

Azerbaijan

Analysis of the Law on Media

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Executive Summary

This Analysis of the Law of the Republic of Azerbaijan “On Media” (Media Law) by the Centre for Law and Democracy (CLD) seeks to enrich and deepen the criticisms and analyses already made of the Law, based on international human rights standards, in particular the right to freedom of expression. Azerbaijan has long had a poor track record in terms of respect for freedom of expression and, overall, despite some positive features, the Media Law will likely contribute more to the challenges than to addressing them.

The scope of the coverage of the Media Law is based on a number of unclear and overbroad definitions, starting with the framing definition of a media entity (which encompasses all of the different media sectors), which fails to incorporate the ideas of editorial control or periodicity of dissemination (although both of these are added later on as formal requirements, absent which media entities may be sanctioned). There is no clear distinction between print and online media, and the definitions of audiovisual media and news agencies both lack elements normally considered to be core features of these sectors. On the other hand, the definition of journalists is unduly narrow, covering only those working as journalists on a professional (paid) basis and as their main activity. Another problem in terms of scope is the attempt to regulate all media “oriented” towards Azerbaijan or its people, regardless of where they are based.

The Media Law includes a number of content restrictions which are problematical for different reasons. Some are simply illegitimate, such as bans on statements which “disrespect” State symbols or “are contrary” to the protection of health or the environment. Many others are worded too broadly, especially given that breach of many of these rules may ultimately lead to the suspension of the relevant media entity. In many cases, a more appropriate approach to addressing these issues would be through a system of professional self- or co-regulation (i.e. instead of directly through legal prohibitions). There is, positively, a rule on protection of confidential sources, although the exceptions to this are too broad and do not incorporate safeguards, such as that there is no other way to protect the interest other than by revealing the source. The Media Law also establishes a right of reply which applies too broadly, including to information which “distorts opinions”, and lacks protections, such as that the original information must be false.

The Media Law establishes an Audiovisual Council and gives it broad powers to regulate the audiovisual media sector. Although the Law states that the Council is independent, it fails to establish proper safeguards for that independence. For example, all of the members are simply “appointed to their position and relieved of their position by a body (institution)

designated by a relevant executive authority”, without any conditions or procedures for this being put in place. There is also no protection for the independence of the budget, with this simply being provided “from the state budget and other sources not prohibited by law”.

The Media Law contains a large number of problematical constraints on or rules for media entities, i.e. all media outlets. These include overly restrictive rules or rules which give too much control to the regulator or government on logos, copyright, foreign content, the use of secret recording techniques, who may found or participate in a media entity and foreign funding. The Media Law also provides for a Media Register, inclusion in which unlocks important benefits for both media entities and journalists, such as access to official announcements, training opportunities, financial benefits (“soft loans”) and improved social security. However, inclusion on the Media Register goes far beyond mere registration for print and online media, requiring the submission of 18 different types of documents (for audiovisual media, inclusion is via the system of licensing).

Inclusion in the Media Register and obtaining a press card involves illegitimate requirements for journalists such as having higher education, working for a registered media entity and not having been convicted of a serious crime. Having a press card, itself dependent on inclusion in the Media Register, is required to access important benefits for journalists, including accreditation to official and non-official bodies (such as civil society organisations). Problematically, accreditation can be removed for tarnishing the reputation of the body which issued the accreditation. Accreditation of foreign journalists to Azerbaijan is done by a State agency and may be limited in retaliation where the State of which the journalist is a citizen imposes restrictions on Azerbaijani journalists.

When it comes to the system of licensing audiovisual media, the approach taken in the Media Law is overly complex and rigid, and yet fails to promote important regulatory objectives. The Analysis recommends a complete rethink of this approach, with more streamlined definitions, tailoring to take into account the needs of both analogue radio and community broadcasting, and limitation of licensing requirements to what is needed (as opposed to the current approach which requires almost all audiovisual media to be licensed). The Analysis also calls on the whole approach to regulation of audiovisual media to do far more to promote media diversity, including through the licensing process.

For the print and online media, the Analysis again calls for the system to be significantly simplified and essentially replaced with a technical registration system which only requires the submission of limited information and no discretion to refuse registration. It also calls for



doing away with a number of overly constraining regulatory rules for the print and online media.

A separate section of the Analysis focuses on the subject of Undue Interference/Control. This covers a number of rules which, even if, individually, they are not necessarily or directly contrary to international human rights standards, together represent an approach towards media regulation which is unnecessary and excessively onerous, and also opens up the possibility of undue control over or interference with the media. There are numerous such provisions but one set of examples outlined in the Analysis is Article 7-9 of the Media Law, which create very broad and discretionary official powers to constrain the work of the media in areas covered by martial law, states of emergency, and special operations against religious extremism or terrorism. Another set of examples relate to the rigid commercial constraints imposed on different types of audiovisual media, which effectively dictate who is allowed to charge whom for different services and in some cases even set the rates for fees. The Analysis calls for these rules to be reviewed and, as necessary, either repealed entirely or revised.

The next section of the Analysis reviews the sanctions which are available for breach of the regulatory rules set out in the Media Law, which focus heavily on the suspension and termination of media entities instead of providing for a graduated system of sanctions which allows for sanctions to be matched appropriately to the nature of breaches. Many provisions the breach of which may or must lead to a suspension could involve both quite serious and quite minor actions. A far more nuanced approach is needed for sanctions for these provisions.

The Analysis ends with a section on Other Comments, which addresses two main issues. The first is the many provisions in the Media Law which simply reiterate that other legal provisions, whether in the same law or another law, are binding. This is obviously unnecessary and these should be removed. The second focuses on Article 17, which seeks to create a mini-access to information system for the media. As Azerbaijan actually already has a very strong access to information law, there is no need for this mini, duplicate version.



Introduction¹

The Law of the Republic of Azerbaijan “On Media” (Media Law or Law) was adopted at the end of 2021 and came into force after it was published in the official gazette on 8 February 2022.² The law has been strongly criticised by both civil society organisations³ and official bodies.⁴

This Analysis by the Centre for Law and Democracy (CLD) seeks to enrich and deepen the criticisms and analyses already made of the Media Law. It is based on international human rights standards, in particular the right to freedom of expression as guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR)⁵ and the *European Convention on Human Rights* (ECHR),⁶ both of which have been ratified by Azerbaijan.⁷ The background context for this Analysis is the poor performance of Azerbaijan in the area of freedom of expression as evidenced by its low rating on various objective assessments of this.⁸

This Analysis is broken down into ten sections focusing, respectively, on the scope of coverage of the Media Law; content restrictions; the independence of the audiovisual media regulator, the Council; the regulation of, respectively, media entities in general and then journalists, audiovisual media and print/online media; provisions which allow for undue interference and

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² The official Azeri version is available at: <https://president.az/az/articles/view/55399>. An English translation is on file with CLD, which takes no responsibility for errors in translation.

³ See, for example, Committee to Protect Journalists, “New Azerbaijan media law increases restrictions on the press”, 10 February 2022, <https://cpj.org/2022/02/new-azerbaijan-media-law-increases-restrictions-on-the-press/>.

⁴ See, for example, the analysis of the law by the OSCE, *Legal Analysis on the Law of the Republic of Azerbaijan “On Media”*, February 2022, <https://www.osce.org/representative-on-freedom-of-media/512941>.

⁵ Adopted 16 December 1966, entry into force 23 March 1976, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A\(XXI\)_civil.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf).

⁶ Adopted 4 November 1950, E.T.S. No. 5, entry into force 3 September 1953.

⁷ Azerbaijan ratified the ICCPR on 14 August 1992 and the ECHR on 15 April 2002.

⁸ Azerbaijan came in 154th place out of 180 countries in Reporters without Borders’ 2022 Press Freedom Index. See <https://rsf.org/en/country/azerbaijan>. It earned only 9 out of a possible 100 points on Freedom House’s 2022 Freedom in the World assessment, and 0 out of 4 points in the area of media freedom. See <https://freedomhouse.org/country/azerbaijan/freedom-world/2022>.

control; excessive sanctions and other comments. Each section describes the rules being assessed, analyses them and then provides recommendations to bring the rules into line with international standards.

1. Scope of the Law

Like most media laws, the Media Law under consideration here mostly places obligations on media outlets in general, such as to provide a right to respond (see Articles 18 and 19), or on different types of media, such as print media to apply officially before commencing operations or to register (see Article 62.2) and to display certain information with each copy (see Article 63). The Media Law also creates a limited number of benefits for different types of media, such as the right to be accredited for journalists with a press card (see Article 71.1.2) or to various benefits from inclusion in the Media Register (see Article 76). There are also some very general benefits set out in Articles 5 and 6, such as a prohibition on State censorship of the media and the right of journalists to form associations.

While a wide range of actors may wish to avail themselves of these benefits, the international law rationale for allocating benefits to the media and/or journalists, such as accreditation and the right not to reveal confidential sources of information, is to promote the flow of information to the public, not to create special benefits for journalists or media *per se*. It is thus important to allocate these benefits only to media actors, properly defined. And it goes without saying that it is not appropriate to impose obligations on actors to which the justifications for media regulatory measures do not apply. In other words, it is important for the scope of the law not to go beyond media actors and, in each different media sector, the types of entities that properly fall into that sector.

Article 1 of the Media Law contains a number of definitions of different types of media. A “media entity” is an individual (although not a journalist) or legal entity whose “main activity is the publication and (or) dissemination of mass information” (Article 1.1.3). “Mass information”, for its part, is defined circularly as information published by media entities “for the purpose of imparting to an unlimited number of persons, and the acquisition, transmission, production and dissemination of which are not limited by the laws of the Republic of Azerbaijan” (Article 1.1.1). As detailed in section 4 of this Analysis, the Media Law places a number of obligations on media entities (see also the obligations in section 2, most of which apply to media entities as well).

It will immediately be clear that apart from the requirement of being published by a media entity, mass information covers, among other things, anything legal that is distributed publicly



over the Internet. The definition of a media entity adds the qualifications that an individual publishing this information is not a journalist and that the main activity of the individual or legal entity is the publication of mass information. However, it lacks elements that are commonly included in a definition of media, such as that the dissemination of information is subject to editorial control (although other definitions do refer to the “editorial board” and “responsible editor” this is not incorporated into the definition as such) and is periodic (this element is added in a roundabout way, with penalties rather than as an upfront definition, as described in sections 6 and 7 of this Analysis). Absent these elements, this definition will capture all sorts of actors who are not media and who should not be subject to the requirements for media, such as an avid blogger, a civil society organisation which focuses on dissemination of information to the public, an advertising company or even someone who is retired and spends their time posting horticultural information on their website.

A “journalist” is defined as someone who works at a media entity either as an employee or as a freelancer, whose main activity, done on a professional (i.e. paid) basis, is to “continuously collect, prepare, edit, produce and transmit information, as well as to express an opinion (to comment) on that information” (Article 1.1.4). In contrast to the definition of a media entity, this one is too narrow, given the broad range of actors and actions that are undertaken by journalists in the modern world. It is perfectly possible, for example, for a journalist to work on a voluntary basis (for example for a community media outlet) or part time while having another, “main”, job. The way a freelancer is defined, as having “an independent contractor agreement”, is also too narrow and rigid.

According to Article 25, there are four types of media, namely audiovisual media, print media, online media and news agencies. All four are defined in Article 1. “Audiovisual media” are defined in Article 1.1.5 as media which provide “television and radio broadcasting, including on-demand broadcast services, to a user in audio and (or) visual form using various technical methods and means”. If the definition of media entities were properly constrained, as recommended above, this sub-definition would more-or-less work although it is normal to incorporate into this definition of audiovisual media the idea of providing a defined programme or service as regards the content offered. The definitions also include a very wide array of other definitions of different types of audiovisual media (at least nine), comprising both content producers and distributors, which gives rise to an unnecessarily complicated and controlling regulatory framework, which is addressed in section 6 of this Analysis.

“Print media” are defined in Article 1.1.6, while “online media” are defined in Article 1.1.7. The former disseminate information in “text or visual form on paper and (or) electronic medium” either with a certain periodicity or simply when “relevant materials are collected”. The latter



are defined as media which are not audiovisual or print but which disseminate information “in text, audio, visual or other electronic (digital) form on a website”. As noted above, it is of the essence for media that they operate periodically, and so this requirement should be hardwired into the definition of print media. In addition, if one is going to distinguish between print media and online media, then the hallmark of the former is that it does appear in print (while usually also online). Otherwise, the current definition of print media would largely subsume online media (especially since print media covers both text and visual formats).

For its part, the definition of online media simply requires media to disseminate information via a website. This adds almost nothing of substance to the definition of a media entity. Here again, the ideas of periodicity and editorial control should be added (either explicitly or implicitly through the definition of media entity) and this form of media should be distinguished clearly from print media. Although it is not legitimate to impose the sorts of requirements that the Media Law imposes on all media entities and then specifically on online media on actors such as bloggers or other online content producers which do not involve a system of editorial control, in some countries these sorts of actors are given the option of opting into the system so as to receive the benefits (including recognition as a media entity), while also of course shouldering the burdens. This is essentially a win-win situation and should be considered.

Finally, a “news agency” is defined in Article 1.1.8 as media that “acquire, transmit, produce and disseminate mass information” and conclude agreements with other media entities to regularly provide information to them. This does not even refer to the core function of a news agency, namely to provide news and current affairs, content which in turn is intended to be published in the other media entities. As such, it would potentially cover a very wide range of actors.

Article 3 defines the scope of application of the Media Law to include media entities located outside of Azerbaijan “whose activities are oriented to the territory and population of the Republic of Azerbaijan”, but only insofar as their products are disseminated inside Azerbaijan. This would cover any media outlet operating (legally) anywhere in the world which distributed its products online, which is essentially all media today, and which talked about Azerbaijan or used the Azeri language, as well as broadcasters and potentially also newspapers based in neighbouring States which could be received inside Azerbaijan (again with the caveat that their content related to the country).

It is fairly obvious that this attempt to extend Azerbaijan’s jurisdiction over media to entities based in other countries is both illegitimate and impractical. Azerbaijan has no more right to



try to regulate media based in other countries than those countries have to regulate media inside Azerbaijan. And it is simply not possible for Azerbaijan to regulate media based in other countries, although it might try to block websites or broadcast transmissions, both of which are extremely repressive forms of behaviour.

Recommendations

- The definition of a “media entity” should be revised to incorporate the ideas of involving an editorial process and the periodicity of dissemination of information.
- The definition of a “journalist” should be amended so as to remove requirements such as working on a paid basis and having journalism as one’s main activity.
- The definition of “audiovisual media” should incorporate the idea of providing a defined programme or service.
- The definition of “print media”, as long as it is to be distinguished from online media, should incorporate the idea of having an actual print version and also make periodicity a hard requirement.
- The definition of “online media” should, if it is to be maintained, be clearly distinguished from that of “print media” (including through the previous recommendation for the latter). The idea of allowing online actors which do not strictly meet the definition of online media to opt into the system, taking on both the benefits and burdens associated with this status, should be considered.
- The definition of a “news agency” should incorporate the idea of providing news and current affairs content to other media entities for purposes forwarding to the public via their own systems of distribution.
- Article 3 should be amended to remove the reference to media located outside of Azerbaijan.

2. Content Restrictions

The Media Law imposes a number of broad and vague restrictions on the content that media entities may distribute. Article 14.1 contains the main list of these restrictions, which apply to all media. Some of these restrictions are simply illegitimate in nature. For example, Article 14.1.2 indicates that “there must be no disrespect for the state symbols of the Republic of Azerbaijan” while Article 14.1.10 prohibits “actions that are contrary to the protection of health and the environment”. It is not appropriate for the State to ban these broad categories of speech. For example, a media entity might produce a piece on how the flag should be changed which might be considered to be disrespectful or on how the health strategy of the government was ineffective which could be considered to be contrary to the protection of



health. Severe sanctions – including suspension for more than three breaches within one year (Article 65.2.3) or removal from the Media Register for three breaches in a year (Article 75.3.5) – apply to breaches of Article 14.1.

In many other cases, the rules in Article 14.1 are not appropriate as hard, legal requirements, especially leading to the dramatic sanctions just noted. Instead, these are the sorts of provisions that should go into self- or co-regulatory professional codes of conduct, at the very least for the print and online media, and be subject only to minor sanctions, such as printing an acknowledgement of the breach. Examples of this are the prohibitions on swearing (Article 14.1.6), on a lack of impartiality (Article 14.1.11), on parapsychology (Article 14.1.12), and on protecting children against harm (Article 14.1.15).

Articles 14.2 and 14.3 prohibit terrestrial broadcasters from using languages other than the State language, except with the permission of the Council (i.e. the regulator). Instead of hard, rigid provisions like this, which create opportunities for potential interference in the work of audiovisual media, broadcasting language should be addressed in a more flexible manner through the licensing process.

Article 15.1 suffers from many of the same flaws as Article 14.1, namely overbroad content and other professional restrictions which would be better addressed through a professional code of conduct for the media than in a law, albeit liability for breach of Article 15 is addressed only in a general way via Article 77, providing for civil, administrative and criminal liability, as relevant. Several provisions ban the publication of information about ongoing criminal investigations which go far beyond the accepted norms in this area (which prohibit this only where dissemination of the information would be likely to lead to a breach of justice).

Interestingly, Articles 15.1.1 and 15.1.2 prohibit journalists from disclosing confidential sources of information, while Article 15.2 creates a right for them to protect these sources, which is a more common and appropriate approach. Article 15.3 provides for this right to be lifted to protect human life, to prevent serious crimes and for the defence of a person who is accused of a serious crime. While these are not inappropriate grounds to lift the right of source confidentiality, the category of preventing serious crimes is overly broad and should be limited to very serious crimes. In addition, other protections should be available, such as that there is no other way to achieve these objectives other than by exposing the source and that the interest in exposing the source clearly outweighs the interest in maintaining confidentiality.

Article 18 provides for a right of response (often called a right of reply) whenever a media entity disseminates information that tarnishes dignity, honour or reputation, libel or insults,



or “distorts opinions”. The proper scope of a right of reply is where the publication of factually false information by a media entity breaches the legal rights of a third party, normally through defaming them. The use of repetitive terms – “dignity”, “honour”, “reputation”, “libel” and “insults” – for reputation in this provision is problematical and suggests that it will be used overly expansively. Instead, only established legal terms found in Azerbaijani law should be used. The reference to distorting opinions is simply not justifiable. And there is no general requirement that the information disseminated be false before it gives rise to a right of reply.

The rules governing the way the right of reply operates are largely in line with better practice except for Article 19.7.4, which only allows the reply to be refused where it is more than twice as long as the original report (this is excessive) and Article 19.7.2, which applies where the media entity has already issued a correction, but only where this is based on the complainant’s appeal (any issuance of an effective correction should void the claim of a right of reply).

Article 39.1 also imposes a number of positive content obligations on broadcasters. Most of these are unnecessary, as they refer to obligations that are already established in other laws. It may be noted that breach of these rules may, pursuant to Article 41.1, lead to the dramatic sanction of broadcasting being suspended for 24 hours. Given this extreme sanction, the provisions in Article 39.1 are not legitimate. For example, Article 39.1.2 requires audiovisual broadcasters to ensure that “special warnings are made about the harmful effects of use of tobacco on health and the environment”, whenever a programme includes direct depictions of smoking. Given how vague this requirement is – for example, what constitutes a “special warning” and how are these to be issued? – it is certainly not appropriate to serve as the basis for suspending the operation of a broadcaster. Instead, it might be appropriate to include this sort of requirement in a professional code of conduct.

Article 77.2 provides that the editorial board and journalist are not responsible for the publication of “untrue information” in the four cases listed (mainly based on the status of the information that was circulated, for example because it had been disseminated by officials). The Media Law, at least, does not ban false news generally, although amendments to the Law “On information, informatisation and protection of information” do contain wide prohibitions in this regard.⁹ However, although this provision is cast as a form of protection, it seems to suggest that liability may apply to other types of false information.

⁹ See, for example, Radio Free Liberty, “Azerbaijan’s Coronavirus Disinformation Law Could Curb Press Freedom, OSCE Says”, 25 March 2020, <https://www.rferl.org/a/azerbaijan-s-coronavirus-disinformation-law-could-curb-press-freedom-osce-says/30509266.html>.

Recommendations

- The restrictions in Articles 14.1 and 15.1 should be reconsidered in favour of an approach based on self- or co-regulation. At a minimum, they should be substantially revised to remove illegitimate restrictions and to narrow down those that are overbroad, while the harsh sanctions for breach of Article 14.1 should be repealed.
- Articles 14.2 and 14.3 should be repealed and issues of language of broadcasting should be addressed through the licensing process.
- Article 15.3 should be amended to narrow the grounds for mandatory exposure of confidential sources in relation to crimes to cases only of preventing very serious crimes, while the additional protections indicated above should be incorporated here.
- The scope of the right of reply should be limited to cases where the publication of false information has harmed the legal rights of the claimant and the rules should be amended to limit replies to the length of the original report and to void a claim of a right of reply where an effective correction has been issued, however this came about.
- The positive content rules in Article 39.1 should be repealed; consideration should be given to including them instead in any professional code of conduct that may be developed.
- Article 77.2 should be expanded to provide generally that journalists and media entities are not responsible for the dissemination of incorrect information unless liability is specifically provided for in another law.

3. Independence of the Regulator

It is well established under international law that bodies which regulate the media need to be independent in the sense of being protected against government and ideally also corporate interference. As the special international mandates on freedom of expression noted in their 2003 Joint Declaration:

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.¹⁰

The Media Law refers to two regulators, the Audiovisual Council of the Republic of Azerbaijan (Council) and a “body (institution) designated by a relevant executive authority”. The latter

¹⁰ At that time, these were the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. The mandates have adopted a joint declaration every year since 1999 (see <https://www.osce.org/fom/66176>). The 2003 Joint Declaration was adopted on 18 December 2003.

appears in practice to be the Media Development Agency of the Republic of Azerbaijan (Agency). It is beyond the scope of this Analysis to review the independence of the Agency, since it was not established by the Media Law, but we note that it is allocated a number of sensitive regulatory roles by the Media Law such that its independence should be guaranteed. For example, while the Council reviews information about founders and participants in audiovisual media, this is done by the Agency for other media entities (see Article 26.7).

The Council is responsible for regulating audiovisual media (Article 43.1). Several provisions in the Media Law – such as Articles 43.3, 44 and 45 – refer to independence but it is to the practical arrangements setting up the Council that we must actually look to assess that independence. Article 45.2, for example, provides that the Agency shall determine the structure of the Council. It is not clear why this task should be allocated to an external body (i.e. why the Council should not determine its own structure, subject only to any rules on this which are set out in law). It is again the Agency which appoints members of the Council and removes them (Article 48.2). No procedure is set out in the Media Law for either appointing or removing members of the Council, so this appears to be left entirely to the Agency, although Article 48.5 does stipulate the grounds for removal. Clearly it is only to the extent that the Agency is independent that these arrangements respect the international law requirement of independence.

This approach may be contrasted with the approach taken in most countries, which set out in some detail in the primary legislation the manner in which members of media regulators shall be appointed, given how important this is. Better practice here is to provide for different actors – including civil society and the general public, as well as official actors, for example such as parliament – to play a role in the appointments process and for the whole system of appointments to be transparent (for example, it is common to publish a shortlist of candidates so that the public may comment on their appropriateness for the job).

Article 48.4 sets out a number of categories of people who may not be appointed as members of the Council, such as those without higher education or those with dual citizenship. It does not, however, prohibit individuals with strong political connections, such as elected officials or officials of political parties, from being appointed. Neither does it really set out requirements for members, such as that they be held in high esteem by society (apart from the very low bar of having higher education).

Although the Law does indicate that the Council shall have an “independent balance sheet”, it also provides that the Council shall be funded from the State budget (and other legal sources) (Articles 43.2 and 43.3). This fails to provide any protection against political



interference via the budget. More positively, the remuneration and benefits afforded to members is linked to other established positions in government (see Article 49).

Although individuals who are media owners may not be appointed to the Council (Article 48.4.8), there are no rules on how to address conflicts of interest that may arise before the Council during its operations. The Media Law also fails to set out any rules governing meetings; as the key decision-making forums for any body, the basic rules for meetings should be set out in law.

Recommendations

- The Media Law should set out at least the framework for appointing members of the Council so as to ensure the engagement of civil society and the public, and require the process to be transparent and participatory.
- Clear and comprehensive prohibitions on individuals being appointed as members of the Council, including on political grounds, along with positive requirements of expertise and social standing, should be added to the law.
- An independent system for funding the Council should be established.
- The law should set out clear conflict of interest rules for members of the Council, as well as a framework of rules for the holding of its meetings.

4. Regulation of Media Entities

As noted above, the term “media entities” is the general term that covers all four types of media, namely audiovisual media, print media, online media and news agencies. The Media Law imposes a number of obligations on all media entities (in addition to the content rules discussed above), and then more specific obligations on different types of media.

Article 12 of the Media Law requires the editorial board of a media entity to have a “logo (emblem)”, which shall be entered into the Media Register. Article 12.3 sets out a number of restrictions on these logos, such as that they not promote discrimination or contain “immoral symbols”. It is not clear why such prohibitions should be considered necessary but, as noted above, the Media Law already contains excessive restrictions on content and this would appear to create another opportunity for interference in the activities of media entities. Changes to the logos of audiovisual media are allowed only with the consent of the Council (Article 12.5) while print and online media require the consent of the Authority (Article 12.6).



This is an entirely unnecessary degree of control by these regulators of the work of the media. It is enough to require media entities to inform their regulators of any changes to their logos.

Article 13 sets out rules on the use of information by one media entity which is produced or owned by other media entities, primarily that the first entity must have a subscription or contract to use such information. It is not clear why this article is necessary at all, given that Azerbaijan presumably already has clear legal rules on intellectual property rights. Article 13.2 provides that, absent a contract for use, a media entity may not use more than one-third of “every piece of information of another media entity” and must give credit for such use. This is neither logical nor appropriate. While copyright rules do include exceptions for reporting, this has limited applicability to the direct use of reporting by other media outlets. In addition, while this is context dependent, one-third would normally exceed the scope of the reporting exception to copyright (i.e. is not necessary to use a full one-third of a document merely to report on it). Article 13.3 provides that these rules do not apply to official reports and information provided by news agencies. Exempting news agencies in this way would appear to run directly counter to their core business model (whereby they provide access to their content via subscription or contract, just as Article 13.1 would otherwise require).

Articles 16.2 and 16.3 allow for the dissemination, respectively, of foreign broadcast programmes and print media products “in cases stipulated by international agreements” to which Azerbaijan is a party, while also giving the Agency the power to extend this in the case of the print media. This makes very little sense. Although Azerbaijan does need to respect its international obligations, there is no reason whatsoever why the import of foreign media content should be limited to Azerbaijan’s formal international legal obligations in this area. Rather, this should be driven by licensing conditions for broadcasters and be open, subject to the general condition of the content being legal, for print media (and not subject to any regulation by the Agency).

In a somewhat similar vein, Article 11.2 allows for branches and offices of foreign media entities to be established in Azerbaijan “in cases envisaged in international agreements” to which Azerbaijan is a party. Once again, this does not make sense. Instead, this should be done in an open manner, essentially allowing foreign media entities to establish offices in Azerbaijan if they should wish to, based on the right to freedom of expression.

Article 21.1 allows for the use of secret audiovisual recordings and photographs only if the subject provides consent or on the basis of a court ruling. This is vastly too limiting. In most countries, these matters are dealt with as a matter of professionalism and self- or co-regulation rather than by law. It is accepted that journalists should not generally use



subterfuge to obtain recordings, but also that this may be used in cases where this is justified in the public interest. Thus, for example, clause 10(i) of the United Kingdom's Independent Press Standards Organisation's (IPSO) Editors' Code of Practice prohibits the use of hidden cameras or clandestine listening devices but then clause 10(ii) goes on to qualify this by stating:

Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.¹¹

Article 26 sets out a number of rules on who may found a media entity. If the founder is an individual, they must be a citizen who resides permanently in Azerbaijan while, if they are legal entities, 75% of the preferential shares must be held by citizens who reside permanently in Azerbaijan or by legal entities registered in Azerbaijan (Articles 26.2.2 and 26.1.2). These rules are problematical given how broadly media entities are defined.

More problematical are the prohibitions on founders in Article 26.3, which cover individuals who have been convicted of serious crimes or crimes against public morality, whose convictions have not been served or revoked, or who are regarded by a court as having limited legal capacity. This reflects a very old-fashioned approach to media regulation which is no longer justifiable in the modern world. There is no reason why someone who was once, perhaps a long time ago, convicted of even a serious crime should not be able to start a media entity or why someone still doing community service for a minor misdemeanour or under a driving ban should not as well. These rules also apply to the head of the governing body of a media entity, who must also have a higher education. It is not legitimate to impose conditions of this sort by law. While we might expect most people who reach the status of head of the governing body of a media entity to have higher education, there is no reason why someone who does not, and who is otherwise successful enough to reach this position, should be barred from occupying it.

Article 26.5 bans, entirely, any funding for a media entity by foreign natural or legal entities that are not its founders. This is far too strict. Separately, Article 69.2 provides that foreigners may sponsor up to 25% of each product of a print or online media.

4.1. Media Register

¹¹ Available at: <https://www.ipso.co.uk/media/2032/ecop-2021-ipso-version-pdf.pdf>.

Articles 73-76 of the Media Law set out the rules for the Media Register, which is run by the Agency (another role for which independence is necessary). The stated purpose of the Register is to “systematise information on media entities, including their editorial boards, as well as journalists”. In fact, however, a very important role of the Media Register is that inclusion on it creates special benefits for media entities and journalists. Thus, Article 76.1 sets out five benefits from being on the Register, including access to official announcements and advertisements; free or discounted participation in training offered by the Agency; participation in Agency projects; various financial discounts and privileges, including soft loans; and additional social security and financial benefits. Although it is welcome that these benefits are provided to journalists, at the same time this puts pressure on the independence of the Agency and likely creates opportunities for political interference in the work of the media. This is especially true for benefits like soft loans and social security benefits, which are not directly connected to the work of journalists.

The Council effectively registers licensed audiovisual media in the Register while print media, online media, news agencies and journalists have to apply. An extremely long list of 18 different types of information needs to be provided, which will then be entered into the Media Register (Article 73.7). This goes very far beyond what would be needed to “systematise information on media entities” and includes detailed ID information on a range of actors involved with a media entity (founder, head of the governing body, responsible editor and even journalists), information about the content of a print media and similar information about an audiovisual media, tax information, agreements with news agencies about content sharing, and information about the criminal records of founders and the head of the governing body. This is excessive and suggest that control, rather than systemisation, is the real goal of this system. This concern is exacerbated by the fact that from among all of this information, only the list of media entities and journalists is made public (Article 73.9). Furthermore, media entities may be removed from the Register if there is a change in any of their information which is not reported to the Agency within 14 working days (Article 75.1.7).

Article 74.1 sets out the requirements for inclusion of media entities in the Media Register, including compliance with most of Article 26 of the Media Law (see discussion above), continuous operation (defined separately for audiovisual, print and online media; see the separate sections on each of these below), and not breaching Article 13 (see discussion above). Apart from the concerns with Articles 26 and 13, and the problematical approach towards continuous operation, these requirements are overly rigid.

The rules on including journalists (Article 74.2) in the Media Register fail in important ways to respect international standards. These require journalists to have higher education, be legally



capable, not have been convicted of a serious crime or crime against public morality, have an employment agreement or individual contract (for freelancers) with a media entity which is itself registered and operates continuously, respect Article 13, have at least three years' experience working as a journalist or journalism professor, and follow professional rules of ethics. It is not legitimate to impose these sorts of conditions on journalists, which is a profession which should be open to everyone. The rules on higher education, experience and having a contract with a registered media entity, for example, are simply not justifiable. As the UN Human Rights Committee, which oversees the ICCPR, stated in its 2011 General Comment No. 34:

Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.¹²

There is also impermissible vagueness in these conditions. For example, absent a clear code of professional conduct and independent system for applying it, it would not be possible to know whether a journalist followed professional ethics.

Recommendations

- There should be no special restrictions on the logos of media entities, although these should, as relevant, be subject to content rules of general application. Media entities should not have to obtain the consent of their respective regulator to change their logos.
- Consideration should be given to removing Article 13 entirely from the Media Law. If it is retained, Article 13.2 should be amended to provide for a more general exception to copyright for reporting purposes and the reference to news agencies should be removed from Article 13.3.
- Articles 16.2 and 16.3 should be repealed; any conditions on importation of foreign broadcasting should be set out in licence conditions (perhaps alongside some general standards on this in the Media Law) while this should not be specifically regulated (beyond general rules on importation of foreign products) for the print media.
- Article 21.1 should be repealed and this matter should be left to be regulated as a professional matter by the media itself.

¹² General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 2. Available in all six UN languages at: <http://undocs.org/ccpr/c/gc/34>.

- The general requirements for founders to be permanent resident citizens or local legal entities largely owned by permanent resident citizens should be reconsidered, while the bars on who may be a founder should be revised to remove unreasonable prohibitions, with the same applying to the head of the governing board of a media entity.
- The complete ban on foreigners who are not founders from funding media entities should be reconsidered, taking into account the benefits that this may bring.
- The whole approach of the Media Registry, if it is to be maintained at all, should be reconsidered. Far less information should need to be provided and most if not all of this information should be made public. The conditions for both media entities and especially journalists to be included in the Media Registry should be fundamentally reworked. For media entities and journalists, it should be enough to be licensed or registered with the Council (audiovisual) or to provide basic information (for other media entities and journalists), without any conditions (apart from providing the information) being attached. At a very minimum, the conditions on who may be considered to be a journalist should be removed.

5. Regulation of Journalists

One of the benefits for journalists of being entered into the Media Registry is access to a press card (Article 70.1). The restrictive rules about being employed by a registered media entity for journalists to be included in the Media Registry are repeated in the part of the Media Law on press cards, with the validity of the press card being terminated on the same day as such employment (Articles 70.5 and 70.6). As with the rules for the Media Registry, these limitations are not legitimate. There is also an illogical rule on renewing the press card, which lasts for three years, which provides that the application for a new card must be made within three days of the expiry of the old card (Article 70.3).

Press cards lead to a number of benefits, including free access to public museums, galleries and cultural and public events, so as to conduct journalism, the right to be accredited, and the right to enjoy the benefits associated with enrolment in the Media Registry, listed above (Article 71.1). In terms of accreditation, Article 71.1.2, on the right of press card holders to be accredited, refers not only to State bodies but also “enterprises, organisations, and non-governmental organisations”. This is again repeated in Article 72, which focuses on accreditation. The law should not attempt to dictate to these bodies, at least to the extent that they are private (which is by definition for non-governmental organisations), who they may accredit or how.

Article 72.4 provides for accreditation to be removed where a journalist or media entity has “disseminated information that tarnishes the business reputation of the institution they are



accredited to, or have disseminated information that is distorted or untrue”, if this has been confirmed by a court. This is highly problematical, despite the apparent protection of a court ruling, since it effectively provides for retaliation in terms of accreditation for critical reporting on an accrediting institution.

Article 11.3 provides for accreditation of foreign journalists to Azerbaijan by the Agency. This is essentially repeated in Article 70.2, which provides that foreign journalists may only work in Azerbaijan where the Agency has authorised them to do so. This is appropriate only if the Agency both has the power to issue or arrange for visas for these journalists and applies this rule in an open fashion, taking into account the right to freedom of expression. Article 11.4 provides that where another State imposes “special restrictions on the professional activities of journalists” who are included in the Media Register, Azerbaijan may impose similar restrictions on journalists from that State. This is illogical since there is no benefit to Azerbaijan of restricting journalists from other States just because those States behave in that way towards Azerbaijani journalists. Where such restrictions represent a breach of the right to freedom of expression, such abuse by another State cannot possibly justify abuse by Azerbaijan of its own human rights obligations (any more than another State torturing Azerbaijanis would justify Azerbaijan torturing citizens of that State).

Recommendations

- The recommendations above relating to enrolment in the Media Registry should also apply, as relevant, to the issuance of a press card. Instead of such restrictions, anyone who in fact works as a journalist, whether full-time or part-time, and whether as an employee, volunteer or freelancer, should be eligible for a press card.
- The law should not stipulate who non-State actors may accredit or how they may do so.
- Article 72.4 should be repealed.
- The system of accrediting foreign journalists to Azerbaijan should be done efficiently and expansively, in line with the right to freedom of expression.
- Article 11.4, providing for reciprocity of treatment of journalists from other States, should be repealed.

6. Regulation of Audiovisual Media

The Media Law sets out a system for regulating audiovisual media which is both excessively complex and rigid and, at the same time, insufficiently developed in key areas. Some of the



concerns about unduly detailed and rigid rules are addressed in section 8 of this Analysis, on Undue Interference/Control.

Article 27, in tandem with the definitions in Article 1, essentially recognises three types of content providers – namely terrestrial broadcasters, platform broadcasters (which, according to Article 1.1.18, distribute their content via a platform operator, multiplex operator or directly over the Internet, although they are also subdivided into those which perform satellite broadcasting and those which do not) and on-demand broadcasters – and three types of distributors – namely platform operators (which retransmit programmes via cable, IPTV, OTT, mobile TV and/or satellite), multiplex operators and infrastructure operators (which ensure retransmission of terrestrial broadcasters content via their “base terrestrial broadcasting networks”). There are further sub-divisions among some of these categories, such as terrestrial broadcasters being sub-divided according to whether they are national or regional and television or radio, and the sub-division of platform broadcasters noted above depending on whether they perform satellite broadcasting. Cross-operations both ways between terrestrial broadcasters, on the one hand, and infrastructure and multiplex operators, on the other, are prohibited (see Article 28.1). On the other hand, platform and multiplex operators can run platform broadcasters, albeit only on the basis of having a licence for the latter (see Article 28.2).

A number of problems are apparent in this system. For example, to the extent that platform broadcasters distribute via multiplex operators, they are essentially terrestrial broadcasters. The system does not appear to allow terrestrial broadcasters, even local analogue radios, to distribute their own content (see Article 29.3). Indeed, the whole system does not appear to take the needs and situation of local, analogue radio stations into account. There is no recognition of community broadcasting or reservation of distribution options for these broadcasters (such as analogue frequencies for radio or space on digital multiplexes for television). All audiovisual media – with the exception of infrastructure operators, who are designated by executive authorities and allocated radio frequencies by the Council (see Articles 1.1.19 and 33.1) – need to obtain a licence from the Council, which for terrestrial and platform broadcasters shall be on a competitive basis. No regard appears to have been given to other options. For example, it is often not necessary to have competitions for community broadcasters and often even analogue radios which operate locally, there is no need to licence platform broadcasters which rely exclusively on the Internet for distribution, and the need to licence even terrestrial broadcasters has been done away with in many countries.

Articles 29-34 set out rules which are specific to the different types of audiovisual media, namely terrestrial broadcasters, platform broadcasters, on-demand broadcasters, platform

operators, infrastructure operators and multiplex operators, respectively, while Articles 35-38 set out some more general rules on the regulation of audiovisual media services. Our further concerns with these provisions are addressed in section 8 of this Analysis, on Undue Interference/Control.

Articles 50-56 address licensing of audiovisual media, with slightly different processes being set out for terrestrial broadcasters, multiplex operators and platform broadcasters which perform satellite broadcasting, on the one hand, and platform broadcasters which do not perform satellite broadcasting, on-demand broadcasters and platform operators, on the other. Apart from excessive rigidity, which sometimes seems impractical – such as setting out the documents which must be provided, in Articles 52.2 and 55.1, apparently without giving the Council leeway to amend this, or setting very strict deadlines, for example of 30 working days to submit an application for a licence (see Article 52.1) – our main concerns with this relate mainly to what it does not include.

In addition to not providing for community broadcasting, the licensing system does not appear to be tailored towards achieving other public interest objectives. One of the justifications for licensing broadcasters is to use the licensing process to promote these kinds of objectives, including in service of freedom of expression. As other justifications for licensing, such as scarcity of radio frequencies, wane in importance, it is more important than ever for the licensing processes to serve public interest objectives. Diversity, in particular, is a key such objective, which has been recognised as a key element of freedom of expression. Thus, the 2007 Joint Declaration of the special international mandates on freedom of expression was titled Joint Declaration on Promoting Diversity in the Broadcast Media and referred at several points to how the licensing of broadcasters could be used to promote diversity.¹³

One way to use licensing to promote diversity is to look at the impact of issuing a licence to an applicant in terms of increasing concentration of media ownership, while another is to assess whether the content the applicant is proposing to provide will increase the range of information available to viewers and listeners. Article 54.1 of the Media Law lists only three criteria to be taken into account when issuing a licence, namely the technical capacity of the applicant, the economic feasibility of the proposal and, for an application from an existing media entity, the impact of the licence on the rules governing monopolies. While the latter does correspond to some extent to the first issue listed above, namely concentration of media ownership, it is based on the general Law “On antimonopoly activities”. For the media,

¹³ Adopted 12 December 2007, <https://www.osce.org/fom/66176>.

however, a far more stringent approach towards concentration of ownership is needed and this provision would not allow the Council to take that need into account. Under the current licensing arrangements, it would not be possible for the Council to assess the diversity of the content that an aspirant audiovisual media entity was proposing.

It is also common for laws governing the regulation of the audiovisual media to contain either set rules on other diversity issues or to allow the regulator to impose standards in this area on individual audiovisual media through the licensing process. For example, above we criticised the requirement for terrestrial broadcasters to obtain the permission of the Council to use languages other than the State language, calling for this to be addressed instead through licensing. Quotas for use of Azeri in different types of broadcasters could be set out directly in the primary legislation or the Council could be given the power to set such quotas through a licence condition. The latter is more flexible and would allow for the nature of the audiovisual media to be taken into account (for example, a radio station in a big city might wish to focus on opera mostly in different languages whereas a national television station might be expected to have a higher proportion of Azeri-language content). Other diversity issues that might be addressed in this way include national content (i.e. content produced inside Azerbaijan), local content (i.e. content not produced in Baku), minority language or otherwise minority-focused content, minimum news and current affairs requirements, educational programming and so on. European Union standards also require all audiovisual media to have at least 10% of their programming prepared by independent producers (i.e. producers who are not part of the audiovisual media entity). None of this is present in the current Media Law.

Recommendations

- The entire approach towards regulating audiovisual media should be reconsidered in favour of an approach that is simpler, less rigid and more aligned with the right to freedom of expression.
- In particular, the following general issues should be taken into account:
 - The definitions of and rules for the different types of audiovisual media should be reconsidered.
 - The system should be tailored to include and promote both analogue radio and community broadcasting.
 - The primary licensing requirements should be amended. Consideration should be given to removing licensing requirements entirely for audiovisual media which engage only in content production or which distribute exclusively over the Internet or mobile technologies. Non-competitive licensing should be allowed where appropriate (i.e. where



competition for a particular type of license is low, as well as where there is no need to limit the number of licences).

- The licensing process, to the extent that it is retained, should be used to promote media diversity. The following should be considered in this regard:
 - Allowing the Council to take wider concentration of ownership issues than just those set out in the Law “On antimonopoly activities”, as well as the contribution of the proposed programme content to the diversity of content available to listeners and viewers, into account when deciding between competing licence applications.
 - Incorporating other diversity issues – such as languages, national and local content, news, educational and other public interest genres, and the idea of minimum quotas of independent productions – into the licensing process, whether directly in the primary legislation or by giving the regulator the power to address this.

7. Regulation of the Print/Online Media

Chapter 6 of the Media Law, running from Articles 59-69, covers the print and online media and to some extent news agencies. Article 59.3 defines periodical publications as newspapers which are published at least once per month and 12 times per year with a circulation of at least 100 copies, or magazines and other publications which are published at least twice per year. Newspapers, in turn, are grouped into weeklies (published at least once per week), dailies (published at least five times per week) and newspapers published every other day (published at least three times per week) (Article 59.4). Article 59.7 sets the rules for a newspaper to be considered as a continuous publication (required for enrolment in the Media Register), for example with dailies being able to take a break for only up to 12 issues per year. In terms of content, newspapers are grouped into current affairs (at least 75% of the content is news and current affairs content) and themed (at least 75% of the content focuses on a particular theme) (Article 59.5). Obviously this does not cover all options for newspapers so it is unclear how other newspapers might be categorised. There are also geographic categories (national and regional, Article 59.6). All of this is completely unnecessary, unduly rigid and creates possibilities for interference and abuse. It is quite enough to have a simple registration system for the print media (indeed, even this is not strictly necessary), without breaking this sector down into all of these different categories and imposing detailed conditions on continuity.

Neither print media nor online media need permission from a State body to operate but they must apply to the Agency seven days before they commence operations (Articles 62.1 and 62.2), which is essentially the same procedure for enrolment in the Media Register (Article



62.3). As noted above, this is overly rigid and incorporates illegitimate conditions from other provisions in the Law (such as Articles 13 and 26).

There are extensive rules on what information both print media and online media must publish. The former must display, on each issue, among other things, the name, address and contact information for both the newspaper and the printing house, taxpayer identification number, editor's name, number, date of publication, time of "signing for printing", circulation and price (Article 63). Online media must provide the following information on their website so that it is accessible from the home page: name, taxpayer identification number of copies, owner of the domain name, responsible editor's name, address and contact information, and the date that it was first published (Article 60). None of this is very objectionable but it is overly rigid and strict.

Both print and online media must keep editorial materials for a full year (Article 67.1). This is unnecessarily long, especially for print media given the deposit rules. These require the publishing house to send free copies to the founder, State archive and relevant libraries (Article 68).

Recommendations

- Consideration should be given to removing the excessively detailed classification of different types of print media and the unduly rigid rules around continuity of publication (as well as the system for enrolment in the Media Register), and replacing it with a simple registration system whereby registration is automatic upon the provision of some basic information about the media outlet. A similar approach should be taken to online media.
- Consideration should be given to limiting and simplifying, if not doing away with entirely, the mandatory publication rules for both print and online media.
- Similarly, consideration should be given to shortening the period online and especially print media must keep editorial materials.

8. Undue Interference/Control

The Media Law contains a number of provisions which, without necessarily being directly or clearly contrary to international law standards, are overly rigid or controlling and/or open up the possibility of interference. We noted above, in section 3, that bodies which regulate the media need to be protected against interference. Even if this is done in a robust manner, it is still not appropriate to give regulators too much power over the operations of media entities,

which can lead to unnecessary interference and undermine the efficiency of the media. Furthermore, even in the most established democracies with the most robust media laws, there is always a risk of political interference in the operations of media regulators. That risk is very significantly higher in Azerbaijan given its poor record on respecting freedom of expression and the problems with the independence of the Council, noted above.

This section does not claim to be comprehensive in terms of identifying provisions which are overly rigid or controlling and/or open up the possibility of interference. Rather, the idea is simply to highlight this as a recurring problem in the Media Law. A good example of this is the rules set out in Articles 7-9 of the Media Law which address, respectively, media work during martial law and states of emergency, media work in areas where a special operation against religious extremism is taking place, and media work in areas where an anti-terror operation is taking place. We refrain from commenting on the conditions under which such restrictions might be legitimate, as this is beyond the scope of this Analysis. However, these rules allocate very broad discretion to different authorities to control the activities of the media. For example, Article 8.1 states that the activities of media workers in areas where a special operation against religious extremism is taking place “shall be determined by the body conducting the operation”. No conditions of any sort are placed upon this power. Given the sensitivity of such an operation, it is obviously of the greatest importance that the media be able to report on it, and that the public receive information about it, subject only to overriding operational needs. At the same time, the incentives for the body conducting the operation to limit reporting on it, including to avoid the burden of accountability as well as actual accountability, are fairly obvious. As such, this sort of unfettered power will almost inevitably be abused. This problem is exacerbated by Article 72.6, which provides that only media entities and journalists who are included in the Media Register may work in the areas covered by Articles 7-9.

A less serious example, but one which still highlights the overreach of the rules, is Article 26.6. This requires audiovisual media to report on prospective changes to their participants (such as their founders) to the Council one month before making any such change. While it is normal to report such changes after they are made, this requirement not only creates operational challenges for audiovisual media but it also allows for interference by the Council in this process. That is clear from the second sentence in this provision, which requires the Council to issue a “substantiated conclusion on the compliance of the change with the requirements of this Law”. In other words, the Council effectively vets prospective participants in advance, an entirely illegitimate form of control.



The general rules on regulation of audiovisual media contain a host of unnecessary and unduly restrictive rules. For example, Article 39.3 sets out the rules for audiovisual broadcasting on “national grief, Remembrance and mourning days”. These include a broad ban on content such as comedies, quiz shows, even entertainment and indeed any “other programmes that run counter to the essence of” the day, and any advertisements (except on Remembrance Day), as well as requirements to provide information about the day every two hours and to observe a minute of silence at noon. Not only are these rules wholly excessive but they are also extremely unclear inasmuch as they cover any programme deemed to be contrary to the essence of the day. The Council may suspend the operations of an audiovisual media for 24 hours for breach of these rules (Article 41.1.1), an extreme sanction even for a far more serious breach. The potential for abuse of these provisions is clear.

There are also a number of restrictions on commercial relations pertaining to different types of audiovisual media which do not appear to have any justification. Terrestrial broadcasters must disseminate their programmes via infrastructure and platform operators; they may not charge the latter a fee for this (Article 29.3) and the agreement they are required to conclude with an infrastructure operator shall involve paying the latter a fee, which is set by a body designated by the executive (Articles 29.4, 33.3 and 33.5) rather than the market. Platform operators are required to sell programmes to users on a contractual basis (Article 32.3) and may transmit a platform broadcaster’s programmes again on a contractual basis (Article 32.6). An infrastructure and operator may not provide paid retransmission services to users (Article 33.4). On the other hand, a multiplex operator must sell programmes to users on a contractual basis (Article 34.3). Various provisions in Article 38 seek to set rules governing intellectual property rights, even though these are presumably already set out in Azerbaijani law. The need or indeed benefit of any of these provisions is very unclear. Instead, they would appear to constrain the ability of audiovisual media to operate in commercially flexible and advantageous ways while also opening up the possibility of official censure for breaching these rules.

Another area where the rules are unduly onerous and controlling is in terms of reporting to the Council. For example, each on-demand broadcaster must submit to the Council not only information about all of the programmes it offers, but also the agreements it has concluded giving it broadcasting rights to those programmes (Article 31.3). In a similar fashion, a platform operator must provide the Council with a copy of any agreement it has concluded with a foreign broadcaster (Article 32.4) and update, with the Council, the list of broadcasters the programming of which it retransmits in the first week of each month (Article 32.8). Very similar requirements apply to multiplex operators (Articles 34.5 and 34.7). All broadcasters



must submit to the Council copies of any agreements they have with authors to broadcast the latter's programmes (Article 38.1). These requirements are unnecessary and unduly controlling.

Recommendation

- The whole of the Media Law should be reviewed carefully with a view to repealing provisions, such as the ones identified above but including any others which are not strictly necessary and which impose constraints on audiovisual media, which give regulators undue power to interfere in the operations of audiovisual media or which create opportunities for political interference in the operations of audiovisual media.

9. Sanctions

Excessive sanctions, on their own, represent a breach of the right to freedom of expression even if some sanction is warranted. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, for example, the European Court of Human Rights held that sanctions on their own had to bear a "reasonable relationship of proportionality to the injury to reputation suffered".¹⁴ Suspension of a media outlet, let alone revocation of its licence or the termination of it, is an extreme sanction which can be justified, if at all, only in very exceptional circumstances. In contrast to this, the Media Law provides for suspension and even termination extremely frequently.

For example, Article 41.1 provides for the Council to suspend the operation of audiovisual media for 24 hours for breach of various provisions within Articles 14.1 and 39, both of which have already been critiqued as being unduly restrictive, or for breach of the rules on geographic distribution in the licence. These include, among others, providing special warnings about the harmfulness of tobacco. The disproportionality of suspending an audiovisual media for 24 hours just for this is self-evident. Article 41.2 provides for a suspension of between one day and one month for breach of the rules relating to operating in situations of martial law, special operations against religious extremism or anti-terrorism activities, related provisions of Article 14.1, disrespecting State symbols and making open calls for a forcible change of the constitutional order. While some of these actions might represent

¹⁴ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49.



quite serious breaches of the law, others would not (including disrespecting State symbols) and providing for a minimum period of suspension for this is again disproportionate. Ironically, Article 41.5 calls for the broadcaster to provide information through its television or radio stations during the period of the suspension (which does not seem possible).

Article 57.1, again covering audiovisual media, calls for licence suspension where a licence holder fails to comply with an instruction of the Council or has not paid an infrastructure operator the service fee for six months. It is not clear why the Council would get involved in a commercial dispute between a licence holder and an infrastructure operator at all, let alone by suspending the former's licence, while the automatic provision for suspension merely for not complying with a Council instruction is, once again, disproportionate.

Article 58.1 sets out 12 circumstances in which the licence of an audiovisual media shall be cancelled, an even more severe sanction than suspending the licence. These include, among other things, where the founder fails to meet the conditions of Article 26 (criticised above), where the original licence information is found to contain errors (which might be very minor in nature), where the grounds for suspension in Article 57.1 (criticised above) are not eliminated before the suspension comes to an end, or where broadcasting is not carried out within the geographical parameters provided for in the licence. Once again, this is disproportionate.

Article 65.2 sets out circumstances in which the operations of a print or online media shall be suspended by a court for up to two months, while Article 65.4 sets out circumstances in which these operations shall be terminated. The former include cases where a person without higher education is appointed as head of the governing body; where a person who received an administrative penalty for "abusing freedom of activity in the field of media and for abusing a journalist's rights", whatever exactly that might mean, repeats the offence within one year; where either a print or online media has been warned three times in a year by the Agency for breaching Articles 13.1 or 13.2 (criticised above) or a print media breaches Article 14.1 (also criticised above) and repeats the violation; where a print or online media is found to have received funding from a foreign source who is not its founder (subject to the rules on foreign sponsorship); or where a print media outlet does not publish in each edition the information required under Article 63 (its name, taxpayer identification number and so on). While some of these could represent serious offences, for the most part they are either not legitimate in the first place or are far too minor to warrant even contemplating the application of such a severe sanction as suspension.



For its part, Article 65.4, calling for complete termination of the media entity, shall apply where breaches of Article 65.2.1 are not remedied or breaches of 65.2.2-5 are repeated within two years following a suspension; where Articles 26.1-4, imposing conditions on founders and criticised above, are breached; where a media outlet has not applied to the Agency prior to starting operations; or where one month has passed since a print or online media was removed from the Media Registry for failing to update its information or two months have passed since it was removed for failing to operate continuously, and the situation has not been resolved. Once again, although some of these breaches might be quite serious, such a rigid, inflexible approach to applying the most severe sanction available to a media outlet is neither necessary nor proportionate, and hence not legitimate.

Both suspensions and termination of a media entity, whether done via the licence or a court order, are extreme sanctions which should be applied very rarely if at all. Better practice is to make it clear in the law that these are exceptional measures which may only be applied in exceptional cases, normally after repeated breaches which less draconian sanctions have failed to address. None of these conditions are provided for in any of the provisions described above.

Recommendations

- The law should provide for a graduated system of sanctions, starting with lighter sanctions such as warnings, requirements to acknowledge the breach publicly (for example by disseminating a statement to this effect through the media entity) and fines, and only envisaging the extreme sanctions of suspension or termination of a media entity in exceptional circumstances, normally involving repeated breach of the rules which lighter sanctions have failed to remedy.
- Provisions imposing sanctions for rules which are problematical in the first place, as indicated in other sections of this Analysis, should be repealed.

10. Other Comments

A number of provisions in the Media Law refer to the binding nature either of other provisions in the same law or of provisions in other laws. Just to give a few examples, Article 6.2 states: "It is unacceptable to illegally interfere in journalists' professional activities." This effectively says that it is unacceptable to commit legal wrongs against journalists, which is obvious. Article 13.4 states: "In the cases provided for in Article 77.2 of this Law, media entities shall not be liable for the accuracy of information and data." That simply restates what Article 77.2 already says. Article 20.1 states: "The use of items subject to copyright and related rights in

the media is allowed in compliance with the requirements of the Law of the Republic of Azerbaijan "On copyright and related rights". Again, this does not say anything new since that other law already establishes this requirement.

Article 17 is a bit different. It seeks to establish a right on the part of media entities and journalists to receive information from various State bodies. It sets out limited procedures governing this right and establishes a very general right to complain about refusals (without providing any details about how this will work). Azerbaijan already has a rather strong Law "On right to obtain information".¹⁵ As such, there is no need to provide for a far more general parallel system for this right in the Media Law. Article 17.3 of the Media Law does provide for the expedited provision of information where it is needed on an urgent basis by a journalist, which it might be useful to retain.

Recommendations

- All of the provisions in the Media Law which simply reaffirm the binding nature of either other provisions in that same Law or provisions in other laws are unnecessary and should be repealed.
- Article 17 of the Media Law, providing for the right to access information, should be repealed apart from the part on expedited provision of information in Article 17.3.

¹⁵ Available in English translation at: <https://www.rti-rating.org/wp-content/uploads/Azerbaijan.pdf>. The RTI Rating run by the Centre for Law and Democracy and recognised as the leading methodology for assessing the strength of the legal framework for access to information rates the Azerbaijani legal framework for this as being in the top 20 of all such laws globally. We take no position on how well that law is being implemented. See <https://www.rti-rating.org/country-data/>.