

N° 7749¹¹

CHAMBRE DES DEPUTES

Session ordinaire 2021-2022

PROJET DE LOI

portant organisation 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 COMPLEMENTAIRE DE L'UNION EUROPEENNE
DE RADIO-TELEVISION**

1. *Preliminary Comment*

In our view, the proposed parliamentary amendments to the draft law on 22 March substantially improve the according to European and international media law standards on PSM governance.¹ Our main concerns would focus on the role of the Administrative Council in editorial policy and its apparent power to monitor and resolve internal disputes, which should be the preserve of Media 100.7's management. These issues are particularly topical and urgent in light of the EU Media Freedom Act initiative, which will focus on the independence of public service media specifically.²

We set out some specific comments and suggestions below, which should be read together with our previous Opinion of March 2021 (Annex 1).

2. *Public service remit*

a. *General remarks to Article 3*

Overall, we consider Article 3 well circumscribes Media 100.7's mission. Compared to the previous draft law (see our previous Opinion of March 2021, Annex 1), the Article is improved in particular by expressly allowing Media 100.7 to provide online services, which are critical for the success and sustainability of PSM in the future (noting the increasing importance of online distribution).

b. *Article 3 (1)*

The deletion of the word „notably“ could be considered to limit Media 100.7. Generally, the EBU advocates sufficient flexibility in the PSM remit, to allow PSM to develop and evolve its services, moving with the market and staying relevant.³ However, we note that the list of activities below is relatively broad, so the impact of this amendment should not be significant.

We strongly support the addition of new Article 3 (1) No.2, allowing Media 100.7 to develop online services to „extend, enrich or complete“ its broadcast programmes. It would be necessary to ensure that this is interpreted in practice to allow Media 100.7 to offer standalone online services and programmes (eg Podcasts), without any necessary link to existing offline content. It is important that we take into account the likely dominance of the online platform for broadcast distribution in the near future.

In Article 3 (1) No. 7, we support the deletion of the words „of quality“, in line with our comments in our previous Opinion of March 2021 (Annex 1).

1 See further on general principles on PSM governance:
https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Gov-Prin_EN.pdf

2 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_85

3 See further on general principles to consider in drafting PSM remits:
https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Remit_EN.pdf

3. Licences and broadcasting frequencies

We would support the addition of „and content“ in **Article 4**, which provides Media 100.7 with more flexibility for the online platform (different formats and services), complementing the new Article 3 (1) No.2.

4. Editorial independence

We consider the (new) **Article 6** to be a significant and important improvement on the previous text (see our previous Opinion, Annex 1). Firstly, it retains the express recognition of Media 100.7's editorial independence, which is critical (Article 6 (1)). Secondly, it ensures that the responsibility for editorial independence is vested in the Director General (Article 6 (2)).

We would however propose the deletion of the Administrative Council's general power to monitor editorial independence (Article 6 (6)), which appears to us too broad and unclear. In addition, the possibility for the Chief Editor to call on the Administrative Council (the supervisory body) to resolve any dispute with the Director General about the interpretation of the editorial guidelines could be problematic in practice. As emphasized in our previous Opinion (Annex 1), the PSM supervisory body should not have any active role in the editorial policy of the PSM day-to-day (if that is what is intended here). Adequate separation between PSM management and supervision is a fundamental principle according to EU and international standards.⁴ The supervisory body should only be involved in editorial issues in the event of a serious error (*ex post*), or for example where there is an allegation of persistent and/or systematic bias or breaches of editorial independence. It should have no role whatsoever in resolving specific editorial cases upfront, and this should be clearly specified.

5. Public relations

We acknowledge the improvements to **Article 7** concerning the setting up of a designated auditors board composed of members of the public, to be consulted twice a year on programming matters and new projects.

We consider the new text to be more proportionate, practical and cost effective for Media 100.7, whilst encouraging requisite transparency.

6. Administrative Council

a. Article 8 (2) Note 2

We note and support the deletion of the Administrative Council's power to validate the programming schedule. However, the maintenance of its power to „approve“ the schedule is practically the same. We would only repeat our previous comments that this could lead to an unacceptable interference in Media 100.7's editorial freedom (Article 6). The Council's role in programming matters should remain limited to providing general guidance on strategy and direction.

b. Article 8 (3) Note 3

As expressed in our previous Opinion (Annex 1), we do not consider it appropriate for the Council to „validate“ the organizational chart of Media 100.7, which seems too far-reaching and a threat to Media 100.7's institutional autonomy.

c. Article 8(3) Note 5

We also question whether the Council should have full control to decide on legal actions. This might be qualified, for example by the insertion of the word „significant“, to preserve management autonomy. Otherwise, there might instead be a delegated authority policy with clear thresholds.

d. Article 8(4) Note 7

We would reiterate our comments in our previous Opinion (Annex 1) that the power to approve „conventions“ is too vague and must be qualified and narrowed to avoid endangering management/institutional autonomy. Again, a clear delegated authority policy might be appropriate (see above).

⁴ See eg paras 2-3, 18 A b, 18B, 31 Recommendation CM/Rec(2012)1 of the Committee of Ministers to member states on public service media governance. See also para 54, Communication from the Commission on the application of state aid rules for public service broadcasting (2009).

e. *Article 9(1)*

We understand Luxembourg's specific cultural, legal and constitutional system and that the 3 members of State would be (non-party) civil servants and not acting politicians (Article 9(3)). In that case, we find the solution acceptable, even more so if it expressly stated this. We fully support the proposal to ensure gender balance. Direct representation of the foreign community would also be welcome.

f. *Article 10(1)*

We propose that it should be Media 100.7 that decides its own internal rules and codes, rather than the government (noting however our comments in e. above concerning the specificities of the Luxembourg system).

7. *Director General and personnel*

a. *Article 11(1)*

We would reiterate our comment in our previous Opinion (Annex 1, then Article 12(1)) that the word „surveillance“ would be better than „contrôle“ to avoid misunderstanding about the Council's role.

b. *Article 11(2), as deleted*

It is important for the Director General to have a stable term of office that is long enough to plan and implement strategy. We support that the Director General can only be removed by a majority of 2/3 of the Council, according to Article 10(5). It would be important to stipulate that this can only be for specific and serious reasons (see by way of example Article 9(6), referring to the Council members).

c. *Article 11(3)*

We question the deletion of the express stipulation that the Director General has a broad autonomy in the execution of his/her function. We find this deletion to be of concern given the importance of Media 100.7's independence and autonomy as a PSM (see comments above). Whilst the wording can be criticized as being too vague, it should not be removed but ideally made more concrete, with reference to a delegated authority policy that would set out a clear delineation of powers based on certain thresholds. Absent such an amendment, we would prefer to keep the text as it is (which is preferable to deletion).

8. *Funding*

With respect to **Article 13**, we would reiterate our comments in our previous Opinion (Annex 1, then Article 14), and in particular that ideally funding of Media 100.7 be sufficient and fixed for the duration of the Convention (also allowing for *ad hoc* payments for specific public interest initiatives).

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Overall, we recognize important improvements in the proposed text to bring the new draft law into line with European and international standards, in particular in relation to remit, independence, and funding. We hope our comments are helpful and would be delighted to discuss them in more detail if required.

Dr Richard BURNLEY
EBU Director of Legal & Policy

April 2022

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ANNEX 1

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

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

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.

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.

3 See Art. 3(6a) 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).

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.

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 „*supervision*“ („*surveillance*“ in French) instead for this particular activity.

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

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).

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.

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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

March 2021

