting, a technical license and an authorization for retransmission of programmes. As the Code provides for two types of licenses and an authorization, this fact should be born in mind when structuring the definition of broadcaster and its peculiarities have to be reflected.

Further to this, it may be wise not to quote the name of the regulatory authority(s) as it can change in time but refer to the licensed status in a more general manner, such as for instance, "titleholder of a license/licenses or authorization issued by the competent authorities" (according to Art.4 of the Audiovisual Code).

The detail about responsibility is important, however, it should be emphasized that it relates to the editorial responsibility over the content of the services transmitted. This element, also underlined by the Committee of Ministers Recommendation CM/Rec(2011)7 to member states on a new notion of media and editorial responsibility, is considered as one of the crucial elements for classifying a given service or a platform as media.

"j) local production – programmes created by broadcasters under 'the jurisdiction of the Republic of Moldova and/or independent producers of programmes from the Republic of Moldova, including by employing technical and intellectual means from the Republic of Moldova.'

The term "production" seems too broad for this law and as the Code is applied to audiovisual works it is recommendable one and the same term/terms to be used everywhere through the Code.

Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media makes use of the term "content" in the new media environment.

Local audiovisual programme content is a special notion related to a more general one - the European audiovisual works. Local content of Moldova is also European content. Possibly a more suitable term will be "local audiovisual works". It is also in conformity with the terminology applied in the Council of Europe Recommendation NR(93)5 of the Committee of Ministers containing principles aimed at promoting the distribution and broadcasting of audiovisual works originating in countries or regions with a low audiovisual output or a limited geographic or linguistic coverage on the European Television markets.

The efforts of the legislator to stimulate the production and distribution of local audiovisual works have their merit. However, the provision of effective mechanisms and measures for boosting local audiovisual industry is also needed but it is not necessary from a systematic point of view for all of them to be incorporated in the Audiovisual Code. With regard to this the guidance provided by the Committee of Ministers Recommendation NR(93)5 and encompassing language transfer, support and co-production schemes can prove useful for policy-makers and drafters.

"Letter k) shall be excluded;

In letter u), the number "19.00" shall be replaced with "18.00" and the number "23.00" shall be replaced with "24.00"

Fixing of the prime time can vary across countries and the situation in European countries is depending on the market conditions and local necessities. The broadcasting space for local

producers and advertisers in Moldova can be enlarged with the view of stimulating local audiovisual production.

"2. The term "(its) own production" shall be completely excluded from the Code."

Obviously the overall philosophy of the act is changing and the two basic terms that remain are "European audiovisual works" and "local audiovisual works". In fact such approach makes the law clearer. It does not contravene European requirements in the media field but has to be consistent throughout the document.

ii. Amendments to Article 4

"Paragraph (1) shall be rephrased as follows:

"(1) For the purposes of this Code, a broadcaster shall be deemed to be under the jurisdiction of the Republic of Moldova if such broadcaster has its principal office and its means of production located in the Republic of Moldova, holds a broadcasting license issued by the Coordinating Council of Audiovisual and its editorial decisions on programme services are made in the Republic of Moldova.

Paragraphs (2) and (3) shall be excluded and paragraphs (4) and (5) shall become (2) and (3)."

There is no sufficient explanation why the other cases for determining jurisdiction - considerable workforce and establishment of stable relationships with the economy of the country are excluded.

The original wording of this article transposes the content of art. 5 para 3 and 4 of the ECTT. Several paragraphs or a cascade of criteria reflecting the different arrangements of contemporary media enterprises are needed to be applied in order to determine properly the jurisdiction in force. The Audiovisual Media Services Directive also treats the issue of jurisdiction in a complex manner (art.2).

The problem of jurisdiction is one of the most complicated topics nowadays due to the new information and communications environment and the availability of a variety of opportunities to establish different configurations of the organization of the media enterprise.

It can be recommended to retain the initial wording of the provision including all possible arrangements in order to escape legal confusion in specific cases that may arise.

iii. Amendments to Article 9

"Article 9 shall be supplemented by two new paragraphs (2) and (3) as follows:

"(2) Broadcasters and service providers are prohibited to broadcast and rebroadcast radio and television channels containing informative, informative-analytical and political programmes or shows that are not made in the member states of the European Union or in the states that have ratified the European Convention on Transfrontier Television.

(3) Broadcasters are prohibited to broadcast and rebroadcast informative, informative-analytical, political and military-themed shows that are not made in the member states of the European Union or in the states that have ratified the European Convention on Transfrontier Television."

The current wording of the two paragraphs generates concerns with respect to the philosophy of ECTT and Art.10 ECHR. As explained in the Explanatory Report to the Convention, the instrument had been adopted to establish a minimal set of requirements for the free and unhampered circulation of programmes in Europe. More precisely "It reaffirms the commitment of the signatory

States to human rights and fundamental freedoms and, in particular, to freedom of expression and information as embodied in Article 10 of the European Convention on Human Rights. In line with the Declaration of 29 April 1982 of the Committee of Ministers of the Council of Europe on the freedom of expression and information, it stresses that the free flow of information and ideas constitutes the basis for their broadcasting policy and recognises their responsibility to take steps in common to encourage the free circulation of television programme services.” Further on explaining the object and purpose of the convention it stresses that they pursue the objective of “facilitating the transfrontier transmission and retransmission of television programme services”. ECTT embodies the right to freedom of expression without interference by public authorities and regardless of borders laid down by ECHR in Art.10 and transposes it in the field of broadcasting.

Restrictions on freedom of broadcasting have to be in conformity with Art. 10 para 2 – such restrictions should be exhaustively enlisted, pursue legitimate aims as provided by the second paragraph of Art.10 and be necessary in a democratic society as interpreted by the European Court of Human Rights (ECtHR).

The Parliamentary Assembly of the Council of Europe also puts an emphasis on these basic guiding principles for policy makers and legislators in Recommendation 1855 (2009) on the regulation of audiovisual media services.

The responsibility of the broadcaster is clarified in the Explanatory Report which requires that they should respect human dignity and equality and should not spread hatred in all its forms and variations and give due prominence to violence.

The grounds for the limitations put on broadcasting of particular programmes have to be explicitly stated in the law and be in conformity with ECHR, ECtHR jurisprudence, ECTT and other instruments of the Council of Europe.

Besides, the Court in Strasbourg has held that the general debate is at the heart of "democratic society" and judges also grant it additional attention in cases where general debate has the capacity to impact the progress of democratic society (*Giniewski v. France*, App.No. 64016/00, ECtHR, Jan. 31, 2006). In *Dink v. Turkey*, the Court stated that States have the positive obligation to create a favourable environment for participation in public debate for everyone and to enable the expression of ideas and opinions without fear (ECtHR, 2010, § 137).

In its seminal decision in *Handyside v. UK (1976)* ECtHR formulated the famous phrase about freedom and broad mindedness in a democratic society that "freedom of expression...is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population" (Para. 49 of the judgment).

Political expression which is at the heart of democratic debate (including comment on matters of general public interest) is given particular precedence and protection by the Court. Further to this the Declaration on freedom of political debate in the media (*Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies*) reaffirms “the pre-eminent importance of freedom of expression and information, in particular through free and independent media, for guaranteeing the right of the public to be informed on matters of public concern and to exercise public scrutiny over public and political affairs.”

Pluralism of sources and outlets is another principle consistently entrenched by the Court starting with *Handyside v. UK (1976)*. The principle has been developed further in the media field in a number of Council of Europe recommendations.

Deriving from these arguments if a ban is imposed on reception and retransmission it has to be specified on what grounds and under what conditions this can happen having regard to the fundamental principles of the Council of Europe and particularly to Art.10. A general prohibition on

particular programmes that can contribute to political debate, as it reads now, can sound vague and its application can result in censorship. Another point that could be raised is how effective such prohibition can be with the free and open Internet now and the opportunity for the public to access much greater variety of information and comments using new services and platforms.

Another reference - to the OSCE Guidelines on the use of Minority Languages in the Broadcast Media, which are promoted by PACE Recommendation 1773 (2006) entitled "The 2003 guidelines on the use of minority languages in the broadcast media and the Council of Europe standards: need to enhance cooperation and synergy with the OSCE" could also prove useful for the better tailoring of provisions: "The free reception of transfrontier broadcasts, whether direct or by means of retransmission or rebroadcasting, shall not be prohibited on the basis of language".

To counteract propaganda it is important, on the one hand, to provide more and diverse information and facts in order to form an enlightened public opinion and to educate the public to compare statements and make their own conclusions (critical thinking) and on the other, to consistently implement the relevant legislation in force with respect to the scope of protected speech.

iv. Amendments in Article 11

Proposal 1

The article will be supplemented with paragraph (3¹) which shall read as follows:

"(3¹) Broadcasters and service providers shall broadcast informative and analytical domestic programmes at a share of 100%, of which 80% shall be in the Romanian language. It shall be permitted to broadcast informative programmes and political-analytical programmes made in the member states of the European Union, the USA, as well as the states that have ratified the European Convention on Transfrontier Television."

Proposal 2

"Paragraphs (2) and (3) shall be restated as follows:

"(2) Local production shall comprise at least 8 hours of the daily broadcasting volume and shall be broadcasted exclusively (in their entirety) between the hours 6.00 and 24.00. At least 6 hours of such local production shall be broadcasted during prime time, out of which at least 4 hours shall be broadcasted in the state official language.

(3) Broadcasters whose purpose is obtaining funds exclusively from distribution shall not be entitled to place advertisements, except where they comply with the provisions of para. (2)."

"In article (7), the words "maintaining the original soundtrack" shall be replaced with the words "in the state language"

"A new article (11) shall be inserted, which shall read as follows:

(11) Private broadcasters shall be prohibited from using the symbols/logos of other television channels, including channels from outside the Republic of Moldova, more than twice per day. Private broadcasters shall be prohibited from using video and audio identification signs of other television channels, including channels from outside the Republic of Moldova."

The amendments in Article 11 are dedicated to the protection of the richness of national heritage with its linguistic, cultural and national aspects. The existing measures are supplemented by new ones. One part of them relates to the support of the dissemination of local audiovisual works within prime-time. This approach is not inconsistent with the Council of Europe standards and should be supported and expanded. Local works can contribute immensely to pluralism and balance of

information and opinions in public debate, to education and to the preservation of cultural traditions.

Other measures are aiming at strengthening the use and proliferation of the official language of Moldova which are not disproportionate provided there is also a room left for the use of other languages by different communities in a multilingual and a multicultural state. It is also pertinent to systematize these measures taking into account a regional perspective having in mind the already cited OSCE Guidelines on the use of Minority Languages in the Broadcast Media (2003).

Concerning foreign programmes it is not quite clear why a specific provision is included at this place concerning the language of broadcasts. May be the idea was to refer to the broadcasting of EU and US programmes in a foreign language. Stating that there will be no special permission for such programmes implies that other programmes will be subject to a permissive regime. It is not clear what the conditions and the procedure are to get such permission (authorization?).

v. Amendments to article 27

"In para. (1), after letter h), the letters i)-m) shall be inserted, which shall read as follows:

"i) failure to comply with the provision of art. 9 para. (2) and (3) hereof"

Comments on the new Art.9 para 2 and 3 have already been provided above.

"j) public incitement to national, racial or religious hatred;

k) explicit incitement to mass public violence;

l) incitement to actions the purpose of which is to overthrow or change, by means of violence, the state order or to violate, by means of violence, the integrity of the Republic of Moldova;

m) incitement to terrorist acts."

"Paragraph (2) shall be excluded."

The international human rights understanding is that hate speech does not constitute protected speech and should be criminalized because of its violation of human dignity, which is in turn closely connected with an infringement of the right to life, equality and non-discrimination. As it has already been mentioned, the right to freedom of expression may cover unpopular ideas and statements which "shock, offend or disturb." Nevertheless, a number of human rights treaties, including the ICCPR require states to prohibit hate speech. The European Court of Human Rights in *Erbakan v. Turkey*, judgment of 6 July 2006, § 56 stated that "[t]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance ..., provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued."

Under the ECHR one approach is that of exclusion from the protection of the Convention certain speech, provided for by Art.17 (prohibition of abuse of rights), where the comments amount to hate speech and negate the fundamental values of the Convention. In this respect the Court emphasized in *Seurot v. France (2004)* "[T]here is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 [freedom of expression] by Art. 17 [prohibition of abuse of rights] (...)".

Another approach is to restrict protection on freedom of expression provided by Article 10, para 2, of the Convention where the speech in question, although it is hate speech, is not aiming at

destroying the fundamental values of the Convention. Then the restrictions of para 2 will be applied.

Therefore approaches may vary according to the circumstances of the case.

In addition to that, one particular form of hate speech – incitement to genocide – is one of only a few types of acts recognised as a crime under international law, akin to war crimes and crimes against humanity.

In 2005 the Council of Europe adopted the Convention on the Prevention of Terrorism, which requires state parties to criminalise “public provocation to commit a terrorist offence”. Experts however, argue about the meaning of “provocation or incitement to terrorist acts”. Besides, at an international level there is no uniform and generally accepted definition of terrorism and terrorist act.

“This policy choice therefore runs the risk of limiting the democratic participation of different groups, which can be a forepost of excluding these groups, and thus can become a risk factor for radicalisation. With regard to the question of effectiveness, it is henceforth important to prevent the method from becoming self-defeating. On the other hand, it is also essential to set clear limits to certain behaviour and speech when it demonstrably creates an imminent and likely risk that a terrorist act might be committed”, argues Dr. van Ginkel (see Dr. Bibi van Ginkel, LL.M., ICCT Research Paper, August 2011: Incitement to Terrorism: A Matter of prevention or Repression? at <http://www.icct.nl/download/file/ICCT-Van-Ginkel-Incitement-To-Terrorism-August-2011.pdf>)

Generally introducing provisions of such type creates a problem for freedom of expression. Incitement to hatred and terrorism may constitute a serious limitation on the right to free expression. These grounds can be applied in an arbitrary and capricious manner by the regulatory authority(ies) in the media field and this can result in the withdrawal of licenses and the closing down of broadcasting stations the programmes and comments of which are considered uncomfortable or opposing the official position. Therefore there should be additional guarantees at different levels against vagueness, loose interpretation, excessive state intervention and abuse.

ECTT sets responsibilities on the broadcaster to respect the dignity of the human being and the fundamental rights of others and their programmes should not “be indecent and in particular contain pornography” and “give undue prominence to violence or be likely to incite to racial hatred” (Art. 7). The Convention provides for a special procedure for settling disputes among parties based on cooperation and exchange of information which gives priority to freedom of broadcasting (provisional suspension). The Explanatory report elucidates that “this article aims to establish a balance between the transmitting and receiving Parties by establishing specific procedures to be followed when a Party invokes violations of this Convention. These procedures are designed, on the one hand, to prevent the arbitrary suspension of retransmission by a receiving Party and, on the other hand, to provide a receiving Party with some means of reaction in the case of transmissions contrary to the terms of the Convention”.

Arguments in support of freedom of expression in the context of antiterrorist legislation and provisions can be found in other Council of Europe documents. The ministers of states participating in the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik on 28 and 29 May 2009, adopted a resolution on the developments in anti-terrorism legislation in Council of Europe member states and their impact on freedom of expression and information. The act states that “any interference with the freedom of expression and information must be prescribed by law and be a proportionate response to a pressing social need related to the limited exceptions set out in Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights”. These guidelines related to the balancing of rights have to be born in mind by policy makers and legislators when drafting legal provisions of the kind. Other relevant acts are the standard-setting texts adopted by the Committee of Ministers of the Council of Europe designed to assist member states in this respect, including: Guidelines on human rights and the fight against terrorism (11 July

2002); Declaration on freedom of expression and information in the media in the context of the fight against terrorism 2 March 2005); Guidelines on protecting freedom of expression and information in times of crisis (26 September 2007).

Further on the resolution shares the general concerns that, “in some cases, anti-terrorism legislation restricting freedom of expression and information is too broad, fails to define clear limits to authorities’ interference or lacks sufficient procedural guarantees to prevent abuse”. The conclusions are based on legislative amendments and practices undertaken across Europe.

What comes to mind as a possible solution with respect to the amendments suggested is that clear cut and precise terms and criteria should be put in place what public incitement to violence and hatred means, what is incitement to terrorism and what is the difference between public and explicit incitement, for instance. Such definitions usually fall within the scope of the penal code and if incorporated in the Audiovisual Code the latter has to refer to the former. Otherwise the Audiovisual Code has to explain the meaning of incitement to hatred or violence through the media taking into consideration their specific features and the purpose of the law.

Moreover other procedural guarantees have to be put in place for broadcasters which serve freedom of expression and information on an everyday large scale. The regulatory authority which imposes such harsh measure as withdrawal, has to take into account a number of factors – intention, context, imminence, etc. and use the triple test of ECHR concerning proportionality. Its administrative practice based on clear human rights criteria has to be consistent and publicly announced.

Apart from the freedom of expression arguments that have to be carefully discussed before adopting the law, another point which merits attention is that the withdrawal of a license has to be the last resort of measures that can be imposed on broadcasters and this can happen only for grave and persistent offences.

vi. Amendments to Article 38 Sanctions

The objective of these amendments in both proposals is to change the system of sanctions in the Code and to bring it to the requirements of a more diversified and saturated media environment. Another goal is to strengthen the application of certain provisions.

The general comment on the sanctions is that they should not be excessive and stifle freedom of expression but should be proportionate to the offence.

In the amendments, warning is envisaged only for some violations - Art. 3 paragraph (7), Art. 6, Art. 7, Art. 10 paragraph (5), Art. 11 paragraphs (3)-(7), (9)-(10), Art. 16 paragraph (2), Art. 17, Art. 64¹ para. (1) of the Electoral Code.

In the expert’s view, before any penalty is being imposed there should be a warning sent to the broadcaster. Reasonable time should be given to them to correct their activities.

The complex system of sanctions proposed provides for gradation of penalties and this is correct. However, there are no provisions concerning fair procedure which is an important guarantee for broadcasters to defend themselves, respectively for freedom of expression. In respect to this, broadcasters should be given the right to fair hearing to provide explanation, to produce evidence, time to correct their behaviour, access to all materials as a basis for taking final decision, etc. If such guarantees are stipulated by an administrative code, a reference to it should be made in the special law – the Audiovisual Code.

As the withdrawal of the license is a restrictive measure provided by Art. 27, its appropriate place is within this particular provision, therefore para 11 of Art. 38 referring to it should be deleted.

vii. New Article 66¹

“Article 66¹ Measuring audience shares

“The measuring of audience shares shall be carried out by a company selected on the basis of a transparent tender, at least once every 5 years, according to the procedures and conditions set out in a Regulation approved by the CCA.”

The new article is about the measuring of audience shares. It is normal for such measuring to be carried out regularly with respect to updating and correcting the media policy and the elaboration of the procedural rules for this to be within the discretion of the media regulatory authority.

The drafters appropriately have envisaged that the most important guarantee for the fairness of the tender procedure serving public interest is its transparency. The proper place of this provision is in the section dedicated to the activities of CCA. In this section it can be pointed out what is the purpose of measuring of shares and how it can influence the audiovisual policy.

viii. Additional Provision in Proposal 2

“Article II. This law shall enter into force at the date of its publication, with the exception of pt. 5 regarding Art. 11, para. (2) and (3) of the Audiovisual Code of the Republic of Moldova, which shall enter into force 6 months following publication, and pt. 7 letter d) para. (4) of Art. 38, which shall enter into force together with the entry into force of provisions ensuring the transparency of broadcasters.”

Apparently accomplishing transparency of ownership of broadcasters is an important goal for the legislator. A comment can be made that it will be better to develop the provisions about transparency and all amendments to enter into force together to avoid confusion.

Appendix 1

Translation from Romanian into English

/COAT OF
ARMS OF THE
REPUBLIC OF
MOLDOVA/

MEMBER OF PARLIAMENT OF THE REPUBLIC OF MOLDOVA

MD-2073, Chisinau, 105, Stefan cel Mare si Sfant Boulevard

www.parliament.m

d

2 April 2015

CF No. 7

To the Permanent Bureau of the Parliament of the Republic of Moldova

In accordance with the provisions of art. 73 of the Constitution of the Republic of Moldova and art. 47 of the Regulation of the Parliament, we hereby submit the draft law supplementing the Audiovisual Code of the Republic of Moldova, as a legislative initiative.

Annexes:

1. The draft law
2. Information note

/seal of the Secretariat of the
Parliament of the Republic of Moldova/
/D.D.P. No. 125, 02 April 2015/

Members of Parliament:

Mihai Ghimpu (*signature*)
Corina Fusu (*signature*)
Mihaela Iacob (*signature*)
Chirinciuc Iurie (*signature*)
Ion Apostol (*signature*)
Iurie Dirda (*signature*)
Carp Lilian (*signature*)
Valeriu Munteanu (*signature*)
Gheorghe Brega (*signature*)

LAW
supplementing the Audiovisual Code
of the Republic of Moldova No. 260-XVI dated 27 July 2006

The Parliament hereby adopts this organic law.

Art. I – The Audiovisual Code of the Republic of Moldova, No. 260-XVI dated 27 July 2006 (Official Monitor of the Republic of Moldova, 2006, No. 131-133, art. 679), as further amended, shall be supplemented as follows:

1. **Article 11** shall be supplemented with paragraph (3¹) which shall read as follows:

"(3¹) Broadcasters and service providers shall broadcast informative and analytical domestic programmes at a share of 100%, of which 80% shall be in the Romanian language. It shall be permitted to broadcast informative programmes and political-analytical programmes made in the member states of the European Union, the USA, as well as the states that have ratified the European Convention on Transfrontier Television."

2. In **article 38**, after paragraph 1, a new paragraph (1¹) shall be inserted, which shall read as follows:

"(1¹) The following sanctions shall be applied for the violation of the provisions of article 11 paragraph (3¹):

- a) fines from MDL 30,000 to MDL 50,000;
- b) the suspension of broadcasting licenses for up to 30 days;
- c) the withdrawal of broadcasting licenses."

Art. II - This law shall enter into force on the 1st of July 2015.

PRESIDENT OF THE PARLIAMENT

INFORMATION NOTE
on the draft Law supplementing the Audiovisual Code of the Republic of Moldova
No. 260-XVI dated 27 July 2006

Broadcasted mass media are the most important source of information for the majority of the population. A large part thereof transmit Russian channels. This has been possible, both due to the limited capability to create local content, permissive laws and, more importantly, the tolerance displayed by the broadcasting regulatory authority.

Today, mass media originating from the Russian Federation is being spread by means of rebroadcasting in exaggerated volumes – 2/3 of rebroadcasted channels, their content being to the detriment of the national interest and against constitutional provisions.

Article 32, para. 3 of the Constitution of the Republic of Moldova sets out the following: *Challenging and slandering the state and the people, inciting wars of aggression, national, religious and racial hatred, inciting discrimination, territorial separatism, public violence, as well as other manifestations that encroach upon the constitutional regime, shall be prohibited and sanctioned in accordance with the law.*

In Article 34, para. 2, 3, 4, the Constitution sets out as follows:

Public authorities, according to the powers incumbent upon them, are under the obligation to ensure that citizens are properly informed on public affairs and matters of personal interest; The right to information shall not infringe measures in place for the protection of citizens or national security; Public mass media, both state-owned and private, are under the obligation to ensure that public opinion is informed in a correct manner.

In addition, the European Convention on Transfrontier Television, ratified by the Republic of Moldova, in Article 5, para. 3, clearly states that *Where the program services broadcasted from the territory of states that are not parties to this convention are rebroadcasted by entities or by technical means that are under the jurisdiction of a party, within the meaning of art. 3, such party shall ensure, as a broadcasting party, by appropriate means and through its duly empowered authorities, the compliance of such services with the provisions of this convention.*

Moreover, in Article 7, the Convention sets out the responsibilities of broadcasters, wherein the explicitly states, in letter b), that broadcasters shall not *give undue prominence to violence or be likely to incite to racial hatred*, and, in para. 3, that *the broadcaster shall ensure that news fairly presents facts and events and encourages the free formation of opinion.*

Therefore, everything that does not meet the standards of a pluralistic, accurate, equidistant and credible journalism, may be deemed propaganda or manipulation, which represent forms of communication for the purpose of influencing opinions, emotions, attitudes and behaviors of any group of people for the direct or indirect benefit of the sponsor of such communication.

Believing that the freedom of expression and information, as guaranteed by art. 10 of the Convention for the protection of human rights and fundamental freedoms, is one of the essential principles of a democratic society and one of the fundamental conditions for the development of such society and of every human being.

Out of a desire to provide the public with an increased possibility of choosing programme services, that would allow the harnessing of the national patrimony and the development of domestic audiovisual creations, and having decided to attain this cultural objective by means of efforts dedicated to increasing the production and circulation of high quality programmes, thus answering the expectations of the public in political, educational and cultural areas.

Recognizing the need to strengthen the legal framework, we propose new judicious and proportionate regulations in order to ensure the proper functioning of the audiovisual sector, with a view to excluding informational manipulation.

These additions aim at ensuring the protection of the national informational space, as well as at consolidating the powers of the BCC to continuously monitor the informative-analytical programmes that are rebroadcasted from abroad in order to ensure compliance with the law.

Corina Fusu /signature/

/COAT OF
ARMS OF THE
REPUBLIC OF
MOLDOVA/

MEMBER OF PARLIAMENT OF THE REPUBLIC OF MOLDOVA

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22 May 2015

SS No. 45

**To the Permanent Bureau of
the Parliament of the Republic of Moldova**

In accordance with the provisions of art. 73 of the Constitution of the Republic of Moldova and art. 47 of the Regulation of the Parliament, we hereby submit the draft law amending and supplementing the Audiovisual Code of the Republic of Moldova, as a legislative initiative.

Annexes:

1. The draft law
2. Information note

Members of Parliament

/seal of the Secretariat of the
Parliament of the Republic of Moldova/
/D.D.P. No. 218, 22 May 2015/

/ SIGNATURES /

LAW
amending and supplementing
the Audiovisual Code of the Republic of Moldova

The Parliament hereby adopts this organic law.

Article I. – The Audiovisual Code of the Republic of Moldova, No. 260-XVI dated 27 July 2006 (Official Monitor, No. 131-133 dated 18 August 2006, art. 679) shall be amended and supplemented as follows:

1. In article 2

Letters b), c) and j) shall be restated as follows:

“b) *rebroadcasting* – the simultaneous capture and broadcasting of programme services or important parts thereof, by any technical means, in their entirety and without any modification, broadcasted by service distributors and meant to be received by the public;

c) *broadcaster* – legal entity, titleholder of a broadcasting license issued by the Coordinating Council of Audiovisual, bearing full responsibility for the transmission of programme services meant to be received by the public;

j) *local production* – programmes created by broadcasters under the jurisdiction of the Republic of Moldova and/or independent producers of programmes from the Republic of Moldova, including by employing technical and intellectual means from the Republic of Moldova.”

Letter k) shall be excluded;

In letter u), the number “19.00” shall be replaced with “18.00” and the number “23.00” shall be replaced with “24.00”

2. The term “(its) own production” shall be completely excluded from the Code.

3. In article 4

Paragraph (1) shall be restated as follows:

“(1) For the purposes of this Code, a broadcaster shall be deemed to be under the jurisdiction of the Republic of Moldova if such broadcaster has its principal office and its means of production located in the Republic of Moldova, holds a broadcasting license issued by the Coordinating Council of Audiovisual and its editorial decisions on programme services are made in the Republic of Moldova.

Paragraphs (2) and (3) shall be excluded and paragraphs (4) and (5) shall become (2) and (3).

4. Article 9 shall be supplemented by two new paragraphs (2) and (3) as follows:

“(2) Broadcasters and service providers are prohibited to broadcast and rebroadcast radio and television channels containing informative, informative-analytical and political programmes or shows that are not made in the member states of the European Union or in the states that have ratified the European Convention on Transfrontier Television.

(3) Broadcasters are prohibited to broadcast and rebroadcast informative, informative-analytical, political and military-themed shows that are not made in the member states of the European Union or in the states that have ratified the European Convention on Transfrontier Television”

Paragraphs (2)-(3) shall, accordingly, become paragraphs (4)-(5)

5. In article 11

Paragraphs (2) and (3) shall be restated as follows:

“(2) Local production shall comprise at least 8 hours of the daily broadcasting volume and shall be broadcasted exclusively (in their entirety) between the hours 6.00 and 24.00. At least 6 hours of such local production shall be broadcasted during prime time, out of which at least 4 hours shall be broadcasted in the state official language.

(3) Broadcasters whose purpose is obtaining funds exclusively from distribution shall not be entitled to place advertisements, except where they comply with the provisions of para. (2).”

In article (7), the words “maintaining the original soundtrack” shall be replaced with the words “in the state language”

A new article (11) shall be inserted, which shall read as follows:

“(11) Private broadcasters shall be prohibited from using the symbols/logos of other television channels, including channels from outside the Republic of Moldova, more than twice per day. Private broadcasters shall be prohibited from using video and audio identification signs of other television channels, including channels from outside the Republic of Moldova.

6. In article 27

In para. (1), after letter h), the letters i)-m) shall be inserted, which shall read as follows:

- “i) failure to comply with the provision of art. 9 para. (2) and (3) hereof;
- j) public incitement to national, racial or religious hatred;
- k) explicit incitement to mass public violence;
- l) incitement to actions the purpose of which is to overthrow or change, by means of violence, the state order or to violate, by means of violence, the integrity of the Republic of Moldova;
- m) incitement to terrorist acts.”

Paragraph (2) shall be excluded.

7. Article 38 shall be restated as follows:

“Article 38. Sanctions

(1) For the purposes of this Code, liability for the violation of broadcasting laws shall entail the application, by the Coordinating Council of Audiovisual, in accordance with the law, of certain sanctions to broadcasters or service providers that have committed violations of broadcasting laws. The Coordinating Council of Audiovisual shall apply sanctions based on the severity and frequency of violations.

(2) Broadcasters shall be sanctioned by means of a public warning for their first violation of the following provisions:

a) art. 3 paragraph (7), art. 6, art. 7, art. 10 paragraph (5), art. 11 paragraphs (3)-(7), (9)-(10), art. 16 paragraph (2), art. 17.

b) art. 64¹ para. (1) of the Electoral Code.

(3) Broadcasters and service providers shall be fined MDL 5,000 to 10,000 for the following violations:

a) the refusal to subject themselves to verifications, to allow access to the premises wherein they conduct their business, to create conditions for the viewing of their offer of rebroadcasted programme services or to make available, to duly empowered representatives, the requested documents and the recordings of broadcasted programmes;

b) the failure to comply with the offer of programme services rebroadcasted by service providers;

c) the failure to present, before the 1st of March, yearly activity reports and agreements on the rebroadcasting of programme services;

- d) the illegal use of the signs and/or symbols/logos of other broadcasters;
- e) the failure to comply with provisions on the communication of the reasoning and object of a sanction, as set out in paragraphs (8)-(10) of this article;
- f) the broadcasting/rebroadcasting of programme services in violation of the provisions contained in the broadcasting license and the rebroadcasting authorization or the failure to comply with the general concept of a programme service, as approved by the Coordinating Council of Audiovisual;
- g) the failure to comply with the decision of the Coordinating Council of Audiovisual and the provisions of paragraphs (4)-(5) of art. 9;
- h) the failure to comply with the provisions of article 16 paragraph (7) and (8) and the provisions of article 18, as well as the refusal to make recordings of programme services available to the Coordinating Council of Audiovisual or the failure to present agreements concluded with the holders of copyrights and related rights;
- i) the failure to comply with the legal provisions on the conditions of broadcasting advertisements and teleshopping, applicable to each established violation;
- j) the repeated committing of the violations listed in paragraph (2).

(4) Broadcasters and service providers shall be fined MDL 10,000 to 15,000 for the following violations:

- a) the failure to comply with the decisions of the Coordinating Council of Audiovisual on the protection of minors;
- b) the use of subliminal techniques in advertisements and teleshopping;
- c) the repeated committing of the violations listed in paragraph (3), with the exception of article 11 paragraph (10);
- d) the failure to fulfill the obligation to ensure the transparency of the assets of broadcasters, set out in art. 66 para. (6)-(7).

(5) Shall be fined MDL 15,000 to 20,000 for the following violations:

- a) the broadcasting/rebroadcasting of programme services without a broadcasting license or a rebroadcasting authorization;
- b) the broadcasting/rebroadcasting of programme services outside the coverage zone specified in the broadcasting license or the rebroadcasting authorization;
- c) the rebroadcasting of programme services with violation of the provisions of art. 28-30;
- d) the unfounded interruption of the broadcaster's/service provider's activity for a period exceeding 10 consecutive days or a period exceeding 30 intermittent days in a calendar year;
- e) the repeated committing of the violations listed in para. (4);
- f) the broadcasting of cinematographic works outside the periods specified in the agreements concluded with copyright holders or without obtaining a valid license entitling the holder to broadcast.

(6) Broadcasters and service providers shall be fined MDL 25,000 to 30,000 for the repeated committing of the violations listed in para. (5) within a period of 12 months;

(7) Broadcasters and service providers shall be sanctioned by suspending their broadcasting license or rebroadcasting authorization for the repeated committing of the violations referred to in paragraph (6) within a period of 12 months. The suspension of the broadcasting license or rebroadcasting authorization shall be applied after the gradual application of the other sanctions listed in this article.

(8) Broadcasters and service providers that have been subjected to one of the sanctions listed in this article shall be under the obligation to communicate to the public the reasons for and object of the sanction, in the manner specified by the Broadcasting Coordination Council in its decision on the application of the sanction.

(9) The text of the sanction shall be broadcasted within the next 48 hours from the date the decision is issued, in audio and/or visual form, at least 3 times during prime time, out of which once as part of the main news broadcasting.

(10) The sanctioned service provider shall be under the obligation to broadcast the text of the sanction applied in relation to it, in a continuous manner, for 24 hours, on each of the channels that are the object of the sanction.

(11) Broadcasting licenses shall be withdrawn in accordance with art. 27.

(12) The decision of the Coordinating Council of Audiovisual on the application of any sanction shall contain the reasoning thereof, and shall become enforceable from the moment it is published. Any decision of the CCA may be appealed with a court of law by the sanctioned broadcaster.

(13) In case if, within 6 months, the broadcaster or service provider has not allowed a repeated violation of the provisions of this Code for which it had been sanctioned, prior sanctions shall be annulled.”

8. Art. 66¹ shall be inserted and shall read as follows:

“Article 66¹. Measuring audience shares

The measuring of audience shares shall be carried out by a company selected on the basis of a transparent tender, at least once every 5 years, according to the procedures and conditions set out in a Regulation approved by the CCA.”

Article II. This law shall enter into force at the date of its publication, with the exception of pt. 5 regarding art. 11, para. (2) and (3) of the Audiovisual Code of the Republic of Moldova, which shall enter into force 6 months following publication, and pt. 7 letter d) para. (4) of art. 38, which shall enter into force together with the entry into force of provisions ensuring the transparency of broadcasters.

PRESIDENT OF THE PARLIAMENT

INFORMATION NOTE
on the draft Law amending and supplementing
the Audiovisual Code of the Republic of Moldova

This draft law aims at amending and supplementing the Audiovisual Code of the Republic of Moldova.

The Audiovisual Code of the Republic of Moldova is a legislative act endowed with special importance for the development of the rule of law principles and the development of democracy in the Republic of Moldova.

From the moment it was adopted in 2006, the Audiovisual Code has undergone a series of amendments, the purpose of which was to improve the relationships regarding, on the one hand, the protection of the rights of consumers of programmes to receive true and objective information, and, on the other hand, ensuring the rights of broadcasters to editorial freedom and the freedom of expression.

The development of the media market, the appearance and large-scale use of modern technologies, as well as the permanent evolution of European jurisprudence in this field brings about the need to make certain adjustments to national broadcasting laws.

An important factor, which generated the need to promote this draft law, are recent regional events, the sensitive nature of information, which can have a distinctively negative effect on the protection of human rights, national security, strengthening the sovereign, independent and unified status of the state.

This draft law proposes to enter certain clarifications regarding the concepts of rebroadcasting, broadcaster and domestic product. In order to avoid abuse and erroneous interpretation, the definition of a broadcaster under the jurisdiction of the Republic of Moldova has been clarified.

In this regard, in order to ensure the information security of the state, to prevent information which has a negative impact and can harm the sovereignty, independence and territorial integrity of the state, the protection of human rights, as well as the harmonization of the national legal framework with international standards, it is hereby proposed to prohibit the broadcasting and rebroadcasting of television and radio channels containing informative, informative-analytical and military programmes or shows that are not made in the member states of the European Union or in the states that have ratified the European Convention on Transfrontier Television.

However, in order to create conditions for the development of local broadcasters and the promotion of local production, it is hereby proposed to review the minimum daily broadcast shares, including those referring to broadcasts in the state language. In addition, it is proposed to increase the prime time interval by two hours in the evening, the interval thus being from 18.00 to 24.00.

It should be noted that these provisions shall not apply to broadcasters that will not place advertising and whose purpose is to benefit only from funds obtained by means of distribution.

The draft law also contains restrictions on private broadcasters to use the symbols/logos and audio/video signs of other television channels.

Taking into account the fact that, from the time the Audiovisual Code had been adopted, the media market has developed immensely, the laws have been improved, it is thus also necessary to review both the mechanism and the amounts of sanctions applied for violations of the mandatory provisions of the Code. In this regard, we propose a new wording for art. 38.

Taking into account the above, realizing the sensitive nature of the subject-matter addressed herein, we believe that only by such explicit rules can the state and the authorities develop local broadcasting, prove their adherence not only to democratic principles, but also their fundamental task – ensuring national interests, national security, sovereignty, independence and the territorial integrity of the Republic of Moldova – supreme values, guaranteed by the Constitution.

/ SIGNATURES /