



CENTRE FOR LAW  
AND DEMOCRACY

## *Mongolia*

# **Analysis of the Draft Broadcasting Law**

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## ***Introduction***<sup>1</sup>

The idea of adopting a broadcasting law has been an issue of debate in Mongolia for at least ten years and there have been various efforts to try to take this idea forward.<sup>2</sup> The adoption of such a law is very important for a number of reasons, including to set clear rules for the licensing and operation of broadcasters, to ensure that broadcasters are regulated by an independent body, to promote diversity in the airwaves and to put in place an effective and appropriate system for ensuring professionalism among broadcasters.

In late December 2016, the government finally placed a draft Law on Broadcasting (draft Law) before Parliament. For the reasons noted above, this is in general a very welcome measure and, indeed, a much-needed step towards ensuring the development of a public interest broadcasting sector in Mongolia. At the same time, although it has some positive features, there are a number of serious weaknesses in the draft Law which we hope will be addressed before it is adopted.

In terms of strengths, the draft Law places some public interest obligations on broadcasters in Mongolia, something which is sorely lacking in the current regulatory environment. It also helps clarify the powers of the regulator, the Communications Regulatory Commission, and the rules on licensing. However, an important shortcoming is that it fails to transform the regulator into an independent body, contrary to established international standards. It also fails to provide for community broadcasters, imposes an unduly harsh regime for regulating content and could go much further in terms of clarifying the rules on licensing.

This Analysis provides an assessment of the draft Law, taking into account international standards and better comparative practice. In terms of the former, it relies, among other things, on the decisions of international and regional human rights courts, statements by regional human rights bodies and the Joint Declarations

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<sup>2</sup> For purposes of disclosure, we note that the Centre for Law and Democracy's Executive Director, Toby Mendel, has worked on this issue with the government of Mongolia twice in recent years. The first time was in 2009 with the Asia-Pacific Institute for Broadcasting Development (AIBD) and the second time was in 2013-14 with the Asia-Pacific Broadcasting Union (ABU).

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of the special international mandates on freedom of expression. It relies on a number of sources as general references for better national practice.<sup>3</sup>

We urge the relevant authorities in Mongolia, including the government and parliament, to consider the draft Law carefully. While we believe that it is important to move forward with this piece of legislation, it is also important to make a number of changes to the current draft, to bring it more fully into line with international standards in this area.

## **1. Independence**

It is well established under international law that bodies which exercise regulatory powers over the media should be independent of both government and the sector they are regulating, in particular in the sense of not being subject to political interference. The reasons for this are fairly obvious. Absent such protection, the regulatory body can be expected to make decisions which serve the government of the day, or at least be influenced by its political goals, rather than objective decisions in the overall public interest.

Every year, the four special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – adopt a joint declaration on a key freedom of expression theme. In 2003, the Joint Declaration of the (then three – UN, OSCE and OAS) special mandates focused on regulation of media and journalists, stating, among other things:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.<sup>4</sup>

In its 2011 General Comment No. 34: Article 19: Freedoms of opinion and expression, the UN Human Rights Committee, the body which oversees compliance

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<sup>3</sup> See, for example, Steve Buckley, Kreszentia Duer, Toby Mendel and Sean O'Siochru, *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation* (2008, Ann Arbor, University of Michigan Press) and Toby Mendel, *Tuning into Development: International Comparative Survey of Community Broadcasting Regulation* (2013, Paris, UNESCO).

<sup>4</sup> 18 December 2003. All of these annual Joint Declarations are available at: <http://www.osce.org/fom/66176>.

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with the *International Covenant on Civil and Political Rights* (ICCPR),<sup>5</sup> which Mongolia ratified in 1974, stated:

It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.<sup>6</sup>

In contrast to some of the previous drafts of the Broadcasting Law, no attempt has been made in the current draft to transform the Communications Regulatory Commission (CRC or Commission) into an independent body. According to Article 8(3) of the 2001 Law on Communications of Mongolia, the Prime Minister appoints the Chair and other members of the Commission, on the basis of nominations by the Minister responsible for communications. It is clear that this process of appointments is entirely controlled by government. Although the tenure of members is six years and there are some requirements of having expertise, there are otherwise no protections for the independence of the body and it is widely recognised as a body which is subject to government control. The draft Law also fails to place any obligation on the CRC to operate in a transparent fashion, another recognised feature of democratic regulatory bodies.

Within the overall scheme of the draft Law, the Commission exercises extensive control over broadcasters, as detailed in the rest of this Analysis. Among other things, the Commission is responsible for licensing broadcasters (see Articles 7.1 and 12), has the power to suspend or revoke licences on various grounds, including for breach of the content rules set out in the draft Law (see Articles 9.5 and 16), and generally has a number of significant regulatory responsibilities (see Article 29).

Article 10 of the draft Law establishes a Development Fund for National Broadcasting which shall be used to improve the quality of Mongolian content, fund priority and costly content production, create necessary infrastructure and support free-to-air terrestrial services. The Fund shall be financed from grants from the State budget and service fees from various types of content producers and consumers. According to Article 27(3) of the draft Law, the government shall collect the Fund and approve regulations on its disbursement. Article 28(4) appears to contradict this, calling for the State administrative body in charge of communications, presumably the Information Technology, Post and Telecommunication Authority (ITPTA), to develop regulations on the collection and disbursement of the Fund.

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<sup>5</sup> Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

<sup>6</sup> 12 September 2011, CCPR/C/GC/34, para. 39.

The idea of a Fund to support these sorts of activities is welcome and, indeed, important to promote quality and diversity within the Mongolian broadcasting environment. At the same time, this is an extremely sensitive function given that it involves the allocation of funding directly for content production. The need for independence in its oversight is thus essential. It is not clear from the draft Law which body will actually run the Fund, but neither the government nor the ITPTA, which are allocated very important roles in relation to the Fund, are remotely independent.

International law, while calling for independent bodies to undertake actual regulation of the media, recognises the government's role in setting policy in this area. Article 27(1) appears to confuse these roles, however, calling for the government to "implement government policy on broadcasting and organize the implementation measures", which are normally regulatory roles. Similarly, Article 28 calls on the administrative body, i.e. the ITPTA, to approve a resolution on news and other programmes in case of a state of emergency or disaster, which is again a (very intrusive) regulatory role.

The draft Law also envisages regulatory roles for various other State bodies. According to Article 8(5), the CRC is to work with the State administrative body in charge of competition to craft regulations on competition and concentration of ownership. According to Article 15(1)(3), a licence may be suspended for up to 90 days if a State inspector or the State administrative body in charge of intellectual property deems that the licensee has breached intellectual property rights. Article 30(1) provides generally that the CRC, relevant State administrative bodies and State inspectors shall work together to implement the law. Article 30(2) provides that the State inspector of communications shall work to "control implementation of broadcasting service, operations and technological processes". Article 30(3) provides that State inspectors shall "work to control the implementation of legislation, rules, regulations, guidelines and standards of the broadcasting". Finally, Article 31(1) provides for State inspectors (and judges) to impose administrative penalties in various situations which fall short of a criminal offence.

This subjects broadcasters to a very wide range of regulatory bodies, none of which meet the standards of independence required of those tasked with regulating the media under international law. Furthermore, each of these bodies might bring a completely different approach to regulation, leaving broadcasters subject to very different standards. While it is appropriate to provide for the CRC to consult with other specialised bodies in different areas, the CRC should be the body that applies administrative regulatory measures to broadcasters in all of the areas mentioned above.

### Recommendations:

- The CRC should be transformed into an independent body and be required to operate in a transparent fashion.
- The law should make it quite clear who will run the Development Fund for National Broadcasting and this should be a robustly independent body, and neither the government nor the IPTA should exercise any control over the Fund.
- The various provisions cited above which subject licensed broadcasters to the jurisdiction of different administrative regulatory actors should be amended so that administrative regulatory measures for broadcasters in these areas all flow through the CRC.

## 2. Licensing

According to Article 7(1) of the draft Law, broadcasting services, including public and commercial radio and television stations and multi-channel distributors, have to obtain a licence from the Commission. Article 7(3) prohibits government bodies and officials, political parties, religious bodies and entities with more than one-third foreign ownership or membership of the Board or senior management from obtaining a licence. According to Article 11, licences shall be issued based on the principles of competition, need, population density and market capacity, while there shall be separation of ownership between stations (content producers) and distributors. The draft Law contains only very brief rules on licensing procedures and, instead, calls on the CRC to adopt regulations on this (Article 12(1)). Article 14(1) does, however, provide that the term of a licence shall be three years.

The problem with these provisions is not so much what they say, as what they fail to say. However, the limitation of the period of a licence to three years is very problematical. First, it is clear that this is too short a time for most operators to be able to recover the costs of establishing their business operations, whether it is as a content producer or distributor. Second, such a short licence term allows for regular review of the operations of the licensee by the regulator, the CRC. While such review is not, of itself, problematical, it is a concern in the context of Mongolia given the lack of independence of the regulator from the government.

There are a number of other problems with this approach. First, it does nothing to resolve some of the problems of licensing radio frequencies as provided for in the Law on Radio Waves which is, pursuant to Article 3(2) of the draft Law, preserved. For example, Article 10(1)(4) of the former provides that you must have the permission of the Governor (for example of the Aimag, capital city or whatever) to

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obtain a frequency licence, which is directly contrary to the requirement of independence in licensing media under international law.

Article 6 of the Law on Radio Waves establishes a very rudimentary system for classifying radio frequencies but it fails to set up any proper system for planning how the frequency spectrum is to be used. This is essential to any coherent system for use of radio frequencies and to the proper promotion of diverse, quality content in the media.

The draft Law fails to set out sufficiently detailed rules on how licensing processes shall work. Although it states that they shall be competitive, and lists some other general considerations to be taken into account, it fails to set out clearly the criteria against which licence applications shall be assessed (which should include such factors as funding, technical capacity, contribution to diversity and human resources).<sup>7</sup> There is also nothing to ensure that the process will be fair. Among other things, the rules do not require the licensing process to be transparent and to allow for public participation. Articles 10-11 of the Law on Radio Waves set out very brief rules on licensing processes, which also fail to address these issues.

One of the big tensions in the Mongolian broadcasting environment is the relationship between content producers and distributors, something which is likely to be significantly impacted by the transition to digital broadcasting. This issue is further complicated by the fact that the government has established a very important national digital, terrestrial transmission system, which should carry a number of local private channels as well as the public broadcaster. A tender for carriage on this system which was held in 2015 has still not been decided. Unfortunately, the draft Law fails to tackle these issues properly.

In terms of the relationship between content producers and distributors, as noted above, Article 11(1)(2) calls for separation of ownership between content producers and distributors, which is a good idea, especially in a small country like Mongolia. According to Article 22(3), distribution services may not insert advertisements into the programmes broadcast by channels, while Article 24 calls for distributors to carry channels on the basis of a contract. Otherwise, however, little is done to regulate these relationships. There is not even a prohibition on distributors discriminating between different content producers. Given how difficult relations between these two sectors have been in Mongolia, and the important impact the now imminent digital transition will have on these relations, the law needs to do more to set at least an appropriate framework of rules in which these negotiations can take place.

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<sup>7</sup> Article 12(2)(3) does set out *de minimus* standards in several of these areas but this is not the same as setting them out as competitive criteria.

Broadcasters which are successful in getting onto the publicly managed national, terrestrial, digital distribution system will have an enormous advantage over other broadcasters. The network is national and is likely to provide a robust, high-quality distribution service. Article 24(5) requires all distributors to carry these channels as part of their basic service, which further enhances the advantages of being part of this system. But the draft Law says nothing about how this system should work, how channels should compete to get selected for the service, how long they should stay on it, and so on. It does not even say how rules for this should be promulgated. All it says, in Article 24(6), is that the CRC shall adopt regulations governing how the Article 24(5) obligation on distributors (i.e. to carry these channels) should work.

There are also other problems. Article 20(3) of the draft Law indicates that the government is responsible for network maintenance for the services stipulated in Article 4(1)(7)(1), which refers to free-to-air terrestrial services. But this appears to equate the national government distribution system with all free-to-air terrestrial services, as though no one else might provide such a service, which is surely wrong.

#### **Recommendations:**

- The licence term should be extended substantially, probably to at least seven years for a radio station and ten years for a television station or distribution operation.
- A licence for using the radio frequency spectrum should not require the permission of political actors such as governors.
- The law should set out more detailed and clear rules on how the licensing process shall work.
- The law should require the relevant authorities to adopt a properly planned approach to the allocation of radio frequency spectrum, including that part of the spectrum which is to be allocated to broadcasting uses.
- The law should do far more to at least set a framework of ground rules for managing relations between content producers and distributors.
- The law should include a set of primary rules or at least principles governing how access to the government-run national, digital, terrestrial network should be allocated.
- The law should not preclude the existence of free-to-air (digital) terrestrial services over and beyond the government-run national network.

### **3. Diversity**

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The principle of diversity is a key objective of media regulation, particularly in the context of broadcasting. Jurisprudentially, this principle flows from the multi-dimensional nature of freedom of expression which protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas).<sup>8</sup> The result is a positive obligation on States to promote an environment in which media diversity can flourish. It is not enough for the State just to let the market run its course, especially in the broadcasting sector, where factors such as scarce frequencies and high entry barriers have traditionally, absent countervailing regulation, prevented the emergence of a truly diverse media.

Pluralism has been broadly endorsed as an element of the right to freedom of expression. For example, the UN Human Rights Committee has stated:

As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.<sup>9</sup>

Similarly, the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), adopted in 2003 by the African Commission on Human and People's Rights, states:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.<sup>10</sup>

The Inter-American Court of Human rights has also recognised the need for a free and pluralistic media as part of the right to seek and receive information and ideas:

It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.<sup>11</sup>

Within Europe, the importance of media diversity has attracted considerable attention. In a 2012 case, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, a Grand Chamber of the European Court of Human Rights described in some detail key diversity principles:

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<sup>8</sup> See Article 19 of the ICCPR, note 5.

<sup>9</sup> General Comment No. 34, note 6, para. 14.

<sup>10</sup> Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002, Principle III.

<sup>11</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5., para. 34.

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129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.

130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.

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134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.

With this in mind, it should be noted that in Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content (see paragraph 72 above) the Committee of Ministers reaffirmed that “in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed”. [references omitted]<sup>12</sup>

The Court noted the Council of Europe’s Recommendation 2007(2) on Media Pluralism and Diversity of Media Content,<sup>13</sup> which is devoted entirely to the issue of media diversity and how to promote it.

The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression also focused entirely on media diversity, stressing its importance both as part of the right to freedom of expression and as a key underpinning of democracy.<sup>14</sup> The Joint Declaration identified three distinct aspects of media diversity, namely: content, outlet and source. **Diversity of**

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<sup>12</sup> 7 June 2012, Application no. 38433/09. See also See, for example, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

<sup>13</sup> Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

<sup>14</sup> Adopted 12 December 2007. Available at: <http://www.osce.org/fom/66176>.

**content**, i.e. the presence of a range of content that serves the needs and interests of different members of society, is the most obvious and ultimately the most important form of diversity. But this, in turn, depends, among other things, on the existence of different types of media, or **outlet diversity**. In the context of broadcasting, this has been understood as requiring the State to put in place a regulatory framework which promotes the three main types of broadcasters, namely public service, commercial and community broadcasters. **Source diversity** refers to the idea that the media should not all be owned by one or an oligopoly of persons, or the idea that there should be rules against concentration of media ownership. It is reasonably clear that States are required, as part of the right to freedom of expression, to support all three types of diversity, namely of source, of outlet and of content.

The draft Law includes a few rules on diversity of source. Article 8 prohibits any natural or legal person from owning more than one national broadcasting licence, more than one radio and one television licence, or more than one licence in any particular service area. It also calls on the State body in charge of competition and the CRC to work together to develop rules on ensuring open competition and the prevention of undue concentration of ownership. For its part, Article 9 is directed at ensuring transparency of ownership, setting out various categories of information that must be provided annually to the CRC by licensees and then calling on the CRC to make this information public.

These are positive rules in general. Transparency of ownership is paramount, while imposing limits on ownership is also key. Better practice is to apply the rules to control of a media outlet, rather than ownership *per se*, because control can be present at relatively low levels of ownership (for example, if the shares are spread among many people). Consideration should also be given to establishing limits on cross ownership not only between the television and radio sectors, as is currently the case, but also between the broadcasting and print media sectors.

In terms of outlet diversity, it is very significant that the draft Law entirely fails to provide for any recognition whatsoever of community broadcasting. Articles 4(1)(6) and (7) define public and commercial broadcasting, but community broadcasting is entirely left out. This is a very serious shortcoming in the draft Law which, as a result, fails to respect international standards in this area. For example, the 2007 Joint Declaration of the special international mandates notes: "Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms."<sup>15</sup> To this end, it calls on States to reserve sufficient space on different broadcasting platforms for all three types of broadcasters and for special measures to protect public service and community broadcasters. The same ideas are reflected in their

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<sup>15</sup> Note 14.

2013 Joint Declaration, which is about the transition to digital terrestrial broadcasting.<sup>16</sup>

Finally, the draft Law includes only very general rules to promote content diversity. It does call, in Article 21(6), for quotas for Mongolian, local and licensee produced content, which shall be approved by the CRC (Article 29(7)). These are, however, very vague obligations. It is not clear, for example, if these are to be done on an individual basis for each licensee or if general rules are to be set for all broadcasters or all broadcasters of a particular type (such as national television stations). Furthermore, it fails to set out minimum quotas for independent producers – producers who are not linked to any particular licensee (i.e. content producer or station) – which is an important way of increasing access to the airwaves. There is no reason why a licensee should not allow other actors to have access to its station for purposes of distributing their content, albeit at the discretion of the licensee.

#### Recommendations:

- The rules on concentration of ownership should apply to control, rather than ownership, of a media outlet.
- Consideration should be given to extending the rules on cross-ownership to the print media sector.
- The law should specifically recognise community broadcasting, as a third type of broadcasting, and put in place a series of measures to promote this sector, including by reserving space on different distribution platforms for these broadcasters.
- The rules on minimum quotas of different types of content should be clarified and consideration should be given to adding independent producers to the list currently found in Article 21(6) of the draft Law.

## 4. Content

The draft Law sets out a number of standards for programme content. The main rules are found in Articles 21, 22 and 25. The former sets out a number of standards for content. In addition to the content quotas mentioned above in 21(6), it requires news to be “true, accurate, fair balanced and independent”, based on multiple sources and distinguished from advertisements and subscription programmes. Measures must also be taken to protect children and youth against inappropriate content.

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<sup>16</sup> Adopted 3 May 2013. Available at: <http://www.law-democracy.org/live/international-mandates-diversity-key-in-digital-transition/>.

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For its part, Article 25 translates the rule on protection of children into a prohibition (programmes must not harm children) and adds a number of other prohibitions, including on violence, pornography, and incitement to crime, use of drugs or hatred. It also sets rules for sponsoring programmes, including that the sponsor shall not seek to influence the content. Article 22 sets out rules for advertisements, including that the CRC shall adopt regulations on various issues relating to advertising.

For the most part, these rules are not *per se* problematical. However, the manner in which they appear to be applied is a matter of concern. Article 12(2)(3) states that the CRC shall refuse to grant a licence if the “program policy is inconsistent with this law and other legislation”. This appears to suggest some sort of control over content through the licensing process. It is not inappropriate to allow the regulator to refuse to licence a broadcaster which is proposing an inappropriate programme schedule, but the way Article 12(2)(3) is cast appears to grant the CRC broad and discretionary power to assess content proposals in licence applications.

Furthermore, Article 16(1)(3) allows the CRC to revoke a licence if the licensee has “breached the terms and conditions of the licence and legislation”. Once again, from the perspective of content, revocation could be appropriate only in cases of repeated and flagrant breaches of the rules, but as provided for it is too broad and allocates too much discretion to the regulator.

Better practice in this area is to set out broad standards relating to content in the law and then to call on the broadcaster to develop more detailed rules, in consultation with interested stakeholders, in a code of conduct. The rules for application of the code should then be set out clearly in the law, with harsher sanctions such as fines or licence suspension or revocation being reserved for only the most serious cases. In terms of applying the code, this should be done both on a *suo moto* (on its own motion) basis by the Commission and in response to complaints from individuals. The law needs to set out a clear procedure for the latter.

Two areas attract special attention in the draft Law, namely states of emergency and disasters, and foreign content. Regarding the first, pursuant to Article 21(4), broadcasters must respect regulations on broadcasting in states of emergency and disasters which shall, in accordance with Article 28(3), be adopted by the State administrative body in charge of communications (i.e. ITPTA). Furthermore, no advertisements may be broadcast during these times (Article 22(4)).

Although the idea of special rules for states of emergency and disasters may be superficially appealing, in fact experience in countries around the world shows clearly that instructing broadcasters, or other media, what to do in such

circumstances is counterproductive and it is, instead, better to let them get on with their job of informing the public freely and independently. This is far more likely to ensure that the public are well informed and avoids the risk of governments distorting the news or information for political reasons. While not all broadcasters will be equally responsible in such situations, at least the public broadcaster can be relied upon to ensure that quality news and information is provided to the public.

It is also unreasonable to ban all advertisements during states of emergency and disasters. These can go on for some time and such a measure would represent an enormous economic hardship for broadcasters. It is also unnecessary since there is no need to require news to be broadcast 24-hours a day, even during natural disasters.

Articles 21(1) and (2) call for all content to be broadcast in the Mongolian language and for foreign programmes to be dubbed or subtitled. While it is not unreasonable to limit the amount of foreign content overall, and/or the amount of content in foreign languages, such a complete ban is neither reasonable nor productive. It is, for example, useful to have some programmes in foreign languages as this can help develop the language skills of Mongolians. According to Article 21(7), foreign content should not “conflict with the national interest and national security of Mongolia”. This rule is repeated in Article 24(1) in respect of foreign channels. The first of these – national interest – is far too vague and flexible to be reasonable as a form of content limitation. Mongolian law presumably already includes sufficient rules on the protection of national security to render the second rule unnecessary.

### Recommendations:

- The whole approach to content regulation as provided for in Articles 21, 22 and 25 should be reconsidered in favour of a system of professional regulation based on the development of a code of conduct, as described above.
- The special rules on states of emergency and disasters should be removed from the law.
- The rule prohibiting any foreign language content should be replaced with a rule(s) limiting the amount of foreign content and/or the amount of content in foreign languages.
- The rule prohibiting foreign content which is against the national interest or national security should be removed.

## **5. Sanctions**

Better practice in the area of sanctions is to provide for a graduated regime of sanctions – ranging from a warning, to a requirement to broadcast a statement recognising the breach and so on – so that the regulator can, in any specific context, impose a proportionate sanction following any breach of the rules. The draft Law fails to establish a regime of sanctions which meets this standard. For example, pursuant to Article 9(5), the only sanction for failing to disclose ownership information – which could range from failing to inform the CRC about a five percent change in ownership within 30 days to specifically hiding ownership information to circumvent the rules on concentration of ownership – is licence revocation.

Similarly, the regime of sanctions in Articles 15-17 only envisages licence suspension and revocation, both very heavy sanctions, for a range of wrongs, such as conducting activities not specified in the licence or breaching the terms and conditions of a licence. Like the ownership rules, such matters could be very serious or relatively minor in nature. In stark contrast, pursuant to Article 31(1)(1), operating a broadcaster without any licence at all will merely lead to loss of the illegal income and a fine of 10-15 times the minimum wage. Similarly, Article 31(1)(2) provides for a fine of 5-10 times the minimum wage for breach of the technical conditions in the law, which might be far more serious than a minor breach of a licence condition. It seems clear that this regime of sanctions is neither fair nor does it allow for the application of proportionate sanctions in different cases.

### **Recommendation:**

- The whole regime of sanctions in the draft Law should be reviewed so as both to render it fair and coherent, and to allow the regulator to apply a proportionate sanction in any particular case of breach of the rules.

## **6. Broadcasting Policy**

Article 5 of the draft Law sets out the broadcasting policy for Mongolia. This is an important part of the law inasmuch as it provides the direction and interpretive backdrop for the rest of the provisions. The list of policy directions is positive and includes such things as cherishing human rights, and respecting media pluralism and independence. It fails, however, to refer directly to respect for freedom of expression as a policy goal and it could be criticised for being weak on diversity (apart from the one reference to pluralism it fails to refer to more specific diversity

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goals). It also does not reference the need to promote quality media content for Mongolians.

**Recommendation:**

- The principles of broadcasting policy, as elaborated in Article 5 of the draft Law, should include references to respect for freedom of expression, to promoting quality media content and to more specific ways of supporting media diversity.