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CHAMBRE DES DEPUTES

Session ordinaire 2020-2021

PROJET DE LOI**portant création de l'établissement public « Média de service public 100,7 » et portant modification de la loi modifiée du 27 juillet 1991 sur les médias électroniques**

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AVIS DE L'UNION EUROPEENNE DE RADIO-TELEVISION**DEPECHE DU DIRECTEUR GENERAL
DE L'UNION EUROPEENNE DE RADIO-TELEVISION
AU MINISTRE DES COMMUNICATIONS ET MEDIAS**

(15.3.2021)

Monsieur Le Ministre,

Faisant suite à votre courrier en date du 13 janvier 2021, je vous prie de bien vouloir trouver en pièce jointe l'avis juridique préparé par notre département des affaires juridiques et publiques.

Nous sommes bien entendu à votre disposition pour tout renseignement complémentaire ou éclaircissement sur cet avis juridique.

Veillez agréer, Monsieur Le Ministre, l'assurance de ma haute considération.

Le Directeur Général,
Noel CURRAN

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EBU LEGAL OPINION*1. Preliminary Comment*

The draft law sets out the legal and governance framework of the public service media organisation Media 100,7, defining the essential parameters of its governance, remit and funding, in consideration of European and international standards. We consider that the draft law represents a significant improvement over the existing legal framework, which is somewhat incomplete and outdated and exposes Media 100,7 to the risk of politicisation. We welcome in particular the establishment of a separate law that lays down an appropriate legal framework for Media 100,7 enhancing its editorial independence as well as its institutional autonomy and ensuring appropriate and stable funding over a multi-year period.

More specifically, we consider it a positive step that the draft law provides a clearer and more detailed legal framework, notably with respect to Media 100,7's broader and more up-to-date remit and the reinforced safeguards to ensure editorial and financial independence, appointment procedures for the supervisory and management bodies of Media 100,7, limiting political influence and opening up its supervisory body to the appointment of independent representatives.

However, some proposals may still be made in order to maximise Media 100,7's autonomy and protection from political influence, to strengthen internal independence of the management from the supervisory level and to ensure that Media 100,7 is firmly anchored in and hence legitimised by the Luxembourg public.

Our below comments and suggestions to the draft text tabled on 18 December 2020 bring to the legislator's attention best practices based on European and international standards, while taking into account, to the best of our knowledge, the specific constitutional and institutional structures of Luxembourg.

2. Public service remit

a. General remarks to Article 4

Overall, we consider that Art. 4 adequately circumscribes Media 100,7's mission. We note positively that Media 100,7 is entrusted to provide a generalist and full-programme service to inform, entertain and educate the Luxembourg population (Art. 4(4) No. 1). We consider that the definition of the public service remit appropriately reflects the specificities of the Luxembourg population (which is made up of a high percentage of non-Luxembourg residents). We welcome the fact that Media 100,7 is regarded as a contributor to social cohesion and better understanding of the respective constituencies/social groups in line with Council of Europe standards (in particular Art. 4(4) Nos. 2, 3 and 5).

In order to allow Media 100,7 to stay relevant for all segments of society and develop its services, particularly those offered online, in a future-proof and innovative manner, we would strongly propose an additional paragraph to Art. 4 that stipulates that Media 100,7 may provide all forms of online and multimedia services, including linear, non-linear as well as text-based services. This is an important development for PSM to be able to appeal to younger audiences for the future. (We note in this respect that Art. 5(3) is somewhat narrow and does not refer to the different online services and formats required.)

b. Article 4(2)

Public funding should always be made in conformity with EU State aid rules. We do not see any reason to mention this expressly, and it is not a standard approach in national PSM laws. We propose deletion (at least from the operative provisions.) If the provision is nevertheless retained, it should be noted that the reference to „Commission Decision of 20 December 2011“ is not correct, since it does not apply to PSM.¹

c. Article 4(4) No. 6

The reference to „quality entertainment“ is unclear and difficult to interpret. We propose simply to use the word „entertainment“, allowing the PSM to provide the full range of content required to reach all sections of the Luxembourg population and, as appropriate, to use more popular entertainment formats in addition to/alongside information and education. Listeners to entertainment content may remain tuned in after the show to watch more serious or significant programming immediately after (so-called „lean-in“ effect).

3. Article 6 – Editorial independence

We welcome the explicit recognition of Media 100,7's editorial independence. This is a significant step forward and a prerequisite to ensure that Media 100,7 can fulfil its public service mission as specified in the draft law and retain the public's trust. However, in addition to Media 100,7's external independence from public authorities and political as well as other vested interests, it is also of paramount importance that the supervisory body, i.e. the Administrative Council, does not interfere with the day-to-day management of Media 100,7, including the daily work of journalists and editorial decisions. The independence of the management (including journalists and editorial issues) from the supervisory body (in this case, the Administrative Council) should be expressly guaranteed. Both, the Council of Europe as well the European Commission have underpinned the importance of separation between PSM management and supervision, attributing distinct functions to each.²

¹ Note that the correct instrument applicable to PSM would be the Communication from the Commission on the application of State aid rules to public service broadcasting. OJ C 257, 27.10.2009. However, we consider that any reference to this is superfluous in statutory law and risks to be outdated when it is amended.

² See for example paras. 2-3, 18 A b, 18B, 31 of Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance. See also para. 54 of Communication from the Commission on the Application of state aid rules for Public Service Broadcasting.

4. Article 7 – Relationship with the public

Interaction with the public is good practice. However, this appears to be a very broad obligation and could require a lot of time and money to fulfil adequately (depending upon its interpretation). We propose that the conditions should be made more specific and in a proportionate way, duly taking into account Media 100,7's available means.

5. Administrative Council

a. Article 9(2) Functions/powers of the Administrative Council

We propose to delete the power of the Council to „validate“ the programme schedule. This would appear to us not only a regrettable step back from the current situation³, but more importantly an unacceptable interference in Media 100,7's editorial freedom as guaranteed by Art. 6. It would be important to clarify that the Council cannot exercise any *ex ante* control over programmes before their publication/making available to the public (see our comments above in relation to Article 6). With respect to programme matters, the Council's role should remain limited to providing guidance on the overall strategy of Media 100,7's output.

b. Article 9(3) No. 3

We do not understand the power of the Council to „validate“ the organisational chart at the proposal of the Director General. This seems rather far-reaching (especially when read in conjunction with Art. 9(3) No. 4), and could lead to a situation where the Council would be in a position to make material decisions over the entire management team of Media 100,7. Freedom in matters of personnel and staff policy is an essential cornerstone of a PSM organisation's institutional autonomy. We would propose to delete or significantly reduce the influence of the Council over staff matters.

c. Article 9(4) No. 7

We would raise the question why the Council needs to approve all conventions or agreements („conventions“). The word is unclear and we consider that this may lead to confusion and possible conflict with respect to competences. We would therefore propose some qualification and narrowing of scope (to preserve management independence), either by type (e.g. international conventions or strategic conventions with other bodies) or by monetary value (e.g. all conventions exceeding a specified amount). (See again our comments to Article 6 above.)

d. Article 10(1) Composition of the Council

We appreciate the efforts to strengthen Media 100,7's institutional autonomy and to establish a supervisory body that is independent from political powers and acts as a buffer. However, we see the risk that the acting government retains an important influence, particularly considering that Media 100,7 is funded through the state budget.

We note in this respect the appointment of the Council by decree and understand that this may be part of the Luxembourg legal and constitutional system. Nevertheless, it creates a direct link between government and the composition of the Council.

We welcome the changes proposed to the composition of the Council, reducing the number of members that the government appoints to one third. The Council itself would appoint the majority of its members, making it a representative body and distancing it from political powers.

We regret, however, that the Parliament has no say in the selection and appointment of Council members. We consider it important to involve Parliament in this process and ensure that the Council becomes a pluralistic body that reflects the diversity of society (including a direct representation of the foreign community as well as a balanced representation of men and women, to the extent possible), as well as political views.

³ See Art. 3(6)a) of the Règlement grand-ducal du 19 juin 1992 fixant les modalités de structure et de fonctionnement de l'établissement public créé par l'article 14 de la loi du 27 juillet 1991 sur les médias électroniques (Mém. A – 46 du 6 juillet 1992, p. 1486), modifié par Règlement grand-ducal du 5 juillet 2016 (Mém. A – 159 du 5 août 2016, p. 2670).

Such involvement could take different forms: Parliament could be asked to approve (by qualified majority, e.g. two-thirds), either the entire list of Members nominated by both the government and the Council or only the three nominees brought forward by the government. Alternatively, the three (government-appointed) members could instead be selected and appointed by the Parliament making appointments subject to an agreement between majority parties and the opposition.

With respect to the individuals for appointment to the Council, we would propose specifying the different competences needed and a requirement to cover a reasonable spectrum of society, as well as the procedure to be followed (ie, open call for candidates according to a clear and transparent procedure, open to public scrutiny) in line with Council of Europe standards.⁴

e. *Article 10(6)*

We note the powers of the government to dismiss Council members upon a reasoned opinion by the Council (requiring a simple majority pursuant to Art. 11(5)). We wish to underline that Council members should be granted an appropriate degree of protection against dismissal and that dismissals should only be possible in exceptional and objectively justified cases defined in the law.

f. *Article 11(1) – Organisation of the Administrative Council*

We propose that it should be the Parliament that agrees the internal rules and codes for the Council, rather than the government, in order to preserve Media 100,7's independence. This could be by simple majority.

6. *Article 12(1) – Director General and staff*

a. *Article 12(1)*

We consider that the reference to the management of programming being „under the control“ of the Council raises certain risks for editorial independence. We would propose to use the word „supervisor“ („surveillance“ in French) instead for this particular activity.

b. *Article 12(4)*

It is important that the Director General of a PSM has sufficient autonomy to carry out all relevant management functions and to retain overall editorial independence. We consider the broad and flexible wording, „enjoy a large margin of discretion in the execution of his functions“ („jouit d'une large autonomie dans l'exécution de ses fonctions“), to be too vague.

We would suggest a clear delineation of powers based on certain thresholds. Reference should be made to a delegated authority policy that would be implemented, setting out clearly value thresholds below which the Director General has sole responsibility, above which authority might be needed by two Directors of the Board, and finally above which Council approval is required.

7. *Article 13 – Commissioner of the Government*

We understand that the government Commissioner is a specific characteristic of the Luxembourg constitutional structure in relation to public entities that are state-funded. However, it is somewhat unique in terms of PSM governance (we are not aware of any other such system among EBU members), and it does not prima facie seem to be in line with international best practice.

8. *Article 14 – Funding*

The budget of Media 100,7 should ideally be fixed for the duration of the Convention, in order to ensure that all prescribed PSM activities are adequately financed for the entire period. The possibility to have funding for a period of 5-10 years arguably offers the required stability to plan and organise for sustainable length of time. However, it is difficult to forecast the cost of fulfilling the remit over a period as long as 10 years. Given the provision allows no adjustment for inflation and/or cost increases, we would recommend a shorter period of 5-6 years (unless the budget is expressly index-linked to inflation and/or allows for ad hoc extra budget payments for specific projects, in line with market developments and innovation).

⁴ Para. 27 of Recommendation CM/Rec(2012)1.

We also note paragraph (5) concerning negotiations with the government for the renewal of the Convention. Whilst a prolongation of the Convention for one year in the event negotiations fail is on its face a positive safeguard for Media 100,7, it is unclear what happens after the expiry of that year. In order to ensure the sustainability of public service media in Luxembourg and to promote Media 100,7's overall independence, we would recommend that the Convention continues until a new agreement is concluded.

Overall, we welcome the new draft law for Media 100,7, and consider it to be a significant improvement on the existing legal framework in terms of remit, independence and stable funding. Our comments above are aimed at bringing the new framework even more in line with international best practices and European standards, and we would be very happy to discuss them in more detail if helpful.

Dr Richard BURNLEY and Dr Jenny WEINAND

