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Technical Assistance to the EU Delegation to Mozambique

Analysis of the Law on Broadcasting (*Lei da Radiofusão*) and the Social Communication Law (*Lei da Comunicação Social*)

July 2021
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(This version of the Analysis is presented for the internal information of the EU Delegation. A redacted version will be presented for sharing with the Government and others, as the EU Delegations sees fit.)

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Executive Summary

The Government of Mozambique is currently proposing to adopt two new laws to regulate the media. The first is a draft Law on Broadcasting (*Lei da Radiofusão*, draft Broadcasting Law), which would establish a regime for licensing and regulating broadcasters. The second is a draft Social Communication Law (*Lei da Comunicação Social*, draft Communication Law), which would repeal the 1991 Press Law (*Lei de Imprensa*), which is the main media law currently in force in Mozambique, and establish new rules to regulate the media, with a focus on journalists and the print media. The two draft laws were adopted by the Government in late 2020 and placed before the Assembly of the Republic, which had a debate about them in March 2021. However, they were subsequently withdrawn in the face of widespread criticism and the Government is now reviewing them with a view to further improving them.

This Media4Democracy Analysis assesses the extent to which these two new draft laws conform to international human rights standards, in particular those relating to freedom of expression. It highlights the changes that would be needed to conform to both professional standards for drafting media legislation and international human rights standards.

Although the two draft laws have a number of positive features, the Analysis concludes that both laws would need quite substantial revisions to meet international law standards and to establish practical systems for the regulation of the media.

One key standard on freedom of expression is that any public institution or authority which regulates the media must have robust protections for its independence. Article 50 of the Constitution of Mozambique provides for the establishment of the Superior Council for the Media (Conselho Superior de Comunicação Social) as an independent media regulator, while the current Press Law has detailed articles setting out the mandate, structure and powers of the Council. In contrast, Article 8 of the draft Communication Law simply provides for the establishment of a 'regulatory body for the mass media' but says nothing about its mandate, structure and powers, leaving everything to be defined by the Government. This fails to ensure protection for the body's independence, since it leaves it up to the government to establish key rules, for example relating to appointments and tenure of members, rather than this being done through legislation adopted by the Assembly of the Republic, which is the near universal practice of other States.

Given that the two draft laws impose important obligations on different media sectors – journalists, publications, broadcasters and all media outlets – it is very important for them to incorporate clear definitions of these sectors. Unfortunately, the definitions in the draft laws of almost all media sectors are very general in nature, capturing a wide range of forms of

communication which simply cannot be compared to the media – such as police communications – and which should not be burdened by obligations which are specifically designed for the media, such as to provide a right of reply.

The two draft laws both establish a number of restrictions on the content of what the media may disseminate. While it is legitimate to ask the media to behave professionally, these rules, as they are currently, are almost all either too vague or too broad to meet the standards for restrictions on freedom of expression under international law, while some unnecessarily duplicate restrictions which are already found in the Penal Code.

It is recommended that this whole approach be replaced with the idea of an independent regulator, whether a self-regulatory or co-regulatory body, developing a code of conduct in consultation with interested stakeholders and then applying it both via a system of complaints from the public and *suo moto*.

Both laws also impose a number of positive obligations on the media, such as to carry public interest content or to satisfy the information needs of citizens. Again, there is a place for this, especially in relation to broadcasters. However, because these rules are mostly unduly onerous, many are unduly vague and all apply without any distinction to all media (or, as the case may be, all broadcasters), they cannot be justified. Instead, it is recommended that general goals in specific areas – such as national languages, national production and news – be set out in the legislation and it then be left to the regulator to decide specific quotas or standards for each broadcaster or class of broadcaster through the licensing process.

Both draft laws also impose a number of constraints or obligations on either all media or different media sectors, for example, regarding concentration of ownership (monopolies), registration, licensing of journalists, requirements for publications to deposit copies and various restrictions on foreigners and foreign media. Many of these pursue legitimate, even important, interests, such as preventing undue concentration of media ownership, while others are not legitimate under international law, such as licensing journalists. Almost all of those which pursue legitimate aims would need to be adjusted or refined to bring them more fully into line with international standards and also just to establish practical systems for achieving their goals. The restrictions on foreign media are particularly harsh and would, if implemented, essentially terminate the operations of the foreign broadcasters currently operating in Mozambique, thereby depriving Mozambicans of valuable sources of independent, quality news. Similarly, the whole regime of registration for the media should either be dropped entirely or substantially revised to make it far simpler to meet its requirements.

The issue of public media is addressed in both draft laws. This is useful as it is very important for Mozambique to establish clearer legal rules governing the operations of its public broadcasters, in particular, given the significant role they play within the overall media environment. However, to transform these broadcasters into independent public service broadcasters, as international law requires, far more would be needed. Among other things, this would require the law to establish structurally independent boards to oversee their operations, and to put in place clear rules on the following: clarifying the mandate and services to be provided by these broadcasters; ensuring the provision of adequate funding to these broadcasters in a way which does not undermine their independence; and providing for the accountability of these broadcasters to the public, ideally through the Assembly of the Republic as well as in more direct ways.

Finally, the approach taken towards licensing broadcasters would need to be significantly revised both to bring it more fully into line with international standards and to ensure a pragmatic approach towards this issue. The current draft fails to provide properly for the regulation of digital television. While it recognises certain categories of broadcasters – such as scope of dissemination (local, regional, national), ownership (public, private and community) and type (radio and television) – it fails to recognise key categories here, such as content providers and distributors. More importantly, it fails to put in place differentiated rules even for the categories it recognises, for example with no specific regime being created for community broadcasters, even though they are significantly different from commercial broadcasters, and no recognition being given to the differences between a national television and a local radio station (with them both being subject to exactly the same terms and obligations). The draft Broadcasting Law is also silent or very underdeveloped as to many key licensing issues, including the criteria for deciding between competing licence applications; the procedures for applying for a licence (apart from the documents that must be provided) and deciding on a licence application; the procedures for applying for licence renewal; and the procedures and rules for amending licence conditions. This draft Law would need to be significantly expanded and developed to create a practical, modern regime for the licensing of broadcasters.

Beyond these more structural areas for reform, this Analysis provides a number of other, often more technical recommendations for improving the draft laws so as to make them more practical while also further aligning them with international standards. As an example of this, it recommends that the rules on concentration of ownership apply to individuals rather than to legal bodies, since any one could easily get around the latter by setting up different companies.

The draft Broadcasting Law and the draft Communication Law represent a bold attempt by the Government of Mozambique to introduce very major updates and modernisations to the regulation of media in the country. To that extent, they are to be welcomed. At the same time, while they represent a very important step forward, significant additional work is needed to ensure both that they are in line with international standards on freedom of expression and that they create a practical, forward-looking regime for regulation of the media in Mozambique.

Introduction

Brief Context Overview

Mozambique has a reasonably diverse media environment comprising both public and private newspapers, public and private broadcasters and a strong community radio sector. The largest State-owned newspaper, Noticias, is reported to be the most popular but its circulation of just around 16,000 among a population of over 30 million is representative of very low newspaper readership levels in the country. Overall, circulation of newspapers is mainly concentrated in Maputo and the surrounding area. Radio is the most popular media in Mozambique, with State-owned Rádio Moçambique, a national radio network operating Antena Nacional and a number of regional stations and broadcasting in about 18 different languages, being the most popular radio station, with most other stations operating locally. The latter includes a mix of community, local State-owned and commercial radios. The community radio sector is comparatively very well developed, with an estimated audience of 18 million, over one-half of the population, a few years ago.[1] Many of these stations are joint initiatives involving the State and the community, while others have been supported by UNESCO.[2] Televisão de Moçambique is the only State-owned television station, and operates alongside a number of private television stations, while a number of international both television and radio stations are available in the country. Cable distribution systems are reported to reach 30% of households in Maputo, with much lower rates in the rest of the country.

[1] Club of Mozambique, 'Estimated audience of 18 million for Community Radios – Mozambique', 19 December 2016, https://clubofmozambique.com/news/estimated-audience-18-million-community-radios-mozambique/.

[2] The Business Year, 'Mozambique 2016: Spreading The Word, Slowly', https://www.thebusinessyear.com/mozambique-2016/spreading-the-word-slowly/review.

Overall democratic freedom in Mozambique has been declining slowly but steadily in terms of its Freedom House, Freedom in the World report rating, declining from 53 out of a possible 100 points in 2017 to 52 in 2018, 51 in 2019 and then dropping to 45 in 2020 and 43 in 2021. At the same time, it has remained fairly steady in terms of the key indicators on freedom of expression and of the media and, in each of these years, its scores earned it a 'partly free' assessment.[3] According to Reporters Without Borders (RSF), Mozambique was in 108th place in the 2021 World Press Freedom Index out of a total of 180 countries,[4] i.e. around the middle of the Index, down from 104th place out of 180 in 2020 and 103rd in 2019.

The government of Mozambique is currently proposing to adopt two new laws to regulate the media, understood broadly, namely a draft Law on Broadcasting (*Lei da Radiofusão*, draft Broadcasting Law)[5] and a draft Social Communication Law (*Lei da Comunicação Social*, draft Communication Law).[6] Currently, the 1991 Press Law (*Lei de Imprensa*)[7] is the main media law currently in force in Mozambique. It sets rules primarily for the print media and journalists, and also establishes the Superior Council for the Media (or Superior Council for Social Communication, Conselho Superior de Comunicação Social), which is also provided for in the Constitution of the Republic of Mozambique (see below), as a key regulatory body for the media.

At the moment, Mozambique does not have a dedicated law on broadcast regulation. However, the 2004 Telecommunications Law (*Lei das Telecomunicações*)[8] sets general rules for the allocation of frequencies, including by creating the telecommunications regulator, the National Institute of Communications (INCM). The INCM licenses the use of radio frequencies, while permissions to operate broadcasting services are made by the government (Council of Ministers). As such, the introduction of a new draft Broadcasting Law is potentially a very welcome development.

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[3] Available at: https://freedomhouse.org/country/mozambique/freedom-world/2021. Freedom House is a respected United States-based human rights organisation which has ranked democratic freedoms around the world for many years.

[4] Available at: https://rsf.org/en/ranking#. RSF's World Press Freedom Index is a widely used tool for assessing the strength of media freedom in a country.

[5] The draft is available in Portuguese at: https://www.misa.org.mz/index.php/publicacoes/proposta-de-lei-de-radiodifusao.

[6] Available in Portuguese at: https://www.misa.org.mz/index.php/publicacoes/proposta-de-lei-de-radiodifusao.

[7] Lei n° 18/91 de 10 de Agosto, available in Portuguese at: https://www.cmaputo.gov.mz/por/Legislacao/Lei-de-Imprensa.

[8] Lei n° 8/2004 de 21 de Julho de 2004, available in Portuguese at: https://wipolex.wipo.int/en/text/181811.

The draft Communication Law, if adopted, would replace and repeal the Press Law. Given that it is now almost exactly 30 years old, a period during which the means of communication have changed dramatically, it is clearly time to update the Press Law. As such, the introduction of a new draft Communication Law has the potential to modernise the rules governing the media in Mozambique.

Both of the new draft laws could, if further improvements were introduced, bring Mozambique more fully in line with international law on freedom of expression, in relation to which some of the key standards are outlined below. At the same time, regulation of the media is always a complex matter from the perspective of freedom of expression, so it is very important to approach this issue in a professional and human rights-sensitive manner. This Media4Democracy Analysis aims to provide readers with the knowledge needed to understand where further improvements could be made to the two draft laws. In several places, the Analysis refers to 'better practice'; this includes better practice regionally and internationally. Media4Democracy is available to highlight in more detail regional and international better practices in the different areas covered by this Analysis upon request.

Assignment and EUD approach

This Media4Democracy Analysis provides an assessment of the two draft laws which were adopted by the Government of Mozambique in late 2020. The two draft laws were placed before the Assembly of the Republic, which had a debate about them in March 2021, but they were subsequently withdrawn in the face of widespread criticism from different quarters. The Government of Mozambique has now asked the European Union for an analysis of these two laws, with a view to bringing them more fully into line with international standards.

The focus of this Analysis is on the extent to which the draft Broadcasting Law and the draft Communication Law conform to international human rights standards, in particular those relating to freedom of expression. However, the draft laws would both need to be substantially expanded and redrafted to achieve their key objectives of replacing the current systems for licensing and regulating broadcasters and for regulating the media and journalists more broadly with approaches which were more in line with international standards. The ways in which this could be done are set out in some detail in the substantive part of this Analysis.

At the outset, this report presents a review of international standards governing the right to freedom of expression as a framing for the analysis which follows.

Summary Recommendations for Future EU Delegation Actions

Both the draft Broadcasting Law and the draft Communication Law fail in important ways to conform to international standards regarding freedom of expression. In many cases, this is because they are either insufficiently developed or take too rigid an approach. In other cases, this is because the approach it takes does not conform to international standards. Given the potentially important impact that adopting a progressive broadcasting law and a progressive law to replace the now outdated 1991 Press Law could have for the development of the broadcasting sector, and the media and journalists, in the country, it is significant that the Government of Mozambique has asked for advice and support from the EU Delegation to improve the current drafts of these Laws. This represents a very important opportunity through which the EU Delegation to Mozambique could manage political engagements and provide technical support to significantly improve these draft laws.

Section 4 at the close of this Analysis provides two sets of recommendations for consideration by the EU Delegation for possible action.

The first part of that section focuses on a few specific short-term suggestions for action, including as part of its response to the request for support from the Government of Mozambique.

The second part of that section presents general ideas for ongoing engagement, including consideration of broader means through which it could support freedom of expression and media freedom in the country.

1. The Right to Freedom of Expression: Review of International Standards

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR),[9] as follows:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a United Nations General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired

[9] United Nations General Assembly Resolution 217A (III), 10 December 1948.

legal force as customary international law since its adoption in 1948.[10] The *International Covenant on Civil and Political Rights* (ICCPR)[11] is a legally binding treaty, adopted in 1966 and ratified by Mozambique on 21 July 1993. The ICCPR gives effect to many of the rights in the UDHR, including freedom of expression, at Article 19(2), which states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Freedom of expression is also guaranteed in Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR),[12] ratified by Mozambique on 22 February 1989, Article 10 of the *European Convention on Human Rights* (ECHR)[13] and Article 13 of the *American Convention on Human Rights* (ACHR).[14]

International bodies and courts have repeatedly emphasised the fundamental importance of the right to freedom of expression. Just as one example, the African Commission on Human and Peoples' Rights has noted, in respect of Article 9 of the African Convention:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[15]

1.1. Restrictions on Freedom of Expression

Freedom of expression is not an absolute right. However, international human rights law places strict conditions on any restrictions on this right, through Article 19(3) of the ICCPR, which states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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[10] See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice) and *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).

[11] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.

[12] Adopted 26 June 1981, in force 21 October 1986.

[13] Adopted 4 November 1950, in force 3 September 1953.

[14] Adopted 22 November 1969, in force 18 July 1978.

[15] *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, paragraph 52.

This imposes a three-part test for restrictions, which international and regional courts have indicated must be strictly interpreted:

> Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[16]

It may be noted that, although Article 9 of the ACHPR is worded differently than Article 19 of the ICCPR, the Africa Court on Human and Peoples' Rights applies the same three-part test.[17]

First, a restriction must be provided by law or imposed in conformity with the law. This implies not only that the restriction is based on a legal provision, but also that the law meets certain standards of clarity and accessibility. Where restrictions are vaguely drafted, they may be interpreted in a way that gives them a wide range of different meanings. This gives the authorities the discretion to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be protected. For those subject to the law, vague provisions fail to give adequate notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as individuals steer well clear of the potential zone of application to avoid censure. As the United Nations Human Rights Committee (UN HRC), the independent body tasked with overseeing implementation of the ICCPR, stated in General Comment No. 34, adopted in 2011:

> For the purposes of paragraph 3, a norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. [references not included][18]

Second, a restriction must pursue one of the legitimate aims listed in Article 19(3). It is quite clear from both the wording of the article and the views of the UN HRC that this list is exclusive and that restrictions which do not serve one of the legitimate aims listed are not valid.[19] It is not sufficient, to satisfy this part of the test, for restrictions on freedom of

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[16] *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88 (European Court of Human Rights), para. 59. While this case was interpreting the ECHR, its guarantee of freedom of expression is very similar to that found in the ICCPR and this rule has consistently been applied to both.

[17] See, for example, *Lohe Issa Konate v. Burkina Faso*, 5 December 2014, Application No. 004/2013, para. 125 and following.

[18] General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 25. Available in all six UN languages at: http://undocs.org/ccpr/c/gc/34.

[19] *Ibid.*

expression to have a merely incidental effect on one of the legitimate aims listed. The measure in question must be primarily directed at that aim.[20]

Third, a restriction must be necessary to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify any restriction. Courts have identified three aspects of this part of the test. First, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. Second, restrictions must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). Third, restrictions must be proportionate. The proportionality part of the test involves comparing two factors, namely the likely effect of the restriction on freedom of expression and its impact on the legitimate aim which is sought to be protected. These elements are largely captured in the following sentence, which the European Court of Human Rights has frequently quoted:

> In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued'.... In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10. [references not included][21]

1.2. Independence of Media Regulators

It is a clear principle of international law to the effect that bodies which have the power to regulate the media need to be independent in the sense of being protected against political and also commercial interference. The underlying reasons for this are reasonably clear. If regulators are controlled by the government, they are likely to make regulatory decisions which favour the government of the day, rather than the wider public interest. This will undermine the ability of the media to report critically, especially on political actors, and thereby diminish respect for freedom of expression.

Numerous international statements by authoritative actors stipulate the need for independence of bodies with the power to regulate the media. A broad version is found in the 2003 Joint Declaration by the (then three: UN, OSCE, OAS) special international mandates on freedom of expression:

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[20] As the Indian Supreme Court has noted: 'So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.' *Thappar v. State of Madras*, [1950] SCR 594, p. 603.

[21] *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, para. 90.

> 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.[22]

Many of these statements have been directed at broadcast or telecommunications regulators, largely because most democracies do not have official bodies that regulate the print media or journalists. Thus, in General Comment No. 34, the UN HRC 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. [references omitted][23]

All three regional bodies for the protection of human rights – in Africa, the Americas and Europe – have also referred to this idea. Thus, the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and People's Rights, states:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[24]

1.3. Freedom of Expression and Diversity

The right to freedom of expression protects not only the right to 'impart' information and ideas but also the rights to 'seek' and 'receive' them, i.e. the rights of listeners or recipients of communications. Part of this is the right of listeners to have access to a wide range of sources of information and ideas. And part of this, in turn, is the positive obligation of States to promote media diversity.

Diversity has received extremely broad endorsement as a key aspect of the right to freedom of expression. For example, the *Declaration of Windhoek*, adopted under the auspices of UNESCO on 3 May 1991, declared:

> 1. Consistent with Article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development.

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[22] Adopted 18 December 2003. Available at: https://www.osce.org/fom/66176. The United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS) and the African Commission on Human and Peoples' Rights (ACmHPR) have each appointed special international mandates on freedom of expression (special rapporteurs). Each year since 1999, they have adopted a Joint Declaration on a specific freedom of expression theme. In 2003, the theme was media regulation.

[23] Note 18, paragraph 39.

[24] Adopted by the African Commission at its 32nd Session, 17-23 October 2002, Principle VII(1).

> 3. By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.[25]

The need for positive measures to promote media diversity has been recognised in several authoritative statements. The African Declaration, for example, states:

> Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things:
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> - availability and promotion of a range of information and ideas to the public;
> - pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;
> - the promotion and protection of African voices, including through media in local languages; and
> - the promotion of the use of local languages in public affairs, including in the courts.[26]

The *African Charter on Broadcasting, 2001*, adopted in Windhoek on the tenth anniversary of the original *Declaration of Windhoek*, contains a number of provisions on diversity, in its Part I: General Regulatory Issues, as follows:

> 1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.
>
> …
>
> 4. The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting.
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> 5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.
>
> 6. Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.
>
> 7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.[27]

1.4. Digital Communications

A first point to make in relation to digital communications is that the right to freedom of expression applies online just as it does offline, albeit with such adjustments to specific rules

[25] The Declaration was endorsed by the UNESCO General Conference at its twenty-sixth session in 1991. Available at: https://www.un.org/womenwatch/osagi/wps/windhoek_declaration.pdf.

[26] Note 24, Principle III.

[27] Available at: https://en.unesco.org/sites/default/files/african_charter.pdf.

on expression as may be required to take into account the particular features of digital means of communication. Thus, the 2003 Declaration on Freedom of Communication on the Internet adopted by the Committee of Ministers of the Council of Europe states, in its Principle 1:

> Member States should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.[28]

Similarly, the 2011 Joint Declaration on Freedom of Expression and the Internet, adopted by the special international mandates on freedom of expression, states:

> Freedom of expression applies to the Internet, as it does to all means of communication.[29]

Just as digital communications themselves are rapidly evolving, so are regulatory standards in this area. As such, unlike many areas where international standards are very clear – such as content restrictions, independence and diversity, all addressed above – this is not always the case in the area of digital communications. This has led to a situation where even established democracies sometimes try to impose regulatory regimes which are widely condemned by freedom of expression advocates and where less democratic countries sometimes try to take advantage of the situation to impose clearly illegitimate restrictions on free speech.

At the same time, a number of principles are clear. For example, States should not adopt special restrictions for digital communications where laws of general application, such as criminal or civil codes, already address the issue adequately, both online and offline. As a result, it is only where the nature of the harm is different in its very nature online that special online restrictions would be warranted. As the special international mandates on freedom of expression noted in their 2018 Joint Declaration on Media Independence and Diversity in the Digital Age:

> Restrictions which are designed specifically for digital communications should be limited in scope to activities which are either new or fundamentally different in their digital forms (such as spamming), and should always respect the standards set out in sub-paragraphs (a) an (b) [which set out general standards for restrictions].[30]

Despite the problems caused by dis- and misinformation, blanket bans on 'false' or 'inaccurate' statements are not legitimate. As the special international mandates on freedom of expression noted in their 2017 Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda:

> General prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.[31]

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[28] Adopted by the Committee of Ministers on 28 May 2003. Available at: https://rm.coe.int/16805dfbd5.

[29] Adopted 1 June 2011, clause 1(a). Available at: https://www.osce.org/fom/66176.

[30] Adopted 2 May 2018, clause 3(c). Available at: https://www.osce.org/fom/66176.

[31] Adopted 3 March 2017, clause 2(a). Available at: https://www.osce.org/fom/66176.

This does not mean that certain specific types of false statements may not be penalised, such as false statements which harm reputation (defamation), false statements made under oath in court (perjury) and false statements intended to result in illegitimate financial or personal gain (fraud).

Another challenging issue in terms of digital communications is what sort of responsibility and action should private intermediaries, and especially social media platforms, take to address harmful speech. These companies are fundamentally different from States although they do have a responsibility to promote and protect human rights. Their power in the area of digital communications was demonstrated very clearly by the 8 January 2021 decision by Twitter to permanently ban Donald Tump's account, @realDonaldTrump. There is a vibrant and ongoing debate about this. Most observers agree that when taking action to limit harmful speech, intermediaries at least need to be transparent and respect some minimum due process guarantees.

The regulation of digital communications is very complicated and it is beyond the scope of this Analysis to delve into it in detail. In addition to the principles noted above, some key principles are: intermediaries should not generally be liable for content posted by users; media and information literacy has an equally important role to play as legal measures in protecting users; administrative general shutdowns of the Internet or mobile phones are not legitimate and even administrative blocking of websites should be exercised with great caution and be subject to appropriate judicial oversight; States should respect network neutrality (non-discrimination in the treatment of Internet data and traffic); and States have an obligation to promote universal access to the Internet.

2. Overview of Relevant Constitutional Guarantees

The 1990 Constitution of the Republic of Mozambique, revised in 2004, includes fairly extensive guarantees for the right to freedom of expression and related rights, along with a fairly complicated regime for exceptions to or restrictions on these rights. The primary guarantee of freedom of expression is found in Article 48 of the Constitution, titled Freedom of Expression and Information. Article 48(1) guarantees all citizens the rights to freedom of expression, to freedom of the press and to information. Article 48(2) indicates that freedom of expression, which 'consists of the ability to impart one's opinions by all lawful means' and the right to information shall not be subject to censorship. Article 48(3) clarifies the scope of freedom of the press, which includes journalistic freedom, access to sources of information, protection of media independence, the right to professional secrecy, and the right to establish newspapers and other means of disseminating content. The detail in this provision is very helpful in terms of clarifying the precise implications of media freedom.

Articles 48(4) and (5) set out certain standards for the public media, including that their impartiality shall be guaranteed and that they shall cover 'ideas from all currents of opinion'. Article 48(5) also protects the independence of journalists from the government and political forces. Article 49 provides for access of various parties to public radio and television, referred to as 'broadcasting rights', including political parties (according to the extent of their representation in the Assembly of the Republic) (Article 49(1)), with special mention being made of opposition parties, for which this right of access is 'in order to exercise their right of reply and the right to respond to the political statements of the Government' (Article 49(2)), trade unions and professional organisations (Article 49(3)), and, during elections, contestants (to regular and equitable broadcasting time) (Article 49(4)). Each right of access shall be as prescribed by law.

Finally, Article 50 provides for the establishment of the Superior Council for the Media (Conselho Superior de Comunicação Social) as an independent body to guarantee the right to information, freedom and independence of the media, broadcasting rights, and the right of reply (Article 50(1)). Its various roles include issuing opinions prior to government decisions on the licensing of broadcasters (radio and television) and participating in the appointment of the directors-general of public media (Articles 50(3) and (4)). Its 11 members shall be appointed as follows: two by the President, of whom one shall be the chair of the Council; five by the Assembly of the Republic, according to the extent of their representation; three by the professional organisations representing journalists; and one by media businesses or institutions (Article 50(2)), while the law shall regulate the 'organisation, functioning and other powers' of the Council (Article 50(5)).

The Constitution also includes a number of provisions which limit these rights. First, the primary guarantee in Article 48(1) is limited to 'citizens' and so does not apply to anyone else, whereas the right to freedom of expression as guaranteed under international law extends to everyone. Second, Article 48(2) subjects freedom of expression to imparting opinions by 'lawful means', implying that laws may impose limits on the exercise of this right. A more explicit provision on exceptions to these rights is found in Article 48(6), which indicates that the exercise of the rights set out in that article 'shall be governed by law on the basis of the imperative respect for the Constitution and for the dignity of the human person'.

The precise implications of Article 48(6) are not clear from its wording. It clearly envisages laws imposing limits on the exercise of freedom of expression but the exact meaning of the references to the Constitution and dignity of the person are not clear. Some sense of this may be gleaned from Articles 44-46 of the Constitution which refer, respectively, to duties 'towards one's fellow beings', 'towards the community' and 'towards the State'.

Unfortunately, the duties set out in these articles are far from precise. For example, duties to other individuals includes maintaining 'relations with them aimed at promoting, safeguarding and strengthening respect, mutual tolerance and solidarity'. It is not clear what this might mean in the context of strong criticism between political opponents during an electoral contest, which is where international courts have held that respect for freedom of expression is most important. Duties to the community, for its part, includes advocating for the preservation of 'the spirit of tolerance and of dialogue', as well as defending 'the good of the community'. Once again, it is hard to know what this might be intended to mean in the context of freedom of expression, which covers strong differences of opinion, including as to what the very nature of the good of the community represents.

Ultimately, it is difficult to see how these guarantees and the exceptions to and restrictions on them could line up with international guarantees of freedom of expression. At the same time, it may be noted that Article 43 of the Constitution provides for its provisions on fundamental rights to be 'interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples Rights', which is certainly a very positive provision. We are also not aware of how courts in Mozambique have interpreted these provisions.

A couple of other comments on these constitutional provisions are in order. First, the implications of the reference in Article 49(2) to the right of reply and response of opposition parties to 'respond to the political statements of the Government' raises some concerns. This is because it somehow implies that the Government has greater access to the public media to make political statements in the first place (otherwise, why would it be necessary to protect the right of opposition parties to respond), which should not be the case (and which the guarantee of impartiality in Article 48(4) would seem to rule out). Second, Article 50(3) clearly suggests that it shall be the Government which makes decisions on licensing private broadcasters. As the standards outlined above make clear, that is not in line with international guarantees of freedom of expression, which require the actual regulation of the media, certainly including licensing, to be done by independent bodies.

It is beyond the scope of this Analysis to make recommendations on how the Constitution of the Republic of Mozambique might or should be amended to bring it more fully into line with international standards on freedom of expression. Furthermore, as noted, we are not aware of how the relevant constitutional provisions have been interpreted by the courts in Mozambique, which is very relevant to their precise scope and meaning, given that constitutional guarantees of rights are, almost by definition, brief and overview in nature, leaving much up to interpretation.

At the same time, we note that it would be useful, in due course, to broaden the scope of application of some of the relevant provisions, for example to guarantee 'everyone' the right to freedom of expression, to tighten up the language regarding exceptions or limitations to these rights, and to remove or amend some of the references noted above which raise concerns.

3. Analysis of the Draft Law on Broadcasting (*Lei da Radiofusão*)

This part of the Analysis focuses on the draft Law on Broadcasting. As noted above, Mozambique does not currently have a fully developed legal regime for the regulation of broadcasting. The 2004 Telecommunications Law appears to be a fairly traditional approach to telecommunications legislation, in keeping with the date of its adoption. As such, it governs the allocation of frequencies, establishes the telecommunications regulator, the National Institute of Communications (INCM), which allocates frequency licences for different uses, and sets general rules for the licensing of frequencies by INCM. The specific structure and rules governing INCM are set by government decree, but is has been described as being 'subordinated to the Ministry of Transport and Communications rather than an independent body'.[32]

While frequencies are issued by the INCM, the government, through the Council of Ministers, grants permissions to engage in broadcasting (i.e. to provide broadcast services, whether of a content nature or in the area of distribution). We are not aware of how the system of allocating these permissions currently works, since it does not appear to be set out in law (or at least we were not able to access legal documents describing it). Presumably the process ends up with broadcast service providers being given some sort of contract or agreement which sets out the conditions under which they may operate, much as a broadcasting licence would.

The draft Law on Broadcasting contains a number of positive features. For example, Articles 6-10 all set out positive general conditions governing the regulation of broadcasting. Article 6 provides for broadcast services to operate in a 'regime of free competition', devoid of monopolies. Article 7 indicates that the provision of and access to broadcast services shall be guided by equality of opportunity and be free of discrimination. Article 8 calls for licensing

[32] Polly Gaster, 'Mozambique', Global Information Society Watch (GISWatch), https://www.giswatch.org/en/country-report/freedom-expression/mozambique.

of services to be based on the law, while Article 9 calls for frequency allocation to be done in a manner which is objective, transparency and impartial. Finally, Article 10 calls for licensing processes to be technologically neutral, except in relation to previously set transmission standards. There are many other positive elements in the draft Broadcasting Law. It is important to note these positive features at the outset of the Analysis because, by definition, it focuses on those areas of the draft Broadcasting Law where improvements are being recommended. This should not be taken as a statement that everything in the draft Broadcasting Law is negative or needs to be improved.

The first part of this section of the Analysis provides general comments on the key issue of the rules on licensing that are found in the draft Law on Broadcasting as well as what a more fully-developed set of broadcasting rules might contain. This is based both on international guarantees of freedom of expression and also the practical experience of countries around the world in setting up licensing frameworks for broadcasting.

The following parts of this section of the Analysis address, respectively, the issue of independent regulation of the media and how that is approached in the draft Broadcasting Law, the scope and objectives of the draft Broadcasting Law, problematical constraints that the draft Broadcasting Law proposes to impose on broadcasters and a final section covering other issues. Recommendations for bringing the respective rules into line with international standards are provided at the end of each part of the section.

3.1. Overall Approach Towards Licensing Broadcast Services

This part of the Analysis focuses on the structural rules regarding licensing (how to obtain a licence, duration, and so on), as opposed to more general conditions that may apply to licensees, such as what they must and may not do. The draft Law on Broadcasting contains a number of provisions on licensing, which the Glossary describes as 'authorisation' for community broadcasting services and a 'licence' for commercial broadcasting services (Appendix, Articles 1(a) and (c)), although the main body of the draft Broadcasting Law refers to this as a 'permit'.[33]

According to Article 34, the provision of broadcast services requires a permit, which shall include a list of nine features relating to the permission that has been granted, and prior authorisation is required before these features may be changed, which changes must then be recorded on the permit. The nine features are: the document that grants the licence; the name of the licensee; the type and scope of activity covered by the licence; from where

[33] See, for example, Article 34. Our copy of the draft Law in Portuguese suggests that these are also the terms used in the original Portuguese version.

transmission is to take place; the authorised frequency and transmission power; the period of transmission; the language(s) of transmission; the period of validity of the permit;[34] and space for endorsements (i.e. additional conditions or specifications). All of this is legitimate, subject to certain reservations about the stipulations relating to language (on which see below). The permit must be 'fixed in a place of easy access' and made available to competent authorities upon request.

Article 30 sets out the system of classification of broadcasters, arranged under the headings of scope (national, regional, etc.), ownership (public, private and community), content (general and thematic), and type (radio and television).

Article 35 is the main and essentially only article that addresses the issue of how to apply for a broadcast permit, listing 12 types of documents that must be provided, in quadruplicate, for this purpose. These include: the technical proposal, along with a map showing the proposed area of coverage; the legal registration documents of the applicant; the residence certificate of the legal representative of the applicant; the criminal record of the legal representative and director; an official copy of the editorial statute; information on sources of funding; a tax clearance certificate (presumably indicating that taxes have been paid and are up-to-date); a social security certificate (again, presumably indicating that social security obligations have been met); a declaration of ownership of the relevant intellectual property ('brand registration', presumably for the name, logo and such like); proof of payment of the 'licence fee'; and a duly completed form.

The draft Broadcasting Law includes a number of provisions on the termination of permits (or licences), other than for breach of the rules. Article 36 provides for permits to 'expire' if transmission does not begin within one year. Article 37 provides for permits to be 'cancelled' where transmission is interrupted for six months. Article 53(4), for its part, provides that where an interruption of service extends for 45 days or more, the licence will automatically be cancelled, unless the reasons for the interruption have 'been communicated, in the terms of the present law and the Law on the Mass Media'. Article 40 lists a number of grounds for licences to expire, including upon the death, 'dissolution or renunciation' or bankruptcy of the licensee (with the second one being repeated in Article 41(2)), the end of the lifespan of the licence or where the licence is cancelled in accordance with the terms of the law.

Other rules relating to licences and licensing are:

[34] Note that the Portuguese original also refers, variously, to the licence and permit.

- Retransmission is generally allowed where necessary to extend or improve signal reception, but not for community broadcasters (Article 31(2)).
- Licences are valid for five years, subject to being renewed (Article 39).
- Licences may only be transferred upon prior approval of the Government and after two years of broadcasting activity (Article 41(1)).
- The media regulator must be informed within seven days of any changes to the 'programming grid' (it is not entirely clear whether this is limited to the bundle or package of channels offered by broadcast distribution services or it also applies to the programme schedule of broadcast content service providers) (Articles 47(2) and (3)).
- The fees which must be paid, which include licence fees, fees for operating the service, fees for 'renewal, extension and transfer or replacement of titles and of rights', fees for use of the frequency, and fees for use of the 'content provider services', which shall be set out in regulations (Article 59).
- Existing media outlets (órgãos de comunicação social) must bring themselves into compliance with this Law within 180 days of its coming into force (presumably including as to obtaining a licence, although this is not entirely clear) (Article 74).

3.1.1 General Comments

We have a number of both general and more specific comments on this regime. In terms of general comments, we start by noting that a full licensing regime would both be more detailed and specific than this, and yet also more flexible. Article 30 classifies broadcasters according to a number of criteria, but the draft Broadcasting Law then fails to establish any different rules, at least in terms of the licensing process, for these different types of broadcasters. For example, Article 30(b)(iii) recognises 'community' as a type of ownership of broadcasters but the draft Broadcasting Law never defines this type of ownership and only includes one substantive rule relating to it (namely the prohibition on retransmission mentioned above). In contrast, a strong broadcasting law would define this sector clearly and then provide for a separate set of licensing rules for this sector, recognising that it needs to have simpler, more expedited licensing procedures and a less onerous regime of fees. Similarly, the draft Broadcasting Law also fails to set differentiated rules for any of the other types of broadcasters, including scope, content and type (radio and television).

The draft Broadcasting Law also fails to recognise a number of other important types of broadcasters, such as the difference between distributors (cable, satellite and digital multiplex operators) and content providers (channels or stations). For example, it is common to require all cable and satellite distributors to carry at least the main public television channel as part of their basic service (otherwise, homes which receive television via these distribution systems will not effectively receive the public channel). Many broadcasting laws also distinguish between free and subscription or pay-per-view services, again setting different rules for them.

Related to this, it may be observed that although the draft Broadcasting Law refers to digital terrestrial (airwaves-based) broadcasting in a few places, it fails to put in place any proper regime for this. For example, many countries do not allow digital multiplex operators (and often also other distributors) also to have content licences and, where this is allowed, distributors are subject to strict non-discrimination rules regarding the various channels they offer to consumers. Article 33(3) provides that only one authorisation shall be granted to one entity, to 'operate a single radio or television station', but this does not speak to the question of distribution services.

The draft Broadcasting Law is also both too detailed and rigid, on the one hand, and too brief, on the other, when it comes to the processes for applying for and obtaining a licence. For example, the whole application procedure, including the specific documentation that needs to be provided, should be very different for a large commercial as compared to a community station, or a national television as compared to a local radio station. According to the draft Broadcasting Law, one standard procedure is imposed on all licensing processes, with no flexibility being allowed.

On the other hand, the draft Broadcasting Law is entirely silent as to a number of important issues. These include, among others:

- The criteria for deciding between competing licence applications where more than one applicant wants to use an available frequency (or even the idea that broadcast licence allocation should be done on a competitive basis).
- The procedures for applying for a licence (apart from the documents that must be provided) and deciding on a licence application. These should, for example, include rules on announcing licensing competitions, timelines for responding to applicants, requirements for the process to be open to the public and generally transparent, a requirement to provide applicants with written notice in case an application is refused and so on.
- Specific procedures for applying for licence renewal, as well as the grounds upon which this may be refused.
- Procedures and rules for amending licence conditions.

Better practice in this regard is for a broadcasting law to avoid prescribing a single set of rules for applying for and issuing licences for all sorts of broadcast services, as is currently the case with Articles 34 and 35. Instead, better practice broadcasting laws set out a framework of rules governing licensing processes and then let the (independent) regulator set far more specific rules for any particular licensing process. As an example, it is common to require licensing to proceed by way of a competitive process – whereby a call for applications is made and anyone who wishes to obtain a licence may apply – for more

heavily subscribed types of licences (such as national television licences or radio licences in larger cities) but to allow for *ad hoc* applications in underserved areas (such as smaller cities and municipalities) or less attractive markets (such as for community radios).

We note that this same critique can be applied to many of the other rules governing licensed broadcast services in the draft Broadcasting Law. One example is the rigid rules on the use of the Portuguese language, which fail to accommodate the possibility of different types of broadcasters, such as an English language music radio station in Maputo (where it would be one among many available radio stations). These issues, including that of language, are discussed where relevant in the commentary below.

3.1.2 More Specific Comments

In addition to these more general comments on the whole approach taken towards licensing, we have a number of more specific comments. Consistent terminology – for example, 'licence' or 'permit' – should be used to describe the authorisation to provide broadcast services. This avoids confusion and makes the law simpler to read and understand. Alongside this, a number of additional key terms should be defined, such as 'community' and 'commercial' broadcaster, and 'programme grid'.

Article 34 requires quite a lot of detailed information to be included on the permit and, in practice, broadcasting licences are often very long and detailed. As such, it may not be realistic to require them to be displayed in a public place, as stipulated in Article 34(5). Instead, it might make sense to envisage a broadcasting certificate, with basic information about the permit, being displayed while the full permit, or licence or agreement, would only need to be produced when demanded by a competent authority.

The documents required to be provided when applying for a permit, pursuant to Article 35, are all quite technical in nature. As suggested above, we recommend that this approach be reconsidered in favour of one which allows the regulator to stipulate, in the context of any particular licensing process, exactly what must be provided, with the law just setting out the main framework of rules for this. As part of the latter, we suggest that licence applicants be required to indicate what sort of content they are proposing to offer, without making this so fixed and rigid that they cannot adapt to market demand and changes. In this way, distribution services would be required to indicate the basic packages of channels that they were going to offer through their services (programme grid), while content providers would be required to indicate in broad terms what sorts of programmes they would be providing on a daily and weekly basis (for example, a half-hour main news broadcast each evening, at least eight hours of educational programming per week and so on) (programme schedule). This is key to the whole competitive licensing process since regulators normally look at these sorts

of factors – which is key to promoting diversity in the broadcasting sector – when deciding who should get a licence.

Article 35(1)(k) calls for proof of payment of the licence fee when applying for a permit but presumably this would only be paid once a licence had been issued and, at that point in the process, all that would need to be paid would be the application fee.

The period of one year to start transmission, set in Article 36, could be reduced; while such long periods were formerly common in broadcasting laws, in the modern environment it does not require anything like that long to get a broadcasting station up and running. The relationship between the rules in Article 37 – which provides for cancellation of a permit when transmission is interrupted for six months – and Article 53(4) – which provides for automatic cancellation after an interruption of 45 days – needs to be clarified (or resolved), as does the exact meaning of the reference to 'communicated' in Article 53(4). Article 40 contemplates the death of the licensee as a ground for a licence to expire, but this seems to be based on the idea that a broadcasting licence might be held by an individual human being, which does not seem very realistic. There is no need to repeat 'dissolution or renunciation' of the licensee as a ground for expiry of the licence in both Article 40(b) and 41(2).

Article 31(2) generally allows for retransmission but rules it out completely for community broadcasters; a better approach would be to leave this up to the regulator. For example, a community broadcaster operating in a very mountainous region may need to use retransmission even to reach a relatively small audience.

As suggested above, rigid conditions for all licences, such as the five-year tenure for licences provided for in Article 39, should be avoided. Significant capital costs are involved in setting up a national television station, justifying a longer licence term than a city radio station. Many broadcasting laws at least distinguish in terms of licence duration between radio and television licences, and often also community radios.

As noted above, the term 'programming grid', as used in Article 47(2), should be defined, presumably to refer to the programme packages offered by broadcast distributors. Ideally, all broadcast service providers, including content providers should be required to notify the regulator of major changes to the content they are offering consumers (with the latter being required to provide a programme schedule as part of their licence application).

The rules on fees, in Article 59, are quite confusing. First, it is not at all clear what the different fees described there refer to. For example, it is not clear what the difference is between the licence fee and the fee for operating the service (since that is normally what a licence fee covers). In some cases, what are described as fees here appear to refer to

commercial arrangements between third parties, such as the fee for use of the 'content provider services'. This sort of payment should not be confused with fees paid to the public purse for authorisations to broadcast. If framework rules are deemed to be required to cover these sorts of fees – which is far from clear since this is part of normal commercial operations – they should be located in a separate part of the law.

Article 74 requires all existing media outlets to bring themselves into compliance with the new Law on Broadcasting rules within 180 days. First, the scope of this, including whether it requires them to obtain a new permit to operate or they could continue to operate under their existing authorisation, should be clarified. Second, this should be limited in scope to broadcast service providers, which is the scope of the Law on Broadcasting, rather than applying to all media outlets.

Measures Needed to Ensure Compliance with International Standards

- Consideration should be given to amending the whole approach to licensing in the draft Broadcasting Law and replacing it with one that establishes a much more complete overall framework for issuing broadcast service licences, but leaves the precise details of any particular licensing process to be determined by an independent regulator tasked with overseeing that process. Some of the issues that would need to be included in such a framework include:
  - A more detailed breakdown of the different types of broadcast services, including distinguishing between distributors and content providers, and free and pay services.
  - Clear definitions of key terms used in the legislation, including those used to describe the different types of broadcast services (such as 'community broadcaster', 'commercial broadcaster', 'distribution service' and 'content service'.
  - Tailoring licensing (and other) rules to the specific needs of the different types of broadcasting services, including specific licensing procedures for community broadcasters, especially community radios.
  - A specific framework of rules for digital broadcasting.
  - Rules on when applications for licences will be decided on a competitive basis and when on the basis of *ad hoc* applications, along with criteria for deciding between competing applications (which should include the contribution of the proposed service to diversity and a system for ensuring that this can be assessed, such as a requirement to indicate the type of content that is proposed to be provided).

- More specific procedures for processing both competitive and *ad hoc* licence applications (including those set out above), as well as for licence renewals and amendment of licence conditions.

➢ Consideration should also be given to addressing all of the more specific recommendations listed above, including:

- Using consistent terminology throughout the legislation, including for the authorisation to provide a broadcast service (such as 'licence').
- Issuing a broadcast certificate for public display alongside the more detailed licence.
- Amending Article 35(1)(k) to refer to the licence application fee as opposed to licence fee.
- Reducing the start time for a broadcasting service in Article 36.
- Clarifying the meaning of Article 53(4) on licence cancellation for interruptions of 45 days, including what 'communicated' means and how this relates to Article 37, providing for cancellation after six months.
- Removing Article 41(2), on expiry of the licence on grounds of 'dissolution or renunciation', for being repetitive with Article 40(b).
- Leaving it up to the regulator to decide on a case-by-case basis whether a community broadcaster may engage in retransmission.
- Establishing different periods of tenure for different types of broadcast services.
- Requiring all broadcast service providers – distribution and content – to notify the regulator of changes to the content they are providing to consumers.
- Clarifying the rules on fees and including in Article 59 only fees paid for public authorisations (such as to broadcast and to use a radio frequency).
- Clarifying the transitional rules in Article 74 and, in particular, whether existing broadcasters would need to obtain a new licence within the 180 days stipulated there.

3.2. Independence of the Regulatory System

As noted above, international standards make it quite clear that the actual regulation of the media, including broadcasters, should be done by independent bodies, while the government retains the role of setting policy in this area. This could be a challenge in Mozambique since

even the Constitution, in Article 50(3), appears to envisage the government licensing private broadcasters. However, unless and until that provision is amended, it should be possible to limit that as far as possible to a formal role which simply involves signing off on licensing recommendations put forward by the media regulator.

A key element in any independent system of media regulation is to guarantee the independence of the body which oversees that regulation. Article 50(1) of the Constitution clearly envisages that role being undertaken by the Superior Council for the Media. The Press Law establishes the Superior Council for the Media (Conselho Superior de Comunicação Social) but the role of that body, as described in Article 36 of the Press Law, does not appear to extend to licensing broadcasters or even registering print media. In terms of new proposals in the two draft laws, it is the draft Communication Law, in Article 8, which provides for the establishment of the regulator, described there as the 'regulatory body for the mass media' (and generally as the 'body which supervises the mass media' in the draft Law on Broadcasting) (media regulator). A detailed assessment of the extent to which that body is independent is contained in section 4 of this Analysis on the draft Communication Law. Suffice it to note here that although the body is described in Article 8 of the draft Communication Law as 'autonomous', that draft law also fails to put in place any specific or practical guarantees for its independence, leaving it entirely up to the government to define the 'attributes, competences, organization, functioning' of it.[35]

A number of specific provisions in the draft Law on Broadcasting are relevant to the issue of independence. Article 11 defines generally the role of the State in the area of broadcasting, for example to promote 'the development of broadcasting services' and 'the development of digital broadcasting'. It would be useful to clarify that these references are to the role of the government, since even an independent regulator is also part of the State, and, further, to clarify that these roles are limited to setting policy and the framework of rules to achieve these goals, rather than any specific regulatory role.

Article 13 is helpful inasmuch as it calls for broadcast service providers to be 'independent and autonomous in matters of programming and distribution'. It would be useful if this went on to clarify what this independence is from, namely the government and other political actors. Otherwise, this remains somewhat theoretical. Furthermore, this provision goes on to add that independence shall be 'except anything contrary to the applicable norms'. The issue of independence is different from the idea that the media need to obey the rules (i.e. the norms set out in laws, regulations, licences and so on). Independence from political actors is

[35] See Article 8(2) of the draft Communication Law.

not an authorisation to break the rules. It is, rather, a guarantee that the rules will be applied fairly and without favour based on political orientation. As such, there is no need for the reference to 'norms' currently found in Article 13.

Article 33(1) indicates that providing a broadcast service is subject to first obtaining a licence to do so from the government, while Article 33(2) indicates that the media regulator 'shall undertake the registration and issue the respective permit'. For its part, Article 34(1) indicates that the provision of a broadcast service requires a permit, which shall be 'granted by the government, and issued by the body which supervises the mass media area'. Then, Article 35(1) provides for requests for broadcast permits to be submitted to the media regulator. Finally, Article 41(1) provides that licences may only be transferred upon 'prior authorisation of the Government'.

It is not clear from all of this exactly what roles are to be played, respectively, by the government and media regulator. However, Article 35(1) suggests that the media regulator shall undertake the primary processing of applications for permits and that the government shall give the final approval (including, pursuant to Article 41(1), for transfers). This also appears to line up with the language of Article 50(3) of the Constitution.

To help limit the role of the government in terms of the licensing of broadcasters, it would be useful for the Law on Broadcasting to make it quite clear that the media regulator is responsible for all of the formal processing of licence applications, such as issuing calls for applications, receiving and processing applications and so on. It could also clarify that the regulator will send proposals to issue licences, justified with reasons, to the government for final approval, as well as that the role of the government is limited to accepting or rejecting the proposals of the regulator (i.e. that it is not open to government to allocate a licence other than pursuant to a recommendation from the regulator). Those measures would both introduce substantial clarity as to the way the licensing process will work and significantly reduce the risk of political interference in it, or at least increase the political costs to the government of interfering.

Measures Needed to Ensure Compliance with International Standards

- Article 11 should be amended to clarify that it refers to the role of the government, rather than the State as a whole, and that the discharge of this role shall be through setting policies and adopting rules (laws and regulations), rather than through direct forms of regulation.
- Consideration should be given to making it clear in Article 13 that the reference to independence and autonomy means from the government and other political

actors while the reference in that article to 'anything contrary to the applicable norms' should be removed.

- The rules on licensing should be amended to make it clear that the media regulator is responsible for all of the formal aspects of the licensing process and that the role of the government is limited to accepting or rejecting proposals from the regulator to issue a licence (and not to issuing licences absent a recommendation from the regulator).

3.3. Scope of the Law and Objectives

3.3.1 Scope of Application of the Law

The role of a broadcasting law is to impose a regulatory regime on broadcasters. This is perfectly legitimate and, indeed, arguably necessary to protect the right of citizens to receive diverse, high-quality information through the broadcasting system (part of the right to seek and receive information and ideas, which is also protected by the right to freedom of expression). At the same time, it is important that the scope of application of a broadcasting law is defined appropriately so that regulatory measures are not imposed on activities for which they are not properly tailored, such as home videos uploaded to personal websites.

The starting point for assessing issues relating to scope is the definitions, contained in the Appendix: Glossary to the draft Law on Broadcasting. 'Broadcasting' is defined in Article 1(i) as a 'service provided through the propagation of electromagnetic waves carrying audio and/or video signals'. This is both too narrow and too broad. It is too narrow because broadcasting can be distributed in other ways, for example via cable, as is increasingly common in Mozambique. In due course, Internet distribution of broadcasting will also become common in Mozambique. Better practice is to define broadcasting as an activity in a way which is independent of the means of distribution. The definition is too broad because it covers the distribution, over the airwaves, of any form of audio or video signal. This would include police and military communications systems, for example, as well as two-way radios used by private actors. It is important to add to this the idea that broadcasting consists of the provision of a defined service or programme of audiovisual or sound material for reception by the whole public or a part thereof (i.e. subscribers). Traditionally, other elements of the definition would include the idea of simultaneous distribution, although modern technology allows for on-demand provision of services, and reception via radio or television equipment, although, again, modern technology means that most digital devices can receive broadcasting

services, at least online. These elements should also be incorporated into the separate definitions of radio (Article 1(h)) and television (Article 1(k)).

It is also important, as noted above, to distinguish between broadcast content services (the production of audiovisual or audio content) and services involving the distribution of this content (via the airwaves, cable, satellite and so on). In the pre-digital era, it was common for entities to both produce content and distribute it. However, in the digital era, with multiplexes, and also with the rise in cable and other means of disseminating broadcasting, it is important to distinguish between these two types of services. There will still be entities, such as FM radio stations, which continue to undertake both activities, but there will also be entities that just do one or the other. Indeed, as noted above, it may be necessary to limit actors to one or the other in certain cases, for example for actors which operate multiplexes (perhaps apart from the public television). Article 1(g) defines a 'content provider' as a body that distributes broadcasting via digital terrestrial transmission, or multiplexes (i.e. a distribution service). This should be expanded to cover other forms of distribution, at least including cable and satellite.

Article 2 in the main body of the draft Broadcasting Law is titled 'Scope of Application'. Article 2(1) provides that it applies to 'licensed national public and private operators' and to 'foreign operators'. This is problematical in two key ways. First, this law should apply to everyone inasmuch as it prohibits the provision of a broadcast service without a licence (so, limiting its scope to licensed operators would automatically render this provision outside of the scope of the law). Second, at least in English translation, 'national' implies that the service is available nationally, which is clearly not the case for all broadcast services. Instead of distinguishing in this way between national and foreign services, it might make more sense to stipulate that the law applies to everyone who distributes a broadcast service specifically in Mozambique. Article 2(2) excludes the transmission of content for purposes of control and surveillance but, if broadcasting were defined properly in the first place, this exclusion would not be needed.

3.3.2 Objectives

Article 4 sets out five overriding objectives of law, including: to regulate broadcasting as a public interest activity; to strengthen democratic principles and respect for the constitution and national unity; to contribute to national culture and Mozambican values; to affirm respect for human dignity and family relations; and to contribute to development. These are all positive objectives although it would be useful to include others, such as:

- To promote respect for freedom of expression.

- To encourage the development of a strong national broadcasting system which provides high-quality, diverse content to Mozambicans and which can compete with foreign services. Certain aspects of diversity might be particularly stressed as part of this such as: developing a three-tier broadcasting system involving public, commercial and community broadcasters; promoting creative as well as specialised local content; and encouraging the production of educational, historical, development and children's programming.
- To prevent undue monopolisation or concentration of ownership in the sector.
- To ensure broad geographic distribution of broadcasting services.
- To advance the use of new broadcasting technologies.
- To support a financially viable and competitive broadcasting sector.

Article 5 is titled 'Principles and Values'. Article 5(1) sets out five principles which guide 'access to and exercise of broadcasting activity', including free competition, free access, transparency, efficient use of the spectrum and technological neutrality. These broadly conform to the subjects of Articles 5-10, which were described in the Introduction as positive features of the draft Broadcasting Law. However, the language here is a bit unclear and it would be useful to clarify that these principles guide regulatory behaviour and not the work of individual broadcast service providers, since achieving these goals is not their responsibility.

Article 5(2) refers explicitly to the 'provision of broadcasting services', and makes such activities 'subject to observation of the values that promote national unity', providing a list of ten such values. These include such ideas as respect for human dignity, defence of the democratic legal order, promotion of citizenship, respect for the family and social responsibility of the media. Imposing very general obligations such as these apparently directly on broadcasters is simply not legitimate. Even calling in a general way for broadcasters to support or promote these values is not legitimate. For some broadcasters, such as music radio stations, the idea of promoting these values simply does not make any logical sense (unless perhaps you understand it as requiring them to play music selections which are designed to promote citizenship and promote national unity). Otherwise, these are such vague and flexible notions that it is not fair to ask broadcasters to promote them.

What is legitimate, on the other hand, is to provide for the development and application of a code of conduct for broadcasters, through a specific regime (see below), which includes more detailed and therefore precise obligations in some of the areas covered in Article 5(2). For example, it is common, in countries around the world, to include rules on protection of children in such codes, as well as rules on respect for grief (as a more specific example of respect for human dignity) and privacy (also listed in this article).

Measures Needed to Ensure Compliance with International Standards

- The law should include clear and appropriate definitions of the core concepts which determine the scope of its application, such as 'broadcasting', 'content providers', 'content distributors' and so on, in line with the comments above.
- Article 2(1) should be amended to remove the reference to 'licensed operators' and, instead of distinguishing between national and foreign operators, should apply to services that are distributed specifically in Mozambique.
- Article 2(2) should be removed as it would not be necessary if the definitions of broadcasting and related terms was clear and appropriate, as recommended just above.
- Consideration should be given to substantially expanding the objectives of the law, as set out in Article 4, in line with the comments above.
- Article 5(1) should be amended to make it clear that these principles guide regulatory behaviour and not individual broadcast service providers.
- Article 5(2) should be removed; instead, consideration should be given to providing for the development and application of a code of conduct for broadcasters (on which see below)

3.4. Constraints

Many of the provisions in the draft Broadcasting Law impose constraints or operating conditions of one sort or another on broadcast service providers. This is perfectly legitimate and, indeed, is a core purpose of a broadcasting law (i.e. to regulate the sector so that it makes a maximum contribution to freedom of expression and other social values). At the same time, not every constraint or condition does contribute to improving the performance of the sector in this way and, even where it does, it may go too far in terms of limiting the ability of broadcasters to operate. This part of the Analysis focuses on those constrains or conditions in the draft Broadcasting Law which need to be adjusted or perhaps even removed to ensure compliance with international standards on freedom of expression and to ensure that the broadcasting sector can operate in a smooth and efficient manner.

3.4.1 Content Restrictions

The draft Broadcasting Law imposes a number of general restrictions on the sort of content that broadcasters may disseminate. A key provision here is Article 14, the first paragraph of which prohibits all broadcasters from offending against the dignity of the person, violating

fundamental rights, inciting crimes, inciting to hatred on various grounds, discriminating or inciting xenophobia. Article 14(2) applies only to 'uncodified channels', presumably meaning those that are openly accessible (i.e. without paying a fee), which are prohibited from transmitting programmes likely to seriously damage the development of children, young people or other vulnerable groups, 'unadvisable programmes', such as those containing pornography or violence, and 'deceitful advertising'. Article 14(3), finally, calls for programmes which are unsuitable for children under 18 years to be transmitted in accordance with rules established by regulation. It is not clear what the sanction might be for breach of these rules. Section I of Chapter VIII on Infractions does not appear to list breach of this sort of provision as an infraction. Article 46 does refer generally to violations of 'human dignity, honour, privacy, image and voice, and in general of the rights of individuals and institutions that are legally recognised' to be imposed 'in terms of the law', but the implications of this are not clear given that the law does not actually set out terms for sanctions for these activities.

In a sense, all of the interests which are protected by Article 14 are legitimate. However, one problem is that some are simply too vague to be understood clearly, such as the prohibitions on offending against dignity, disseminating 'unadvisable programmes', none of the terms for which are defined, and 'deceitful advertising', again not defined. As noted above, it is not legitimate to impose vague or unclear restrictions on freedom of expression, including through broadcasting. A second problem is that some of these provisions, such as those relating to incitement to hatred or crime, or distributing pornography, are presumably already generally prohibited by the criminal law. It is neither necessary nor appropriate to repeat general criminal rules in a media-specific piece of legislation, thereby exposing the media to dual standards and potentially double jeopardy (being sanctioning twice for the same behaviour).

On the other hand, it is legitimate to provide for the development and application of a code of conduct for broadcasters, as mentioned above. Article 43 of the draft Broadcasting Law already provides for each licensed broadcaster to develop its own 'code of ethics', based on the principles of the law and international human rights treaties, and covering issues such as family time, mechanisms of self-regulation and the conscience clause (referring to the right of journalists to refuse to report in ways that are against their own consciences). These codes must be sent to the media regulator for approval and published in the official gazette (Boletim da República). It also calls on broadcasters to put in place systems to receive and process complaints from the public under these codes.

This is one approach to developing and applying a code of conduct. However, it is not necessarily an efficient or effective one. First, it will be very burdensome for each broadcaster, especially smaller ones, to put in place such a system. Second, even with a requirement of codes being approved by the media regulator, this will result in a patchwork of different codes and systems for applying them across different broadcasters. Third, even if they do their best, individual broadcasters cannot be expected to decide on complaints about their own behaviour objectively. It might be possible for some to appoint independent decision-makers to do this for them but this would not be possible for all of them. For these three reasons, even the most developed countries do not take this approach towards developing and applying broadcasting codes of conduct. Furthermore, the list of issues to be covered by the codes is far too limited in scope.

Instead, most countries provide for a centralised system, with a central body developing and applying the code of conduct. This might be a cross-industry body, such as an association of broadcasters, or, in many countries, an independent regulatory body. In most cases, the law sets out the key areas which the code should address – which includes those covered in Article 14 of the draft Broadcasting Law, along with many others – and indicates who is responsible for running the system and what sort of sanctions might be applied for breach of the code.

Given that these codes deal with very sensitive content issues, the following features are necessary to ensure that these systems do not breach the right to freedom of expression:

- The codes must be developed in close consultation with broadcasters, as well as other stakeholders, to ensure that they take into account the operating reality of this sector.
- Broadcasters may be accused of breaching the code either through a complaint from a member of the public or on a *suo moto* application by the body which is responsible for applying the code.
- Where broadcasters are being investigated for breach of the code, they should benefit from due process protections, including the right to be heard and to defend themselves.
- Sanctions for breach of the code should be very light in nature, normally only a warning or requirement to broadcast a statement acknowledging the breach (usually issued by the body which is responsible for applying the code), or, at the upper end, only relatively modest fines.
- The body which is responsible for applying the code must be scrupulously independent of the government and other political actors, whether it is an industry body (such as an association of broadcasters) or a media regulator. This is very important given the sensitivity of applying content rules.

There are number of benefits of such systems, if they are designed and run properly, over legal prohibitions such as are provided for in Article 14 of the draft Broadcasting Law including:

- They are normally very accessible even to ordinary citizens, including because decisions are reached fairly quickly upon receipt of a complaint.
- The standards they apply are far more detailed than what you would expect to find in a law, thereby providing clear guidance to both broadcasters and the public as to what professional standards are expected from broadcasters.
- The body that interprets the rules normally has a good understanding of the working reality of broadcasters, whether it is the regulator or an industry body.
- The sanctions are minor in nature but sufficient to promote professional behaviour on the part of broadcasters.

Thus, instead of an approach based on the current Article 14 in the draft Broadcasting Law, an approach based on a centralised code of conduct system, as described above, is recommended.

Article 27 applies to broadcast distribution services and requires such services to ensure that the channels they offer do not breach the same standards as are set out in Article 14(1). We recommend that this issue also be covered through the code of conduct system rather than through a direct prohibition in the law. Article 45, which applies without prejudice to Article 14, prohibits the dissemination, during family time – i.e. from 06:00 to 23:00 – of obscene content or content which 'might affect the values inherent to the family, particularly children and adolescents'. We again recommend that this issue be dealt with through the code of conduct system. Articles 50 and 51 provide for a regime to classify programmes as 'fit for minors, for people over the age of 18, under adult guidance, or exclusively for adults'. This is again something that would probably be dealt with better as part of the code of conduct system.

Articles 55 and 56 set out a regime governing the dissemination of advertising by broadcasters. Article 55 focuses on where advertisements may be placed. We note that this seems excessively restrictive, for example only allowing advertisements once every 20 minutes or 30 minutes in case of longer programmes, and only during intervals in sports programmes and similar events. Article 56 sets out a number of substantive limitations on advertising, such as that advertisements may not promote tobacco or 'services or products not proven scientifically, using subliminal advertising techniques', alongside detailed rules on advertising for alcoholic drinks. Here again, it would be preferable to address this through the code of conduct system, perhaps providing for a separate code to cover advertising.

Article 15 of the draft Broadcasting Law prohibits broadcasters from carrying 'political propaganda', apart from in accordance with the rules on the right to airtime and the right of reply. Historically, such prohibitions were reasonably common. However, they deprive political parties and candidates of a key means of taking their messages to the public and also limit the ability of the public to access those messages. As such, a better approach may be to allow political advertisements but to impose conditions on them, such as that broadcasters may not discriminate between parties and candidates in terms of the conditions under which they offer such advertising.

3.4.2 Positive Content Obligations

The draft Broadcasting Law imposes a number of positive obligations on broadcasters to do certain things. As with other constraints, this is potentially legitimate but loses that characteristic if the rules become unduly burdensome or do not promote a broader public interest. Article 28(1) provides that broadcast programming needs to be either produced in Portuguese or other national languages, or sub-titled or dubbed into those languages, although it does include a rather unclear exception for 'programmes that meet specific informational needs or are intended for the teaching of foreign languages'. Article 28(2) provides that 80% of all 'programmes of national content', excluding advertising, needs to be originally produced in Portuguese. Once again, there is a rather vague carve-out for programmes 'whose nature and themes are opposed to this'.

These rules are problematical for several reasons. First, they are not very clear. Does this rule cover music, for example? If so, Article 28(1) would appear to exclude any broadcasting via radio of foreign language songs (since these cannot be sub-titled or dubbed and are not aimed at teaching foreign languages). As noted, the exceptions in both cases are very unclear. Second, they do not allow for any flexibility based on reasonable circumstances or the different situation of broadcasters. Third, it is not clear how realistic the 80% original production in Portuguese rule is for broadcasters in Mozambique. A better approach here would be to set general principles regarding languages – such as on the promotion of original productions in Portuguese – and then leave it up to the regulator to set specific rules for each broadcaster at the time of licensing. Or at least give the regulator the power to waive these rules for broadcasters based on reasonable grounds.

Article 22 requires all broadcasters to broadcast for at least 18 hours per day, not including advertisements. Imposing a rigid requirement like this on all broadcasters is not reasonable and, indeed, such a requirement seems unreasonable for many broadcasters, especially radio stations, noting that, if they carry any advertisements at all, this would mean that their period of transmission would need extend to the time between midnight and 06:00. Once again,

including a general goal of extending hours of transmission in the legislation and then letting the regulator set the minimum hours of transmission for each broadcaster through the licence would be more reasonable.

Article 29 provides for a number of extremely vague positive content obligations for broadcasters, based on the idea that the social function of broadcasters is to 'satisfy the needs of citizens in the fields of information, knowledge, culture, education and entertainment'. Some of the specific requirements include supporting public campaigns during emergencies and supporting social and cultural campaigns. Article 29(3) goes even further and requires broadcasters to 'collaborate with the competent authorities' during states of emergency and related situations, in order to protect not only human life but also 'natural resources and of public and private assets'. It is not legitimate to impose very general obligations on broadcasters, such as to satisfy the cultural or educational needs of citizens, or even to support public campaigns. These are not capable of proper definition and hence either mean nothing or may be abused to control broadcasters. Instead, the licensing process should ensure that broadcasters devote an appropriate amount of time to social issues, such as education and culture. As for emergencies, experience in every country shows that there is no need to require broadcasters to engage, since they always do, and requiring them by law to collaborate with the authorities is not only unnecessary but something that can very easily be abused.

Article 47(1) imposes a blanket requirement on all broadcasters to ensure that 80% of their daily content is national and that the remaining 20% is diverse, preferably coming from Southern Africa, Africa in general or the Community of Portuguese Language Countries. This is an incredibly high proportion of national content which would presumably be difficult for many local broadcasters, especially radio stations, to meet. The 20% rule is also simply too vague to be useful and it is also rather narrow-minded to try to exclude all content from outside of Africa or Portuguese speaking countries. Indeed, it is hard to see how either of these rules could really be deemed to be in the wider public interest. It is good for Mozambicans to have access to broadcasting content from around the world. Here, as with the rules in Article 28, it would be preferable for the law to set out (more realistic, modest) goals and then leave it to the regulator to set specific standards for each broadcaster through the licensing process.

Article 48(1) calls on all broadcasters, again without taking into account the different situation of different broadcasters, to ensure the dissemination of 'regular general news services'. This is another provision that is unduly vague. Once again, it would be preferable for the law to set out general goals in this area and then leave it to the regulator to set more

specific rules through the licensing process. For example, it would be reasonable to require a national television station to have a major daily news segment, say of at least 30 minutes, while local radios might only need to carry five-minute news updates every couple of hours.

Article 49(1) requires all private broadcasters to ensure that at least 20% of their content is 'of public interest'. It is very problematical that there is no definition of public interest content, since this is, at least in this context, a very vague notion. For example, would running several hours of a session of the Assembly of the Republic during the middle of the night, perhaps repeating past coverage when the Assembly was not sitting, qualify for this? 20% also seems a very large quotient of this sort of content, with most broadcasting laws not imposing any such obligation and others limiting it to 5%.

Finally, Article 54 requires all 'information, educational and cultural programmes' on television to be accompanied by sign language or sub-titles. The aim of this, namely to protect people with hearing disabilities, is certainly worthy. It may be noted that Article 21(d) of the Convention on the Rights of Persons with Disabilities[36] calls on States Parties to encourage the mass media 'to make their services accessible to persons with disabilities'. A hard requirement such as the one currently in Article 54 may be difficult for broadcasters in Mozambique to comply with, which may have the unintended effect of reducing the proportion of these sorts of otherwise valuable programmes among the national programming mix. In line with this commitment ('encourage'), a more flexible approach would seem to be warranted. One option here would be to set general goals to increase the accessibility of these sorts of programmes to those with disabilities in the legislation (which could also be broader and include described video for those with impaired vision) and then let the regulator set specific standards for different broadcasters, taking into account their overall situation, through the licensing process.

3.4.3 Prescriptive Rules

In a number of areas, the draft Broadcasting Law imposes overly prescriptive rules on how broadcasters should operate, often reaching into their internal operations. While this is not, at least not in principle, prohibited by international law, such rules are rare in most countries and require a strong public interest justification to render them legitimate.

For example, Article 19(1) requires all broadcasters to have a person who is 'responsible for content guidance and supervision' (i.e. an editor). While this is a near universal approach for larger broadcasters, not all community radios, for example, follow this approach. More

[36] Adopted 30 March 2007, in force 3 May 2008, and ratified by Mozambique on 30 January 2012. Available at: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

importantly, it is not clear why imposing this as a legal obligation is warranted. Normally, broadcasters should be free to organise themselves as they might wish, unless there is a very clear and overriding reason for prescribing a certain arrangement. Similarly, the justification for the requirement in Article 19(2) for broadcasters which carry informational programming to have a person who is 'responsible for information' is not clear. And, in the same way, the justification for the Article 26 requirement for content distributors to have a person who is 'responsible for the selection and grouping of channels in the form of packages' is not clear.

Article 20 imposes an obligation on all broadcasters to adopt an 'editorial statute' which defines 'their orientation and their objectives', and also sets out their commitment to respect the law and the 'ethical principles of journalism'.[37] There is no point calling on broadcasters to make a commitment to respect the law since they are already legally obliged to do this, on pain of punishment if they do not. Since the 'ethical principles of journalism' are not defined in the draft Broadcasting Law or anywhere else to a precise standard, there is little point in having broadcasters commit to respecting them. Instead, a more pragmatic approach would be to put in place a code of conduct system, as recommended above. Finally, the purpose of an 'editorial statute' is not clear but it may be noted that broadcasters around the world operate successfully without one, demonstrating that it is not necessary.

Article 21 calls on broadcasters which employ five or more journalists in their newsrooms to set up 'Newsroom Councils', as provided for in the draft Communication Law. Since Article 39 of that law imposes this obligation on all media outlets, it is by definition unnecessary to repeat it in the draft Law on Broadcasting.[38]

48(2) is even more intrusive and directive in nature, calling on all broadcasters to ensure that their (mandatory) news services are produced by journalists whose 'professional quality is proven by possession of their respective licence'. We note, to start with, that the possession of a licence is absolutely no guarantee of professionalism (see our comments on this in section 3 of this Analysis, focusing on the draft Communication Law). Otherwise, this sort of provision comes dangerously close to dictating who may and who may not practise journalism, something which is absolutely ruled out by international standards.

3.4.4 Other Constraints

Article 16(3) of the draft Broadcasting Law provides for the programmes which have been retained by broadcasters for seven days to be provided free of charge upon request not only to

[37] Note that the provision on an editorial statute in Article 37 of the draft Communication Law does not include this reference to respecting the law. See part 4.4.4 Prescriptive Rules of this Analysis.

[38] See part 4.4.4 Prescriptive Rules of this Analysis.

the media regulator but also to 'any person with a legitimate interest'. It is not clear what would constitute a legitimate interest for this purpose but a better approach would be to require anyone who wanted to obtain a copy of the programme to go through the media regulator to get it.

The draft Broadcasting Law includes a number of constraints on foreign broadcasters. According to Article 31(3), foreign broadcasters may only operate in Mozambique via closed-circuit distribution systems, which is extremely limited.[39] This would completely rule out the current arrangement whereby many foreign broadcasters – including BBC World Service radio, Rádio e Televisão de Portugal (RTP), Radiodifusão Portuguesa (RDP) and Brazilian-based TV Miramar – broadcast their programmes in Mozambique. As such, implementing this rule would essentially ban all of these broadcasters from Mozambique immediately after it came into force. Given that these broadcasters provide high-quality news and other types of content, simply removing them from the broadcasting system would substantially undermine the diversity of programming available to Mozambicans. It would also raise issues of fairness, given the investments that these broadcasters are likely to have made to be able to operate in Mozambique.

The rules would also seriously constrain the ability of local broadcasters to carry programmes produced by foreign broadcasters. Article 52(a) prohibits Mozambican broadcasters from carrying any type of foreign advertising in programmes coming from abroad, apart from sports and recreational content.[40] Article 52(b) prohibits local broadcasters from granting any airtime to foreign broadcasters, while Article 52(c) limits the retransmission of foreign programmes to a closed list of types, mostly recreational or entertainment programmes, which does not include news or educational programmes. Finally, Article 52(d) prohibits any transmission of foreign content except using sub-titles or dubbing into Portuguese or another national language. Article 28, on language of broadcasts, discussed above, would also substantially constrain the distribution of any foreign broadcasts that were not produced originally in Portuguese.

The justification for such stringent prohibitions on foreign programming, including the outright ban on all news programmes, is unclear. While it is important to promote and

[39] Closed-circuit systems transmit signals to specific locations or a set number of television monitors or devices. The term is common used to describe systems whereby surveillance cameras send feed to monitoring television monitors. In contrast, what we normally think of as broadcasting distributes signals widely to customers via the airwaves, or satellite or cable distribution systems.

[40] It is not clear, at least in the English translation, whether this condition refers to the advertising content or the underlying programme into which the advertising is inserted by it seems to be the former.

support local news production, it is also very useful for Mozambicans to have access to quality news produced by foreign broadcasters.

Measures Needed to Ensure Compliance with International Standards

- Consideration should be given putting in place a system for the development and application of a code of conduct, along the lines described above, to be overseen either by regulator, with strong protection for its independence (essential to the legitimacy of this approach), or an industry body.
- If the above is done, Articles 14, 27, 45, 50, 51 and 56 should be removed entirely from the law and these issues should instead be dealt with via the code of conduct system. If these articles are retained, they should be substantially revised to ensure that they are clear and precise and do not impose undue limits on the content of what may be broadcast.
- Consideration should be given to replacing the prohibition on political advertising in Article 15 with a regime which allows such advertising but places conditions on it, including of non-discrimination.
- The restrictions on placement of advertisements in Article 55 should be reviewed to make sure they are realistic taking into account the current advertising approach being employed by broadcasters in Mozambique.
- Rather than imposing fixed rules and percentages in the legislation, for the issues covered by Articles 22, 28, 47(1), 48(1) and 54, consideration should be given to setting out key principles and aims in the legislation but leaving it up to the regulator to set specific standards for each broadcaster through the licensing process. At a minimum, the regulator should have the power to waive or reduce the stringency of these rules for different broadcasters.
- Article 29, on the social function of broadcasters and reporting during emergencies, should be removed.
- The requirement in Article 49(1) to carry 'public interest' content should either be removed entirely or the concept of 'public interest' content should be defined clearly and the percentage reduced substantially from 20%, for example to 5%.
- Articles 19, 20, 21, 26 and 48(2) are all unnecessary and overly prescriptive in terms of dictating how broadcasters should organise their operations and should, as a result, be removed from the law.
- Article 16(3) should be limited to requiring access to programmes to be provided to the media regulator.
- The broad and often blanket restrictions on foreign broadcasters should be reconsidered in favour of allowing the regulator to approve, on a limited basis

and taking into account the wider public interest, both direct transmission of some foreign channels and wider rights for local stations to retransmit foreign programmes, including news.

3.5. Other Issues

This part of the Analysis addresses a number of other issues where the draft Broadcasting Law could be improved to bring it more fully into line with international standards and as a practical tool for promoting a strong, diverse broadcasting sector in Mozambique.

3.5.1 Monopolies

The only provision in the draft Broadcasting Law which addresses the issue of undue concentration of ownership of the media is Article 33(3), which provides that no entity shall be granted more than 'one authorisation to operate a single radio or television station'. We are not aware whether or not there are already cases of multiple media ownership in Mozambique, but the best time to address this issue is before it becomes a problem, because it is extremely difficult to do so afterwards. To this extent, rules on concentration of media ownership in the draft Broadcasting Law are welcome. At the same time, this is a very crude, flat rule to address the problem. There is, for example, a big difference between owning a national television station and a small local radio station. Consideration could thus be given to adding a bit more complexity to the rule. Options here include:

- Providing that no one may own more than one broadcaster operating in any one media market. That would limit national broadcasters to one station but would allow multiple ownership of local radio stations in different cities.
- Setting maximum market shares that no one was permitted to exceed in any given market.
- Linking the rules to individuals, and their families, as opposed to legal entities (by applying them to the ownership or control of broadcasters as opposed to granting licences to legal entities). Otherwise, one person could set up different companies and thereby control more than one broadcaster.

3.5.2 Public Broadcasters

Chapter VII of the draft Broadcasting Law, comprising Articles 60-64, addresses 'Public Broadcasting Services'. Article 60(1) provides that public television comprises digital transmissions nationally and internationally. It is not clear what the point of this is, but presumably public television should at least also be able to distribute via cable, satellite and Internet, while ruling out the possibility of provincial or regional public television does not

seem very helpful. This rule may be contrasted with Article 60(2), on public radio, which envisages different geographic scopes and any appropriate method of distribution.

Article 61 sets out a list of issues for public broadcasters which shall be included in the 'Contract-Programme', such as programming obligations, the provision of services, coverage, financing and so on. This is useful but it would be prudent to indicate that these matters may also be dealt with through law or regulations.

Article 63 sets out the mission or objectives of the public broadcasting service. These are quite comprehensive but could be expanded to include:

- Covering the whole territory of Mozambique.
- Producing programming of high quality.
- Providing a comprehensive news service (in addition to what is indicated in Article 63(1)(e)).
- Contributing to a sense of national identity while also reflecting the diversity of the country (as provided for in Article 63(1)(d)).
- Giving a voice to all ethnic groups (in addition to reflecting diversity, as provided for in Article 63(1)(d)).
- Striking a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences.
- Providing a reasonable proportion of educational programmes and programmes oriented towards children.

More generally, while these provisions are useful, they are insufficient to create a strong and independent public service broadcaster. As far as we understand, currently the public broadcasters are established by government decrees as autonomous public companies, much like other public companies, but this is not the same as saying that they are independent in the full sense that the international law standard for public broadcasters requires. As an example of this, Article 64 of the draft Broadcasting Law, covering financing, just provides that the State guarantees the financing of the public broadcasting service, without setting up any particular system for doing this in a way that safeguards the independence of public broadcasting. We understand, for example, that the chairs of these broadcasters are appointed by the Council of Ministers, while two other members of the board are appointed by the Office of Information, GABINFO, which is under the Office of the Prime Minister, and one more is appointed by the Minister of Finance, which is not conducive to independence.

To create a robust legal framework for the public broadcasters would additionally require the following:

- The establishment of structurally independent boards to oversee their operations, including a system of appointments, protection of tenure and so on.
- Rules on the mandate and services to be provided by these broadcasters.

- Rules on funding which ensured adequate funding was provided in a way which did not undermine their independence.
- Rules on accountability to the public, ideally through the Assembly of the Republic as well as in more direct ways.

3.5.3 Infractions

Section I of Chapter VIII deals with Infractions, with Articles 66-68 detailing, respectively, the types of infractions that shall be classified as 'minor infractions', 'serious infractions' and 'especially serious infractions'. Article 70 describes the sanctions to be associated with each type of infraction, which is a fine of 30% of the value of the licence fee for minor infractions, increasing to 45% for repeat offences, a fine of 60% of the value of the licence fee and suspension of the licence for serious infractions, and a fine of 100% of the value of the licence fee and revocation of the licence for especially serious infractions.

As a first point, it may be noted that at least some of the rules in the draft Broadcasting Law are not mentioned anywhere in this framework of infractions (as noted above, even the content rules in Article 14 do not appear to be reflected here). Otherwise, this approach is, like some of the other approaches in the draft Broadcasting Law, simply too rigid. Licence suspensions and revocations should be applied only in the very most serious cases, normally for repeated breaches. However, non-compliance with the 'norms concerning family time' is classified as an especially serious infraction, leading automatically to licence revocation, whereas such an infringement could be quite minor in nature (for example, where a broadcaster failed to realise that certain content was inappropriate for minors). Even the pre-set fines for each level of infraction are not appropriate and fail to recognise the fairly obvious point that infractions vary in how serious they are and hence in what sanction they should attract. According to international standards, sanctions for breaches of rules on freedom of expression need to be proportionate and a flat system of sanctions like this could never meet that standard. It may also be noted that only fines, and suspension and revocation of the licence are recognised as sanctions, whereas a more tailored approach would be to recognise additional sanctions such as a warning, a requirement to broadcast a statement acknowledging the breach, a requirement to grant a right of correction of reply to an offended person, a requirement to correct or stop a wrong that was being committed, and a requirement to stop broadcasting just one particular programme (instead of suspending the licence as a whole).

Measures Needed to Ensure Compliance with International Standards

- The flat rule in Article 33(3) prohibiting any entity from obtaining more than one broadcasting licence to operate a single radio or television station should be reconsidered in favour of a more nuanced rule that applied to ownership or control by an individual and that took into account the vast differential in influence of a national television and local radio station.

- Article 60(1) should be amended so that it does not straightjacket the operations of public television.
- Article 61 should make it clear that the issues to be addressed in the Contract-Programme may also be dealt with through law and regulation.
- Consideration should be given to expanding the mission of public broadcasting, as described in Article 63, to include the issues mentioned above.
- Broader consideration should be given to creating a full legal framework to transform the public broadcasters into true public service broadcasters, along the lines mentioned above.
- The whole approach to sanctions should be amended along the following lines
  - All of the breaches of the law should be recognised as one or another type of infraction.
  - Additional possible sanctions should be provided for, along the lines recommended above.
  - Flexibility in applying sanctions so that they are proportionate to the wrong done and harm, if any, caused should be provided for. This would probably involve moving away from a strict system of classifying infractions into three classes and certainly involve moving away from a system of set sanctions for each class of infraction.

4. Analysis of the Draft Social Communication Law (*Lei da Comunicação Social*)

This part of the Analysis focuses on the draft Social Communication Law. As noted above, this would replace the current Press Law, adopted in 1991. The draft Communication Law contains a number of positive features. For example Article 4 stipulates that freedom of the press covers journalists' freedom, access to sources of information, protection of independence, professional secrecy and the right to establish media outlets. This is almost identical to Article 48(3) of the Constitution, and also Article 2 of the Press Law. The right to access sources of information is repeated in Article 21 of the draft Communication Law, while the right to secrecy, meaning the right to protect the confidentiality of one's sources of information, is elaborated upon in a manner that aligns within international law in Article 22. There are other positive elements in the draft Communication Law. It is important to note these positive features at the outset of the Analysis because, by definition, it focuses on those areas of the draft Communication Law where improvements are being recommended. This

should not be taken as a statement that everything in the draft Communication Law is negative or needs to be improved.

The first part of this section of the Analysis focuses on framework issues in the law, such as its scope and the nature of the media regulator that it establishes. This is followed by an assessment of the rules on content and professionalism. The next part looks at the way the draft Communication Law proposes to regulate different media sectors, specifically journalists, publications, public media and foreign media. The final part reviews constraints in a number of areas which the draft Communication Law proposes for the media, organised under the headings of registration, right of reply, monopolies, prescriptive rules, intellectual property and liability.

4.1. Framework Issues

4.1.1 Scope

Given that much of the draft Communication Law, like its current version, the Press Law, focuses on regulations and constraints for the media, its scope of application is naturally very important. Article 2(1) defines in a very general way the scope of the law as covering 'all individual and collective persons whose activity is the collection, treatment and publication of information, through the various media', while Article 2(2) makes it clear that it also applies to foreign media 'which are authorised to operate in' Mozambique.

Given the generality of these provisions, it is really the definitions, found in the Appendix: Glossary, which forms an integral part of the law (see Article 3), which clarify the scope of the law. 'Mass media' is defined in Article (q) of the Appendix as 'vehicles through which information is published or broadcast to the public', while 'media outlets' are defined in Article (v) as 'organisations whose social object is to publish or produce or broadcast through the social communication media, namely printed or electronic publications and broadcasting stations'. It may be noted that the former (i.e. 'mass media') is incredibly broad and would cover not only media as such but also any website or social media platform and, indeed, even forms of communication such as public notice boards and posters. It obviously does not make any sense to impose either the rights or the obligations set out in the draft Communication Law on such a wide range of players. The definition of 'media outlets' is more appropriate for the subject of the draft Communication Law, although this depends on what qualifies as a 'publication' or 'broadcaster' (see below).

A 'broadcasting station' is defined in Article (k) as a media outlet 'in the form of sound and television broadcasting, which transmits in an open or codified signal', while 'broadcasting' is defined in Article (cc) as a 'service provided through propagation of electromagnetic waves of audio and/or video signals using the frequencies of the radio spectrum allocated by

the State'. This is both too narrow – since broadcasting can be disseminated in other ways, such as via cable – and too broad – since it would potentially cover other services, such as police communications. It would be useful to remove from this the reference to means of dissemination – i.e. the electromagnetic waves – and add the idea that broadcasting consists of the provision of a defined service or programme of audiovisual or sound material for reception by the whole public or a part thereof.

There are a number of definitions of different types of publications – such as periodicals, general or specialist publications and unitary publications – found in Articles (w) to (z). The first, 'publications of general information', are defined as 'periodicals on current events intended for the public', while 'periodical publications' are defined as being 'published under the same title, in a continual series, or in successive numbers at regular intervals'. This would cover quite a wide range of types of printed matter, such as magazines and even academic journals. It is not clear whether electronic publications are intended to be included but, if so, this would raise a number of additional issues. Given the focus of the rules in the draft Communication Law, it might make more sense to limit its scope to publications which cover news or current affairs topics. It surely does not make sense, for example, to require academic journals or even magazines to publish official messages (as required of all media outlets by Article 42 of the draft Communication Law). Including 'unitary publications', defined in Article (z) of the Appendix as 'publications with normally homogeneous content, published in full or in volumes or booklets', which would cover books and potentially a wide range of other types of publications, makes even less sense vis-à-vis the objectives and stipulations of the draft Communication Law. These overly broad definitions are essentially reflected in Article 34 of the draft Communication Law, which describes the print media as embracing both general and thematic publications, 'regardless of their print run, format or means of production and distribution', as well as both periodical and unitary publications. As with the main definitions, this is far too broad given the regulatory requirements imposed on these entities.

A journalist is defined, in Article (o), as a professional who presents 'news, information or opinion through the mass media, and for whom this activity is his main, permanent and paid profession'. Unfortunately, this is linked to the idea of the 'mass media' which, as noted above, is significantly overbroad, as opposed to the more tailored concept of 'media outlet'. The other conditions on journalists, namely that providing information is his or her 'main', 'permanent' (whatever that might mean) and 'paid' profession are all unduly restrictive,

especially in the modern world where, as the UN Human Rights Committee has noted, 'journalism is a function shared by a wide range of actors'.[41]

4.1.2 Media Regulator and Independence

The only provision in the draft Communication Law referring to a regulatory body is Article 8, which creates a "regulatory body for the mass media" (entidade reguladora de area de comunicação social), which is to have 'legal status and with technical, administrative, financial and patrimonial autonomy'. It is not clear from the text and language used whether this is intended to be the Superior Council for the Media that is provided for in the Constitution but we presume that it is since the draft Communication Law would repeal the Press Law, which current provides the legal framework for creating this body. The one suggestion in the draft Communication Law that this might not be the case is the requirement, in Article 36(2), to deposit copies with both the media regulator and the Superior Council for the Media (or Superior Council for Social Communication). This is the first and only explicit reference to the latter body in the draft version of the Communication Law (at least in English translation). This is significant because it appears to suggest that the media regulator would not be the Superior Council for the Media although, with the repeal by the draft Communication Law of the Press Law, that would leave the country without a Superior Council for the Media, contrary to the requirements of the Constitution (and possibly creating a conflict with the Constitution given the role envisaged for the media regulator).

Article 8(2) of the draft Communication Law provides that the 'Government shall define the attributes, competences, organisation, functioning and the specific professional qualifier of the body mentioned in paragraph 1 of the present article' and no further details regarding this body are provided for in that law. This may be contrasted with the Press Law, which has six articles setting out the mandate, structure and powers of the Council.

As noted above, international law requires regulatory bodies for the media to be independent of government. This is especially the case when the body will undertake very important regulatory functions, including registration of journalists and media outlets as well as making recommendations regarding the licensing of broadcasters (via the draft Broadcasting Law). Theoretically, independence can be achieved via government regulation, which is presumably how the definition of the organisation and functioning of the body, as provided for in Article 8(2), would take place. However, there are three problems with this.

First, laws in other countries which establish bodies to regulate the media which have these sorts of powers always define certain core characteristics – including as to the appointment of

[41] General Comment No. 34, note 18, para. 44.

the governing body, and core mandate and powers – in primary legislation. In Mozambique, the Constitution describes the membership of the body and yet the draft Communication Law, which would actually establish it, does not even do that. It is very important to include these sorts of characteristics in primary legislation.

Second, given that the way the powers, independence and mandate of this body are defined will impact on the enjoyment by Mozambicans of their fundamental rights, most importantly to freedom of expression, there may be legal or constitutional barriers to leaving these matters entirely up to secondary legislation or government regulation. We are not familiar with the intricacies of the Mozambican legal system, but many countries require rules that impact on fundamental rights to be set out in primary legislation, which is adopted by the legislature, as opposed to regulations, which are adopted by the executive.

Third, even if the initial regulations establishing this body did protect its independence and otherwise defined its mandate and powers in a way that was consistent with international law, it is relatively easy to amend regulations and so these could be changed at any time, essentially at the will of the government. In contrast, it requires time and a very public process to change primary legislation. As such, leaving key issues regarding independence, mandate and powers to regulation is not an effective way to ensure that human rights will be protected.

Measures Needed to Ensure Compliance with International Standards

- The definitions should be narrowed considerably, in line with the suggestions above, so that it makes sense to impose the sorts of obligations that the draft Communication Law establishes on the entities covered by these definitions. Some of the more specific changes that are recommended include:
  - Abolishing or substantially narrowing the definition of mass media.
  - Adding the idea of distributing a programme or defined service to the public or a section of the public to the definition of broadcasting and removing the reference to the means of dissemination.
  - Limiting the definition of publications to periodicals which contain news (and eliminating the idea of a unitary publication).
  - Removing the references to ‘paid’, ‘permanent’ and ‘main profession’ from the definition of a journalist.
- Instead of leaving the whole matter of elaborating on the nature and role of the media regulator to the government (executive), the key elements of this – at least including the structure (and appointment of the board or governing body),

mandate and powers – should be included in the primary legislation.

4.2. Rules on Content and Professionalism

4.2.1 General Restrictions

The draft Communication Law includes a number of both very general and some more specific restrictions on the content of what may be disseminated through the mass media. A first point here is that the terminology varies quite a bit. For example, Article 6 refers to limits on press freedom (liberdade de imprensa) while Articles 7 and 9 refer to the objectives of the mass media (órgãos de comunicação social). The former is not even defined in the draft Communication Law but, in any case, it would be preferable, to the extent that this was possible, for terms to be consistent throughout the law.

Article 6 refers to limits on the exercise of press freedom, listing both positive values and specific limits. In terms of the former, examples include safeguarding the objectivity and impartiality of information, protecting reputations, privacy and children, protecting various forms of secrecy, and defending the public interest, democratic order, public health and morality. The latter refers to avoiding the 'illicit production of information' by avoiding 'illicit or unfair' (i.e. fraudulent) means of obtaining information. Violation of these limits will incur penalties under 'the penal legislation'.

It is not clear if these references are intended to create new restrictions or merely refer to penalties which already exist in the Penal Code. If the latter, there is no need to highlight this in the draft Communication Law, since the Penal Code already exists as a constraint on people's behaviour. As such, reiterating its provisions in a law dedicated to the media has no legal effect but could be seen somehow to be threatening. If the former, most are very problematical from a freedom of expression point of view, mostly because they are all unduly vague and hence fail to meet the international law standard for restrictions on freedom of expression that they be 'provided by law'. It is impossible, for example, to determine what journalists would be expected to do to defend 'public health', let alone the even wider term 'public interest'. Even the references to 'safeguarding impartiality' and 'protecting reputations' are simply not sufficient clear to provide clear guidance.

The implications of Article 7 on the objectives of the mass media are also very unclear. In particular, will mass media outlets be required to support these objectives, subject to facing sanctions, or is there another purpose to including these (in which case, it is not clear what that might be)? Once again, the specific objectives listed here are extremely general,

including such ideas as consolidating 'national unity', promoting democracy and social justice, strengthening the rule of law, fostering economic, social and cultural development, and so on. These are certainly not specific enough to serve as the basis for sanctioning the media and, as general statements of the objectives of the media, they do not appear to be very useful.

Article 9, under the title 'Right to Information', refers generally to a number of rights citizens have 'through the mass media', such as being informed and informing others about relevant facts and opinions in Mozambique and abroad. Articles 9(2) and (4) refer to more specific obligations of the 'mass media', such as publishing their editorial statutes, recognising the right of reply, identifying and ensuring the veracity of advertisements, and ensuring the right to information for people with disabilities. Some of these – such as publishing editorial statutes and recognising the right of reply – are elaborated upon in more detail in the rest of the draft Communication Law but the others are, once again, simply too vague to pass muster as restrictions on freedom of expression.

Article 51 is far more specific, with the first paragraph indicating that in defamation ('libel') cases proof of truth is a defence unless: a) the imputations were not justified in the public interest; or b) the facts concern the private or family life of the person involved. Article 51(d) also bars proof of truth as a defence where the plaintiff is the President of Mozambique or, in cases of reciprocity, the head of State of another country or his or her representative in Mozambique (i.e. a diplomat). These exceptions to proof of truth as a defence all breach international guarantees of the right to information, according to which truth shall always be a defence. Truth is enough to justify disseminating a statement; it is not legitimate additionally to require that the statement was in the public interest (among other things because this is a very vague concept). While it is legitimate to impose limits on the dissemination of (true) private facts about a third party, this does not mean that the dissemination of true, private facts should sustain an allegation of defamation. Finally, international law makes it absolutely clear that it is not legitimate to provide special protection against criticism to politicians or public officials.

4.2.2 Positive Content Obligations

The draft Communication Law also includes a number of positive content obligations (or forms of expression that media are required to engage in, noting that some of the rules above could also be characterised in this way). For example, Article 11 stipulates that mass media outlets 'have the social responsibility to ensure the right of citizens to inform and to be informed, in accordance with the public interest'. Article 12 refers to a long list of issues which are included in the notion of 'public interest content", such as contributing to the rule

of law, national unity and territorial integrity, informing the public about the news in an accurate and impartial manner, ensuring the expression of public opinion, promoting good governance, and disseminating news about crimes, anti-social conduct, health and security. Here, as with many of the provisions referred to in the previous part, a key problem is that neither the primary obligation regarding the public interest nor the specific definition of public interest content is sufficiently clear to guide media behaviour. For example, there is no way of knowing how far the media are expected to go in terms of providing public interest content or what it even means to promote such values as good governance through the media. Once again, these are simply not legitimate if they are intended to serve as the basis for sanctioning media that are somehow deemed not to meet these standards while, if their goal is something else, it is not at all clear what that might be.

Article 14 calls on the media to, 'as a rule transmit information in the official language' and 'promote national languages'. Once again, the exact purpose of this provision is not clear. If it is intended as a hard requirement for the media, for which sanctions might be imposed following a failure to respect it, then it is simply too vague to be legitimate (what, for example, does 'as a rule' or "promote' in this context actually mean?). And if it has some other purpose, what that might be is also not clear.

Article 42 requires both public and private media to 'publish, immediately and in full, and with due prominence messages from the President of the Republic, official notes from the government, rulings of the Constitutional Council concerning elections'. This shall be free of charge and shall be done immediately if the message concerns a national public emergency. This is simply not legitimate. Mass media outlets should never be required to carry government messages. Professional media will always cover news about official actions, albeit in their own words and quoting, as they wish, from government messages. But there is no warrant for requiring them to carry specific messages. Even in emergencies, this is not legitimate since experience shows that the media (almost) always cover emergencies extensively, including by disseminating government messages, albeit as they deem them to be useful. Indeed, experience shows that mandatory rules like this actually lead to far worse news coverage, especially during emergencies, since they encourage poor messaging by government rather than leaving the media, who are professionals at this, to decide how best to communicate with the public.

Article 63 indicates that media coverage of elections shall be 'regulated by specific legislation'. There is simply no value in including statements like this in a law. At such time as future legislation may regulate this, those who are interested will be able to discern the rules from that legislation.

4.2.3 Self- or Co-regulatory Initiatives

We are not aware if the issue of self-regulation of the print media has come up in Mozambique or if the possibility of co-regulation has been discussed. Self-regulation is where a media sector organises itself to establish a complaints body, along with a code of conduct to set standards for complaints, through which citizens who feel that a media outlet has not respected professional standards can complain. A co-regulatory approach is where this is done but with the backing of legislation, while the media sector concerned remains in control of the system (for example because they appoint most of its members, whether those members represent the media or the public). In many countries, many of the sorts of issues that are addressed in the provisions discussed above, under both General Restrictions and Positive Content Obligations, are essentially dealt with in this way. A self- or co-regulatory system can set more stringent professional standards for the media than would be legitimate through direct rules, such as are found in the provisions discussed above, due to their characteristics (i.e. being controlled by the media and able only to apply lighter sanctions). It can thus be a very positive way to promote professionalism in the media without leading to undue government control or otherwise unduly restricting media freedom. A code of conduct approach to regulating broadcasters is also recommended in section 3 of this Analysis focusing on the draft Broadcasting Law.

Measures Needed to Ensure Compliance with International Standards

- Articles 6, 7 and 9 should either be removed entirely from the law or very substantially amended either to render their limitations far more specific and legitimate or to make it clear that they do not represent specific limitations on what may be disseminated through the media (in which case their purpose should be made clear).
- The limitations on proof of truth as a defence to a claim of defamation should be removed from Article 51.
- Consideration should be given to removing Articles 11, 12, 14, 42 and 63 from the law. If they, or some part of them, are retained, they should be substantially amended to bring them into line with international standards.
- Consideration should be given, if this has not already happened, to initiating discussions around a self- or co-regulatory system for the print media in Mozambique.

4.3. Regulation of Different Sectors

A number of provisions in the draft Communication Law establish rules for different media sectors. The rules applying to four different sectors – namely journalists, publications, public media and foreigners and foreign media – are discussed below.

4.3.1 Journalists

According to Article 18 of the draft Communication Law, a professional licence for journalists is 'the indispensable condition for the exercise of the profession and of the rights which the law confers on it'. It is up to the government, 'on the proposal of the representative socio-professional associations in the mass media area' to 'regulate and approve material on the professional licence of journalists'. This should be read in conjunction with Article 19, which sets out the rights of journalists, Article 20, which sets out their duties, Article 21, on access to sources of information, Article 22, on professional secrecy, and Article 23 on accreditation (see below).

Article 19 sets out nine separate rights of journalists. Some of these are the right to access and remain in public places to exercise their profession, not to accept editorial directives except from competent individuals at their media outlets, to refuse to hand over work material, to participate in the internal life of the media where they work, to benefit from travel insurance and insurance against accidents, and to have recourse to the competent authorities when they are denied these rights.

Article 20, for its part, sets out nine duties of journalists. Some of these are to respect the rights and freedoms of citizens, to act with 'rigour, objectivity and impartiality', to correct false information that has been published, to defend the public interest, democracy, public health and morality, to safeguard reputations, privacy and children, and to protect various forms of secrets.

Article 21 guarantees the right of journalists to access sources of information, while Article 22 protects their right not to disclose the identity of their confidential sources of information (and not to be punished for refusing to do so), which also extends to the director of the media outlet, when he or she is aware of the source. Finally, for local media, Article 23(3) provides that the government shall approve regulations on accreditation.

International law makes it quite clear that States cannot define who is a journalist insofar as this is used to determine who may practise journalism. Everyone has the right, as part of freedom of expression, to express themselves through any media, including the mass media (i.e. the right to work as a journalist). This has been recognised for some time but, with the advent of digital communications systems, it is more true today than ever. Article 18 is thus

not legitimate under international law, although it is at least positive that the government must base the professional licence on the proposal of representative bodies.

International law does not provide explicit protection for media freedom, *per se*, instead recognising the right of everyone to freedom of expression. At the same time, international law does recognise the special role played by the media in ensuring the right to freedom of expression in practice and, flowing from that (i.e. flowing from the role of the media in informing ordinary citizens), the need for journalists to benefit from two 'special' benefits or privileges, namely to have access to limited or restricted venues or spaces, such as parliament and crime scenes, and to protect the confidentiality of their sources of information.

The way that many democracies address this apparent conundrum – they cannot licence journalists and yet they have to grant them certain privileges – is by recognising the press cards issued directly by recognised professional associations for journalists. Article 23(3) does not conform to this idea inasmuch as it provides for the government to accredit journalists directly. It is legitimate for certain bodies, such as parliament, to put in place special accreditation procedures, for example to ensure access of parliamentary journalists from leading media outlets to parliament. But this is one of a few special cases and the government as a whole should not provide for the accreditation of journalists.

Some of the provisions in Article 19, along with Articles 21 and 22, do protect these journalistic privileges. On the other hand, some of the provisions in Article 19 impose unduly intrusive rules on mass media outlets, such as the right to benefit from travel insurance, even though not every journalist travels. Yet others have nothing particular to do with being a journalist – such as the right to sign a work contract and benefit from accident insurance – which should be found in general labour laws, not a media-specific law.

The problem with the duties found in Article 20 is the same as with the content rules discussed in the previous part and, indeed, many of these are identical to provisions found in Articles 6 or 7 of the draft Communication Law. These rules are simply too general to serve as the basis for actual obligations of journalists and, failing that, it is not clear what their purpose might be.

4.3.2 Publications

According to Article 35(1), publications, which are defined very broadly, must print on the first page the name and number of the edition, date, regularity, name of director and price. This must be accompanied, on an inside page, with the title, place of publication, identification of the owners, senior editors and editorial staff, address of the newsroom and administration, identification and address of the printer, print run, press registration number, registration number of the name (presumably obtained from the body which regulates

intellectual property) and the tax number of the owner (although unitary publications are exempted from some of these requirements). This is quite onerous although it would be largely reasonable for larger newspapers (but not all of the entities or 'publications' to which this would currently apply based on the definitions and Article 34). The two issues here which seem unduly onerous, especially given the registration requirements, are the registration number of the name of the publication and the tax number of the owner.

According to Article 36, publications are required to deposit two copies of each publication, on the day of publication, with the local prosecutor, the media regulator and the Superior Council for the Media, as well as any other bodies 'in relation to which there is a legal duty of deposit'. Given the stated aim of this, namely 'constituting and conserving the national collection and the establishment of statistics of the written publications published in the country', the requirement of making deposits with the prosecutor does not make any sense. Indeed, that can only serve to intimidate the media and to facilitate prosecution should any of the content be deemed to be illegal, which is not a legitimate aim of a deposit scheme. If the media regulator and the Superior Council for the Media really are different bodies (and this is not just a mistake), then it would be enough to require publications to make deposits at one of them. It is also unnecessarily burdensome to require deposits to be made the same day as the publication is issued, which may also not be practical for some publications based outside of Maputo.

Article 36(4) suggests that electronic publications 'shall be deposited in their respective format'. This appears to be the first explicit reference to the idea of electronic publications. It is not clear if this was intended or a mistake but we note that many of the requirements of Article 35, relating to what must be printed on the first and inside pages, do not make sense in the context of electronic publications.

4.3.3 Public Media

Only two articles of the draft Communication Law focus on the public media, namely Articles 40 and 41. Article 40 lists, as the 'main functions of the public sector media outlets', to promote access of citizens to information throughout the country, to guarantee impartial, objective and balanced news coverage, to reflect on the diversity of ideas in a balanced way and to promote national languages. It also states that public media shall operate free from interference and be guided by high technical and professional standards. Finally, it provides that they may contract out space to third parties. The protection of independence and list of functions are useful but the latter misses several key ideas normally associated with public media such as contributing to a sense of national identity while reflecting diversity, giving voice to all groups in society, striking a balance between content of wide appeal and more

specialised content, and producing and disseminating educational and cultural content. It also seems odd to allow these media to be able to 'rent' out space presumably to private third parties, since this would seem to be inconsistent with their role as public media.

Article 41, on right to airtime on public broadcasters, covers quite a lot of the same ideas as Article 49 of the Constitution. The first paragraph provides for political parties which are represented in the Assembly of the Republic to have airtime in accordance with regulations, in line with Article 49(1) of the Constitution. However, given that this is the law elaborating on this right, it should provide more detail as to how that would work. Article 41(2) provides for airtime during elections, in accordance with the Electoral Law. As with other provisions referring to rules in other laws, there is little point to include this in the Communication Law. Finally, Article 41(3) calls for opposition parties which are represented in the Assembly of the Republic to have the right to reply to government statements on public media 'which directly call into question their respective political positions'. It may be noted that this is narrower than the similar rule in Article 49(2) of the Constitution in two important ways. First, it is limited to responding to statements from the government on public broadcasters, whereas the Constitution applies to any statements by the government. Second, it is limited to responding to statements which question the political positions of the opposition. This is quite a significant limitation, which would not apply to cases where the government only talked about its own positions and activities, and did not question opposition positions.

Overall, it may be noted that this is a fairly limited selection of provisions on public media. While it calls for content to be balanced, it says nothing about how the structure of public media and, in particular, governing bodies, need to be independent, nothing about how these bodies should be funded, and nothing about how they should be accountable to the public, for example through the Assembly of the Republic and also in direct ways. Including more rules, even in general terms, about how public media are to operate could go some way to help transform existing public media into public service media.

4.3.4 Foreigners and Foreign Media

The draft Communication Law applies to foreign mass media 'which are authorised to operate in the national territory' (Article 2(2)). However, it appears to envisage strict limits on the importation of foreign mass media, since even foreign entities and diplomatic missions are required, pursuant to Article 17, to declare to the media regulator any importation of 'periodical publications intended for free distribution'. It is not clear whether this accords with international law relating to diplomatic relations and, given that the scope of this activity is almost inevitably very limited, it is also hard to see how it could be justified as a restriction on freedom of expression.

Article 23(1) provides that foreign media correspondents must register with the media regulator before they start work, in accordance with regulations adopted by the regulator. Article 23(2) goes on to indicate that only two professionals may be registered by a foreign media outlet. Article (r) of the Appendix: Glossary defines 'foreign media' as media which are based abroad but are disseminated in Mozambique. This is a narrow definition since foreign media which do not disseminate in Mozambique may also wish to accredit correspondents in the country, so as to report on what is happening there (to their home audiences).

Different countries have different approaches to the question of issuing visas to foreign correspondents, although international law at least requires that such rules be justified as necessary to protect legitimate national interests such as security and the avoidance of abuse of these visas. Requiring these journalists to register with the media regulator, however, is quite a different matter which would seem to be unnecessary in addition to the visa process. Furthermore, the Article 23 rules cover all professionals working for foreign media, and are not necessarily limited to foreigners doing this. Limiting the number of professionals that may be registered to a foreign media outlet to two is simply not legitimate. They should be free to employ as many correspondents as they wish to.

Article 24(4) provides that only Mozambican institutions and resident citizens may own (presumably local) media outlets. This is very strict compared to the rules in many countries. While it is important to ensure local voices in and local control over the media, this does not normally justify an absolute prohibition of foreign ownership of local media, especially print media. It may be noted that such rules can be counterproductive since online media focusing on Mozambique can formally be based anywhere. Unduly strict requirements of local ownership can have the unintended effect of driving online media out of the country, a phenomenon that has been observed in several countries. Article 24(5) goes on to limit the participation of foreign capital in all media outlets to a maximum of 20 percent. While such limits are not uncommon in the area of broadcasting, this is again a very strict rule, at least for the print media. We are not aware of the current situation regarding foreign ownership of the media in Mozambique but, in many countries, foreign investment can bring much needed not only capital but also expertise. Article 38 limits directors, editors and programme staff of media outlets to Mozambican citizens who are resident in the country, which is again unduly limited. First, it would seem to preclude a Mozambican media from posting a journalist abroad to report from there (since they would then no longer be resident in Mozambique). Second, it would prevent Mozambican media from hiring experienced foreigners who might

be able to bring important expertise to their operations, even at the programme staff level, which would leave Mozambicans in full control of the media outlet.

Measures Needed to Ensure Compliance with International Standards

- Article 18 of the draft Communication Law, providing for the professional licensing of journalists, should be removed. To the extent necessary, for example for purposes of protecting journalists' confidential sources of information, it can be replaced with a system whereby the government, or relevant government actors, such as the police, accept the press cards issued by recognised professional associations of journalists.
- The provisions in Article 19 which do not relate to access to limited or restricted spaces or to protecting the confidentiality of sources of information should be removed.
- Article 20 should be removed entirely from the law.
- Article 23(3) should either be removed entirely from the law or be replaced with a provision along the lines mentioned in the first recommendation above.
- The obligations to print various types of information on the front and an inside page should be limited to regular news media publications.
- Consideration should be given to removing the requirements to print the registration number of the name of the publication and the tax number of the owner.
- Deposits should only be required to be made with the media regulator and perhaps a library of record, and certainly not with the prosecutor. Deposits should also not be required to be made on the same day as the publication is issued.
- Consideration should be given to expanding substantially on the provisions relating to the public media, with the aim of providing for them to be structurally independent of government, adequately funded and yet accountable to the public.
- The list of functions of public media in Article 40 should be expanded in line with the recommendations above.
- Article 41(2) should be removed, Article 41(1) should be expanded to set out more clearly how the right to airtime will work outside of electoral periods and Article 41(3) should be amended to bring it into line with the Constitution.
- Article 17 should be removed from the law.
- The definition of foreign media should be amended to include media which are based abroad and do not disseminate their products in Mozambique, at least for purposes of local correspondents.

- The rules on accreditation of professionals working for foreign media in Article 23 should either be removed entirely or substantially amended to bring them into line with international standards (i.e. so that they do not arbitrarily limit the number of professionals working for foreign media or place unduly burdensome requirements for foreign correspondents to work in Mozambique).
- Consideration should be given to relaxing the rules on foreign ownership of media outlets in Mozambique, in particular the rule on 20 percent foreign investment in the print media sector.
- The ban on foreigners working for Mozambican media outlets even at the programme staff level should be removed.

4.4. Constraints

4.4.1 Registration

Articles 25-33 establish a regime for registration for media outlets, 'including those distributed through the Internet', before they start their activities, while broadcasters are 'also subject to licensing by the Government' (Article 25). Article 26 empowers the media regulator to dispense with this requirement for certain actors – such as State bodies, companies and educational establishments – which produce publications and audio-visual material with limited circulation. It may be noted that if the definition of 'media outlet' were more precise, as recommended above, this power to waive registration would not be necessary, because these sorts of publications would not be covered in the first place.

The process of applying for registration is complex and it is not entirely clear from the draft Communication Law which bodies undertake which functions in relation to it. Article 27 indicates that media outlets are registered 'through a request accompanied by a Press Registration Declaration obtained from the body which supervises the media area', while Article 28, titled Permit, indicates that media may not start operations until they have obtained 'the Permit attributed by the government and issued by the body which supervises the media area'. The process thus seems to involve two documents – the Press Registration Declaration and the registration Permit – with two bodies – the government and the media regulator – playing a role in issuing them, with the main work being done by the regulator, albeit somehow ultimately under final government control.

Article 27(2) includes a list of 16 documents that must be provided as part of the registration process, such as an up-to-date and certified copy of the statute of the body which owns the media and, if different, of the printer, producer or broadcaster, information on the sources of

funding, the residence certificate and criminal registration of the director or editor, a declaration of the registration of the 'brand' (presumably the name and any logo or trademark), issued by the body responsible for intellectual property, a tax clearance certificate and the NUIT or tax number, and so on. Additional items are required to be provided by broadcasters, according to Article 27(3). Any 'modification' of any of this information needs the prior authorisation of the 'competent entity', presumably the media regulator (Article 28(2)), although this should be stated clearly instead of using roundabout language like this. This is not reasonable, for example in relation to changing the editor (so that you would need to hire a new person for this position and then wait for the regulator to approve them before you could actually offer them a contract and they could start work). However, Article 31 does appear to allow for some flexibility here, indicating that modification of the registration documents needs to be presented to the media regulator within ten days.

The application shall be processed within 30 days and registration lasts for five years (Article 29). Fees for registration, as well as other media activities, are to be set by 'regulation' (Article 63). Article 54 of the draft Communication Law provides for harsh penalties and other consequences for media outlets that operate without first having been registered.

Registration requirements for the print media are not entirely ruled out under international law but they are generally deemed to be of limited utility because print media outlets are normally already registered as corporations and there is simply no need to impose an additional layer of registration on them. In any case, registration can only be justified if it meets certain conditions such as that it is not unduly onerous and does not allow for any discretion to refuse registration once the basic conditions are met. As an initial point, it may be noted that there is absolutely no need to require broadcasters to both register and to obtain a licence, as is explicitly required here, as well as in the draft Broadcasting Law. A registration system for online publications would also be very hard to justify, at least in the absence of a very clear definition of an online newspaper which was limited to entities that had all of the characteristics of a proper newspaper (and were not simply blogs or information websites).

The roles of both the government and the media regulation in the registration process need to be clarified. Here, as with other forms of media regulation, it is essential that those overseeing the process are independent of government, which means that ideally government should have no role and, at best, it should exercise only a very technical role.

The biggest problem with this system of registration, however, is that is it incredibly onerous. Those wishing to start a media outlet are essentially being asked to pre-clear any possible

obstacle by pre-proving compliance with multiple regulatory systems such as tax, intellectual property and so on. This is simply not legitimate. In addition, it is not clear whether or not the regulator or even the government has any discretionary power to refuse registration which would need to be the case for the system to pass muster under international law. This problem is exacerbated by the Article 28(2) requirement of prior authorisation for any changes (as opposed to the far more reasonable approach of giving the media outlet two or three weeks simply to notify the regulator after changes have been made.

It is not clear from Article 63 which body will set the fees for registration. This should ideally be the media regulator rather than the government and any fees for this should be low, essentially simply covering the reasonable administrative costs of running the system.

4.4.2 Right of Reply

According to Article 44(1) of the draft Communication Law, any legal or moral person, or public entity, who feels he or she has been 'damaged' by the dissemination by a media outlet of 'untruthful or erroneous references liable to affect the moral integrity and good name' has the right of reply. This may be contrasted with the slightly different definition of this right in Article (h) of the Appendix: Glossary, which defines it as arising whenever a media outlet 'has published or diffused references damaging to his moral integrity and good name', which is broader inasmuch as it does not require the original statement to be inaccurate.

This right, which encompasses a right of correction, may be claimed within 30 days of the original statement having been published in a daily or weekly publication, or within seven days of it having been broadcast or published on the Internet. A reply or correction shall be published once, 'without interpellation or interruption and free of charge' in the next edition (or same programme for broadcasters). Replies are limited to responding directly to the offending part of the original statement, and to its length as well, and may not contain any illegal material which, in any case, will only give rise to liability on the part of the author of the reply. Publication of a reply does not affect criminal or civil legal liability for the original statement. In the event that the original statement is later proven in court to be accurate, and the reply inaccurate, the author of the reply shall pay the prevailing advertising cost for publishing the reply. Various appeals relating to replies are provided for in Article 45, first to the editorial director, then to the media regulator and finally to the courts.

These rules are largely in line with international standards, although they could be tweaked a bit to improve them further. Best practice in this area is to limit a right of reply to cases where the legal rights of the claimant have been breached, such as his or her right to reputation or privacy, while the formulation 'integrity and good name' used in the draft Communication Law is vague as to what exactly is covered. This right is often limited to

legal and moral persons, to the exclusion of public entities, which, according to international law, do not have a reputation of their own to protect. Where a simple correction of an error will redress the harm done, better practice is to limit the right of the person who has been affected to a correction (i.e. not to allow them a reply where a correction will suffice) and, in that case, leave it to the media outlet to craft and insert the correction.

4.4.3 Monopolies

Article 13 provides that the 'concentration of more than two media outlets in a single entity is prohibited'. It is important, as the same article states, to prevent undue concentration of ownership of the media, among other things to maintain 'pluralism of information and healthy competition'. At the same time, this is an extremely strict rule on concentration which could also be improved to make it more effective. Better practice in this area is to focus on individuals rather than 'entities', since one individual can own many legal entities, by crafting rules to apply to the ownership or control, directly or indirectly, of media by an individual or his or her close relatives. The rule could also be relaxed somewhat by applying within a single media market rather than in the country as a whole. Under such a rule, an individual would be eligible to own more than one local radio station, as long as they were in different cities, but not a national media outlet and any other outlet. This change would reflect the power that comes with owning a national television and potentially also a national newspaper, as well as the relatively more limited influence of a local radio station.

4.4.4 Prescriptive Rules

A number of the rules in the draft Communication Law are overly prescriptive in nature in the sense of setting unduly precise and intrusive rules for how media outlets are required to operate. Article 37(1) requires all media outlets to adopt an 'editorial statute' which 'clearly defines its orientation and its objectives' and also declares its commitment to respect professional ethical principles for the media. Article 37(2) indicates that the editorial statute may be altered 'after consulting the Newsroom Council' (see below), although it is not clear how the first statute is supposed to be adopted. In addition, since only media outlets with five or more journalists are required to establish a newsroom council, it is not clear how Article 37(2) applies to smaller media outlets.

According to Article 39, each media outlet with five or more journalists must also establish a 'newsroom council', the composition and powers of which are defined in the respective statutes of the media outlet. This council is to be a 'consultative body, through which journalists participate in the editorial management' of the media outlet. Some of these ideas are also reflected in Article 19, on the rights of journalists, for example with Article 19(e)

creating a right to ‘participate in the internal life of the media outlet’, presumably through the newsroom council.

It is not clear what the overriding purpose of having an editorial statute is that would justify imposing this requirement on all media outlets. This is not a requirement in most countries, suggesting that it cannot be necessary for the successful operation of media outlets, which is what international law requires before such a condition could be considered to be legitimate. Among other things, there would appear to be little to require a media outlet to respect either the orientation and objectives or the professional standards to which it had committed in its editorial statute.

The declaration of a commitment to respect professional standards seems particularly unnecessary since this is extremely unlikely to ensure respect for those standards in practice, something which is not necessarily very easy to achieve. Instead, what have proven to be effective here are self- and co-regulatory systems, including codes setting out the relevant standards and systems for receiving and processing complaints about breaches of the code.

The same applies to the idea of the newsroom council, although its purpose is at least a bit clearer. Despite that, it seems hard to justify a blanket requirement on all media outlets to establish a newsroom council or even to require every media outlet to allow journalists to ‘participate in the internal life of the media outlet’. Among other things, this is so vague as to have no concrete meaning. For example, a media outlet could establish a council which met only once a year and had no power other than to make general recommendations, and yet that would appear to meet the conditions of this requirement. It would also seem to be illogical for journalists who were not working on news production to participate in a ‘newsroom council’. For this purpose, it may be noted that Article (e) of the Appendix: Glossary defines the ‘newsroom council’ as something which ‘operates within the newsroom’.

4.4.5 Intellectual Property

Article 15 states that media outlets shall ‘respect intellectual property rights, in terms of the applicable legislation’. Like other provisions in the draft Communication Law that call for other laws to be respected, this has no independent force or effect and there is, thus, no reason to include it in this law.

4.4.6 Liability

The draft Communication Law includes a number of provisions setting out the rules on liability for media wrongs under the criminal or civil law. For the most part, these conform to international standards and accepted practice, although there are a number of areas where improvements could be made. Some of the key ones are as follows:

- Article 46(3) provides that the court decision holding a media outlet civilly liable shall be published or broadcast free of charge by the responsible media outlet and that this shall contain 'the facts proved, the identity of those offended and those sentenced, the sanctions applied and the compensation decreed'. While most court decisions would contain this information, this rule indirectly amounts to an instruction to courts as to how to write decisions in media cases, which does not appear to be appropriate.
- Article 48(1) provides that the editor or editorial or programme director shall be criminally responsible for unsigned content disseminated through the media unless they are 'exonerated of liability' (see also Articles 49(1)(b) and (c) and Article 49(2)(b)). While it is common to impose civil liability on these actors, this provision reverses the presumption of innocence which is a fundamental human rights standard for the criminal law. Similarly, Article 48(3) provides for joint and several liability, apparently in criminal law, of the author and media outlet for incitement to or the commission of crimes. While there are cases where legal entities such as media outlets may bear criminal responsibility, there are conditions for this, whereas this rule imposes such responsibility for all crimes, regardless of the circumstances.
- Article 52(1) provides for various periods of suspension of media outlets for the crime of libel or insult if committed three times in five years. It is well established under international law that defamation (including libel and insult) should be addressed through the civil rather than the criminal law. In any case, suspension is a very serious penalty for a media outlet which should be imposed only in exceptional cases and where justified by all of the facts and circumstances. Blanket rules providing for automatic suspension based merely on repetition of an offence, which do not take into account all of the circumstances, can never be legitimate as restrictions on freedom of expression. Similarly, Article 52(2), which provides for the suspension of the editor or editorial or programme director from working as such for two years after being convicted for libel for the third time is not legitimate given that it represents the blanket imposition of a very serious punishment which is not tailored to the specific facts of the case in question.
- Article 52(4) provides for the publication of inaccurate statements or 'baseless rumours' to be punished as though they were defamation. It is very clear under international law that it is not legitimate to prohibit the mere publication of inaccurate statements, although this may be prohibited in certain cases, such as where it harms the reputation of a third party or constitutes fraud or perjury.

Measures Needed to Ensure Compliance with International Standards

- Consideration should be given to removing entirely the registration requirement, given that registration of media outlets as companies is sufficient. If it is retained, it should conform to the following:

- Broadcasters, which are required to obtain a licence to operate, and online media should not be required to be registered.
- The scope of print media that are covered by this should be defined clearly and narrowly in the definitions section of the law, so that the power of the regulator to waive the registration requirement would not be needed.
- The law should clarify exactly what roles the government and media regulator play with respect to regulation, with the former playing, at most, only a very technical role.
- The whole process of registration should be very substantially simplified and breach of other legal requirements – such as those relating to tax – should be dealt with through other administrative means. It should also be very clear that neither the media regulator nor especially the government has any discretion to refuse registration once the basic conditions for it have been met.
- Print media should only have to notify the media regulator within a set period of time, such as ten working days, after any changes to the information provided upon registration have been made.
- Any fees for registration should ideally be set by the media regulator and be limited to the reasonable administrative fees of running the (simplified) registration system.

➢ Consideration should be given to limiting the right of reply to cases where the legal rights of the claimant have been affected, or at least to defining the conditions where it will apply more clearly, and to extending the right only to legal and moral persons (and not public entities). Where a correction will suffice to redress the harm done, the right should be limited to that remedy and it should be left to the media outlet to draft and insert the correction.

➢ Article 13, on monopolies, should focus on ownership or control by an individual, rather than an 'entity', and consideration should be given to amending the rule so as to prevent only ownership of more than one media outlet in any given media market, rather than in the whole of Mozambique.

➢ The idea of requiring all media outlets to have editorial statutes and larger media outlets to establish newsroom councils should be reconsidered. If these requirements are retained, the purpose of and conditions for these bodies should be clarified in a way that ensures that they are relevant to the work and effectiveness of all media outlets.

➢ Article 15 should be removed.

➢ Articles 46(3), 48(1), 48(3), 49(1)(b) and (c), 49(2)(b), 52(1), 52(2) and 52(4)

should be removed.

5. Recommendations for Future EU Delegation Action

The draft Law on Broadcasting and draft Social Communication Law both fail in important ways to conform to international standards regarding freedom of expression. At the same time, the Government of Mozambique appears to recognise this, since it has asked the EU Delegation for its assessment of these two laws on media issues.

Recommendations for short-term as well as for general ongoing actions by the EU Delegation are presented below.

5.1. Specific Short-term Actions for EU Delegation to Consider

The EU Delegation could consider the following short-term actions:

- While sharing the relevant part of this Analysis with the Government, meet directly with representatives of the Ministry of Justice to emphasis the primary issues and process to bring the draft laws more into line with international standards.
- As appropriate, sharing the full analysis with EU Member States and discuss coordinated actions linked to above.
- Publishing the redacted form of this Analysis, whether as an EU product or via the organisation of the author, so as to ensure that it is made widely available, including to interested parties in Mozambique. The Analysis will already have been translated into Portuguese, which would facilitate this.
- Following-up with the Government of Mozambique at least with an online workshop to discuss the recommendations in the analysis but potentially also by offering much more in-depth technical assistance. The latter might include an offer to prepare draft alternative language for parts of the draft laws, the provision of examples from other countries on how to address some of the issues raised in this Analysis, additional online workshops to provide concrete input into how to improve the draft laws, and even potentially an expert mission to the country to work more closely with the Government to improve the draft laws.
- Convening an invitation only workshop with selected participants – for example from other diplomatic missions in Mozambique, relevant international and local civil society organisations and media – to present this Analysis and its main findings. This could support the identification of common priorities for advocacy and action, as well as for collaboration.
- Providing support to international and local civil society organisations to continue to conduct their own analyses of and to advocate for changes to the draft laws, and to raise global awareness about the problems with it.

5.2. Recommendations for Ongoing EU Delegation Action

A range of medium- to longer-term recommendations is provided below.

5.2.1 Policy and Political Dialogue

It is valuable for the EU to engage in policy dialogue with the Government of Mozambique on the draft Broadcasting Law, the draft Communication Law and on the general media freedom and human rights situation in the country, whether this is done through private dialogue with key decision makers or in a more public manner. Here again, coordinating actions with EU Member States would be valuable.

5.2.2 Monitoring and Reporting

The EU could consider ways to ensure better monitoring of and reporting on abuses of freedom of expression in Mozambique, whether it does this directly or supports third parties, such as civil society organisations, to do it. The experience of other countries suggests that this is crucially important, for example to create opportunities for redress in due course, to expose wrongdoing globally and to provide at least some measure of support to the victims. Such monitoring and reporting can also feed into national or parallel civil society reporting on progress on achieving Sustainable Development Goal Target 16.10. Part of this could also involve trial observation where journalists and others are formally charged for exercising their right to freedom of expression.

5.2.3 Strengthening Civil Society

There is a reasonably diverse civil society in Mozambique focusing on freedom of expression and media freedom issues, but its ability to engage in analysis of legal regimes governing this right remains relatively limited. It could be useful to take steps to raise local groups' awareness about international standards on freedom of expression and ways in which the local legal and policy framework fails to conform to these standards.

5.2.4 Support for Programming

The EU Delegation could consider supporting targeted programming, beyond the support mentioned above, potentially in the following areas:

- Strengthen the capacity of lawyers to defend journalists and others who are charged for exercising their right to freedom of expression.
- Provide support for international and local civil society organisations to monitor and report on abuses, and generally to create pressure on the Government of Mozambique to improve its laws and practices on freedom of expression and media freedom.
- Build awareness within Mozambique in other ways about the human rights situation and how this could be addressed.