CENTRE FOR LAW AND DEMOCRACY

Somalia

Note on the Somali Communications Act of 2012

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Introduction

This Note contains an analysis by the Centre for Law and Democracy of the draft Somali Communications Act of 2012 (draft Act). The draft Act was approved by Council of Ministers of the Transitional Federal Government of Somalia in March 2012, but it has not yet been passed into law. The draft Act was prepared by the African Union/United Nations Information Support Team, at the request of the Minister of Information, Posts and Telecommunications. The current draft was the subject of a broad consultation in Mogadishu, attended by relevant stakeholders, and it reflects their input. We understand that the current draft provides a basic framework for the regulation of broadcasting, and that the idea is that a more comprehensive law on broadcasting, to work in tandem with this law, will be prepared in due course.

This Note provides an international law perspective on the Act, with a view to helping ensure that any law which is finally adopted is as consistent as possible with international human rights standards. The Note also draws on better practice in other States, with a view to helping to ensure that the law is practical and results in efficient regulation of the communications sector.

The Note is in four parts. The first part assesses the provisions in the draft Act dealing with the Commission, with a particular focus on measures to promote its independence, in particular from the government. The second assesses the regime for regulation of broadcasting, which is far less developed, and hence more problematical, than the corresponding regime for telecommunications regulation, which, in turn, is the subject of the third part of the Note. The fourth part addresses a number of other issues which do not fit into the other parts.

In many respects, the draft Act provides a strong basis for the regulation of telecommunications and broadcasting. It recognises the international principle that regulation should be overseen by independent bodies, and it incorporates strong openness standards into the process. At the same time, it would still benefit from further improvements. The practical arrangements for guaranteeing the independence of the Commission could be enhanced. There is a certain confusion between telecommunications and the Internet, and some standards for the former appear to be applied to the latter, which is in appropriate. There is also clearly a need for more detailed provisions on broadcasting, which will hopefully be reflected in another law on this issue.

1. The Commission

Section 301 of the draft Act establishes a Somali Communications Commission, with broad powers to regulate communications – both broadcasting and

telecommunications – in the country. For the most part, the draft Act is very strong in terms of the powers it allocates to the Commission and the systems it puts in place. We have concerns in two areas, namely the independence of the Commission and some of the operational rules governing it.

Independence

A key requirement under international law is that bodies which regulate at least broadcasting should be independent of both the government and of commercial players. This has been stressed by both global and regional human rights bodies, including in Africa.[1] The reasons for this are fairly clear: if regulators are subject to government control, for example, they are more likely to promote the political interests of the government of the day, than the overall longer term public interest in broadcasting. For the same reasons, independence is important to ensure respect for freedom of expression. Finally, independent regulation is likely to promote investment in the sector, as businesses will have confidence that decisions will be based on merit, rather than political considerations.

The main rules on appointments of members of the Board of the Commission are found in section 302(a), which provides simply that the nine Commissioners shall be nominated by the President and appointed by a majority vote of the Council of Ministers, with the Chairperson being identified by the President. This is not a very robust system for ensuring the independence of the Commission from the government.

As a general rule, independence is enhanced by involving more players in the process of appointments, and by building more robust appointments structures. Consideration could be given to allowing other actors to nominate members, or to involving other actors in the formal appointments process. Appointment could also be by way of a super-majority vote of the Council of Ministers, say of 60 per cent or two-thirds.

Almost as important as appointments is the system of removals. Section 302(c) provides that no one shall be appointed as or remain a Commissioner who is not a resident citizen of Somali, who is a Member of Parliament or any State or local government body, who is incapacitated by physical illness, who has been certified by the 'competent authorities' as being of unsound mind, or who has been convicted of a 'felony criminal offence'. Section 302(h), which is presumably intended to work in tandem with section 302(c), provides for the removal of a Commissioner only by a two-thirds vote of the Transitional Federal Parliament (or its successor), on grounds of incapacity due to illness, conviction by a court of a crime punishable by a

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[1] See, for example, the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

term of imprisonment or the knowing and continued violation of the conflict of interest provisions.

It may be noted at the outset that the prohibitions on remaining a Commissioner are not aligned with the grounds for removal. Thus, the list for the former is longer, although it does not include breach of the conflict of interest provisions, and there is direct inconsistency between the grounds for removal on the basis of conviction for crime. It may be noted that even very minor offences may fall within the set of offences for which imprisonment is available, for more serious wrongs, and that the standard in section 302(c)(vi) of conviction of a felony offence is preferable. Alternately, the standard could be linked to conviction for either a serious crime or a crime of dishonesty. Finally, it is unclear from section 302(c)(iv) who shall assess physical incapacity and, in particular, who would ask the Transitional Federal Parliament to consider removing a Commissioner. The same problem applies to the certification of an individual as being of unsound mind, and who would be a competent authority for this purpose.

Section 302(f) provides for replacement of Commissioners in case of a vacancy. It is recommended that this apply only where the vacancy occurs longer than six months before the natural end of the term of office of the relevant Commissioner.

Section 302(d) provides for staggered five-year terms for Commissioners, who may be reappointed. Limiting consecutive terms to two would be preferable. Section 302(e) establishes a complex five-lot system for staggering the terms of Commissioners. This is unreasonably complex and will quickly become undone if just one or two Commissioners leave their positions early. A simpler system of two, or at most three, overlapping terms is recommended.

Pursuant to section 302(g), the rate of remuneration of Commissioners is to be set by law, but shall be at least equal to the salary of a minister. It is not clear why this is left to a future law, rather than being stipulated in the draft Act. Pursuant to section 303(a), the Commission shall meet at least once a month, making it clear that it is not intended to be a full-time position. In this case, it is not reasonable for Commissioners to earn the same salary as a minister. It is suggested that, instead, the salary be linked to the salary of a minister (for example being set at 20 per cent of that rate).

Section 311(a)(ii) provides that all fees assessed by the Commission, including under the terms of any licence, shall accrue to the Fund which supports the Commission's operations, while section 311(b) states that all monies from licence auctions shall be paid into the General Fund of the Ministry of Finance. Better practice is to allow regulators to retain licence fees, albeit subject to those fees being established in advance through a schedule that is externally approved, while requiring them to remit to a central fund any fees imposed on licensees as sanctions

(so as to avoid a situation where the Commission has an incentive to impose high fines).

The main conflict of interest rules are set out in section 336, which provides that Commissioners, the Director General, staff of the Commission and members of the Appeal Board may not "work on any Commission matter" that involves them in a conflict of interest. Where such a conflict arises, the individual may either divest him- or herself of the interest, or recuse him- or herself from participating in the matter. In many countries, more sophisticated conflict of interest rules apply whereby certain more serious conflicts, such as owning investments in the sector, act as a barrier to being appointed as a member of the regulator in the first place, while less serious conflicts, which are limited to a particular decision-making process, may be resolved through recusals.

Section 401(d) provides that, for the first year, the Minister of Information shall provide material assistance to the Commission. While this is understandable as a practical mechanism for getting the Commission on its feet, at the same time it could have very serious implications in terms of independence. This is particularly the case since the first year will be an important formative year for the Commission, during which it is important that its independence be scrupulously safeguarded. It is questionable whether such support from the Minister really is necessary and whether it could not be provided from other (more independent) sources.

Section 402(a) provides for the Commission to conduct policy consultations on behalf of the Minister, prior to the latter adopting a policy. While the intentions here are no doubt laudable, at the same time this is likely to have the unfortunate effect of creating confusion as to the independence and role of the Commission vis-à-vis the government. There is no reason why the Minister should not conduct his or her own consultations.

As regards the Appeals Board, section 335(c) provides for its appointment by the President. Consideration should be given to putting in place the same protections for the independence of the Appeals Board as for the Board itself, including in relation to the manner of appointment, the prohibitions on appointment of members and so on.

Powers and Operations

There is some confusion in section 304(d), which appears to say both that a vacancy in the position of the Director General of the Commission might be filled by a Commissioner, and that this should not happen.

There is also some confusion about responsibility for staff. Section 304(a) provides that the Director General shall be responsible for hiring staff and for running the organisation, while sections 305(a) and (b) suggest that the Board shall hire staff

and set their conditions of service. Better practice would be for the Board to set the general conditions of service, but for the Director General to hire and to set the specific terms of employment for each staff member. There is also a problem of dual reporting of the Secretary who, pursuant to section 305(b), appears to report to both the Board and the Director General. This is not practical.

Recommendations:

- Consideration should be given to enhancing the protection for independence in the appointments process for Commissioners, for example by allowing other stakeholders to nominate Commissioners and/or by providing for a super-majority vote in the Council of Ministers for appointment.
- The grounds for removal of Commissioners should be aligned with those relating to non-continuance in the position of Commissioner.
- The standard for removal for criminal activity should be clarified, preferably in favour of the more permissive standard of a serious crime, and perhaps by adding crimes of dishonesty.
- The law should clarify who is responsible for asking the Transitional Federal Parliament to consider removing a Commissioner on the grounds that he or she is incapacitated or of unsound mind.
- Vacancies on the Board should only be filled where the remaining term of office is longer than six months.
- Commissioners should only be allowed to be reappointed for two consecutive terms, and the system of staggered tenure should be substantially simplified.
- Consideration should be given to setting the rate of remuneration for Commissioners in this law, rather than leaving this for a future law. The rate should not be equal to that of a minister, although it could be tied to that rate.
- The destination of revenues from licensing should be clarified, preferably in favour of them being kept by the Commission.
- Consideration should be given to putting in place a two-level system of conflict of interest rules as described above.
- Consideration should be given to whether it is necessary for the Ministry of Information to provide support to the Commission during its first, and most formative, year.
- The Commission should not be required to conduct policy consultations on behalf of the Minister of Information.
- The law should clarify that a Commissioner may not fill a vacancy in the position of the Director General.
- Stronger protections should be added for the independence of the Appeals Panel, along the lines of those for the Board of the Commission.
- It should be clear that the Director General is responsible for appointing staff and for setting their individual terms of reference, while the Board is responsible for setting the general conditions of employment for the Commission as a whole.

- The law should clarify that the Secretary reports either to the Director General or the Board, preferably the former, who, however, is may be subject to directions in this regard from the latter.

2. Regulation of Broadcasting

The clear focus of the draft Act is on regulation of telecommunications, and broadcast regulation is dealt with only as a secondary matter. This is reflected in the comparatively tiny proportion of the draft Act that is devoted to broadcast regulation, as well as in several instances where the rules do not address the broadcast sector. We understand that the aim was to provide for a framework of rules for broadcasting, which will be further developed in another law focusing specifically on broadcasting. Our comments are based on that understanding.

Section 802 is the main substantive provision specifically on broadcast regulation, apart from the (apparent) inclusion of broadcasting under the rules on licensing in Title VI of the draft Act. That section provides, without any elaboration, for the regulation by the Commission of licensing, broadcasting content, advertising and sponsorship, elections, copyright and such other matters as may be required. Without more, this is inadequate and would effectively grant the Commission unfettered powers, subject only to vague appeals to respect international standards, to control broadcasters in each of these areas. In other countries, all of these areas of regulation receive detailed attention in broadcasting or communications laws, and this is also necessary in the context of Somalia. To address this, these issues would need to be addressed in detail in a future law devoted exclusively to broadcasting.

There is some confusion about whether or not certain rules are supposed to cover broadcasting. A good example of this is the definition of an "individual licence" which is defined as a "Telecommunications Licence", even though the term is repeatedly used in Title VI – Licensing, which covers both telecommunications and broadcasting. This is exacerbated by confusing references in Title VI, such as the reference in section 601(b) to the issuance of "communications licenses for the operation and provision of Telecommunications Services". Broadcasting is again omitted from section 602(a). It is not clear whether this is intentional or simply an accident but at least some references to "individual licences", such as the one in section 604, would appear to be relevant to both telecommunications and broadcasting. This needs to be clarified.

Broadcasting is not included in the Universal Access to Telecommunications Services fund established by section 741. However, universal access to broadcasting services is an extremely important public interest and democratic objective and consideration should be given broadening the scope of the fund to cover

broadcasting. If this is to be done, it will be necessary to go beyond the very general provisions in section 321(a)(xii) and to set out clear rules regarding the criteria for allocations from the fund to support broadcasting, as well as the process for this. This could either be done in the current legislation, or in a future broadcasting law.

Broadcasting is also not mentioned in section 731 of the draft Act, which refers to the authority of the Commission to manage and regulate the country's radio frequency spectrum "for purposes of the provision of Telecommunications Services" and to conduct public consultations to this end. Section 504 does recognise broadcasting as one of the uses of the radio frequency spectrum, which should be included in the national frequency allocation table. It is important to conduct consultations when developing regulations on managing the broadcasting part of the spectrum as well, and this should either be addressed in this law, or in a future broadcasting law.

Section 603(b)(i) provides that a licence may include such terms and conditions as the Commission may determine are necessary. For broadcasters, at least, this power should be subject to certain conditions, for example that such terms promote the object and purposes of the law and are reasonable, taking into account the right to freedom of expression and the state of development of the broadcasting sector.

The Commission should be required to hold consultations before issuing a licence pursuant to section 604(a), just as it is before refusing to renew a licence (section 606(b)).

Section 604(b) provides that, where more than one application is received for a licence, the licence shall be allocated via an auction. This should be reconsidered, at least for broadcasting, where a number of other criteria should be taken into account, including the technical and financial capacity of the applicant, and the extent to which the proposed service contributes to diversity in the airwaves. The same provision stipulates that the allocation of licences through auction shall not require the ratification of the Commission. This does not seem practical and would appear to be at odds with section 604(c), which specifically requires the Commission to verify that an applicant satisfies various conditions before giving a final decision on a licence.

Section 606(a) requires the Commission to renew a licence where the licensee has complied with all material terms of the licence. This is arguably unduly rigid and there should at least be the possibility of the Commission refusing to renew the licence where this is clearly in the overall public interest.

Section 608 provides that a licence may be suspended or revoked in various circumstances, including where the licensee has failed to comply with this law, with another law, with regulations or other instruments adopted pursuant to this law or

with its licence conditions. This is far too permissive. Such an extreme measure should be taken only where the breach is very serious, and normally repetitive in nature, and when less extreme sanctions have failed to remedy the problem (see also the discussion on general sanctions below, under Other Issues).

The draft Act fails to incorporate rules on competition for broadcasting, although Title VII(C) establishes such rules for telecommunications services. The draft Act also fails to put in place clear rules on controlling undue concentration of ownership in either the broadcasting or telecommunications sectors (apart from the rules on anti-competitive practices in Title VII(C)). The sole provision that appears to be directed towards this is section 604(g), which requires notification to be provided to the Commission whenever someone acquires a five per cent or greater equity share in a licensee. Measures to address concentration of ownership should, among other things, include the power to take this into account in licensing and giving the Commission the power to prevent mergers which would threaten competition or diversity. Rules on transparency of ownership of licensees are also needed, so as to enable the Commission to exercise such powers. For broadcasters, the issues of competition and ownership could be addressed in a future broadcasting law.

Recommendations:

- As a general recommendation, far more attention needs to be given to matters relating to the regulation of broadcasting. Specifically, the unfettered powers of the Commission in relation to whole areas of broadcast regulation need to be the subject of extensive elaboration and clarification, so as to constrain and guide the actions of the Commission with a view to promoting a public interest broadcasting sector. This should be addressed in a future broadcasting law.
- The draft Act should be amended to make it clear whether or not broadcasting is intended to be covered in various rules set out in Title VI which refer to "individual licences", to "communications licences" or to "Telecommunications Services".
- Broadcasting should be included in the universal fund, and clear rules regarding the allocation of this fund for broadcasting uses should be set out in either this law or a future broadcasting law.
- Either this law or a future broadcasting law should provide for consultations around regulation of the spectrum for broadcasting uses, which is analogous to the one for telecommunications.
- The power of the Commission to impose terms and conditions on broadcasters through their licences should be constrained by requiring such terms to support the object and purposes of the law, and to be reasonable.
- The grant of a licence should be done only after a process of consultation.
- Decisions about the allocation of broadcasting licences among competing applicants should not be made simply by auction but should also take into

account other criteria, which should be set out in the law. This needs to be recognised in the current law, even if the detailed rules are to be provided for in a future broadcasting law. In any case, if licences are allocated by auction, they should still be subject to final ratification by the Commission.

- The Commission should have the power not to renew a licence where the public interest is clearly served by this.
- The power of the Commission to suspend or revoke a licence should be limited to situations of serious and normally repetitive breach of the rules.
- The Commission should be given the power to regulate undue concentration of ownership that threatens competition or diversity in broadcasting or telecommunications through the licensing process and through a power to prevent mergers. To facilitate these powers, wider ownership transparency obligations should be placed on licensed telecommunications and broadcast service providers.

3. Regulation of Telecommunications

The definition of "information services" in the draft Act appears to include certain Internet-based services. This is reinforced by section 733(a), which grants the Commission the power to regulate "numbering and addressing resources", which shall include "Internet domain registration". The rules governing the regulation of these resources are, however, completely inappropriate for Internet domain registration. This includes, among other things, a ban on providing such resources: a) to anyone who is not a licensed telecommunications service provider; b) where this is "not compatible with the National Numbering Plan"; c) where this is inconsistent with the law or with the Commission's regulations; d) where this would pose a risk to national security or public order; or e) where the applicant would not make effective use of those resources. There needs to be a clear separation of the allocation of numbering and Internet domain registration resources and none of the rules above should apply to the latter. In practice, application of these rules is likely to drive potential users to acquire international or foreign domain resources, to the detriment of the development of a national Internet presence.

It may be noted that some sort of system for registering and regulating top level Internet service providers might be reasonable, but that these provisions do not constitute such a system.

Section 753(a) provides protection for the privacy of customers' telecommunications information. However, section 753(b) allows for this to be overridden on broad grounds, including any lawful surveillance or investigation. While it may be difficult for a telecommunications law to override other laws, in particular relating to criminal investigations, at the same time it is likely to be the

case that these other laws do not provide sufficient protection for privacy. At a minimum, a reference to international standards might be added in here, but consideration could also be given to including other measures to constrain these powers.

Section 761(b), referring to the idea of recognised testing bodies for telecommunications equipment, refers to two specific bodies that might be recognised. To create such a privileged commercial position for two such bodies by law is simply not appropriate; it should be left to the Commission to decide on which bodies to recognise as testing bodies.

Recommendations:

- The rules on allocation of numbering and addressing resources should not apply to the allocation of Internet domain resources, which should be done on a totally different basis. This is without prejudice to the possibility of putting in place a system to regulate top level Internet service providers.
- A reference to international standards should be included in the rules allowing for telecommunications privacy overrides, and consideration should be given to putting in place other constraints on this.
- The reference to specific testing bodies for equipment should be removed and this should be left to the Commission.

4. Other Issues

The purposes of communication regulation, as set out in section 101(b), could include a reference to promoting freedom of expression, either generally or specifically in section 101(b)(ix), dealing broadcast regulation.

The section on definitions lacks a section number.

The rules on consultations, while a very positive feature of the draft Act, are in some cases excessive. Section 333(b) provides for members of the public to respond to representations made by others but those responses are also representations, and a right to respond to those may be claimed, leading to an endless cycle of consultation. It is probably sufficient to provide for publicity for third party representations.

There are a number of examples in the draft Act where the obligation to conduct a section 331-334 consultation is unnecessary. This is arguably the case in relation to the internal regulations of the Board (section 302(a)), for every code of conduct adopted by a telecommunications provider (section 751(b)), and in relation to every petition to the Commission to add or delete a recognised testing body, which might

be abused (section 761(c)). It is also not appropriate to hold a public consultation for the application of sanctions or the conduct of dispute resolution, pursuant to Section 901(c). This is a quasi-judicial function and it should be based on an objective application of the rules, not an assessment of public opinion.

Section 334(a) requires the Commission to base its decision in any 'proceeding' before it on written reasons and on information which is contained in the record and which is publicly available. This is not reasonable. First, it is not clear what is meant here by 'proceeding' but it is not practical to require the Commission to explain its reasons in writing for every decision it reaches, for example regarding its internal procedures. This is mostly necessary where the Commission takes a decision that directly affects the rights or interests of a third party (for example, a licensing decision). Second, in many cases licensing and other decisions may legitimately be based on confidential information provided by the applicant. It is unrealistic to restrict the Commission to relying on information which is on the record in such cases.

Section 504 provides for the development by the Commission of a national frequency allocation table. No conditions or criteria for this exercise are set out in the law. At least a minimum framework of rules should be established for the development of this table. This should, for example, provide for an equitable allocation of frequencies to the different uses, as well as an equitable sub-allocation of broadcasting frequencies to different types of broadcasters, including public, commercial and community broadcasters.

Section 901(c) provides for the imposition of various sanctions for violation of the law, regulations or licence conditions. These include fines and other appropriate sanctions, as long as they are "proportionate, non-discriminatory and transparent". It would be useful to spell out other, less intrusive, sanctions, such as a warning and an obligation to disseminate a message acknowledging breach of the rules. It might also be useful to stipulate that sanctions should be applied in a graduated fashion and that more serious sanctions should only be applied in light of more serious or repeated breaches which less heavy sanctions have failed to resolve.

Recommendations:

- Consideration should be given to adding in a reference to freedom of expression as one of the purposes of the law.
- The section on definitions should be given a number.
- Stakeholders should not have a right to comment on the representations made by other third parties, as this is not practical.
- Consideration should be given to whether or not it is necessary to conduct consultations in all of the cases noted above.
- The obligation on the Commission to provide written reasons for every

decision should be limited to cases where the decision affects the rights or interests of a third party, and the Commission should not be limited to basing its decisions on publicly available facts.

- At least a framework of rules for the development of the national frequency allocation table should be provided in the law.
- Consideration should be given to providing for a wide range of sanctions, including lighter sanctions, and to stipulating that sanctions should be applied in a graduated fashion, with heavier sanctions being reserved for more serious or repeated breaches.