MEMORANDUM

on

the Law of Broadcasting through the establishment of the Independent Media Commission

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This memorandum analyses the draft Kosovo "Law of Broadcasting through the establishment of the Independent Media Commission" (the draft Broadcasting Law), as received by ARTICLE 19 in April 2003. Enactment of this Law is a requirement under the Constitutional Framework for Provisional Self-Government, established in UNMIK Regulation 2001/9, which states that an independent media commission is to be set up to regulate broadcast media "consistent with [human rights treaties] and the best European practices."[1] The Independent Media Commission will take over broadcast licensing and related regulatory functions of the Temporary Media Commissioner.[2]

This Memorandum analyses the draft Broadcasting Law against international standards on freedom of expression. Two standard-setting documents will be relied on in particular: Council of Europe Recommendation No. (2000)23 on the independence and functions of

[1] Constitutional Framework for Self-Government, UNMIK/REG/2001/9, 15 May 2001.
[2] Under UNMIK Regulation 2000/36, the TMC was responsible for the broadcasting regulatory regime in Kosovo pending the establishment of a regulatory regime.

regulatory authorities for the broadcasting sector,[3] and ARTICLE 19's *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*.[4] The former represents standards developed under the Council of Europe system while the latter takes into account wider international practice, including under United Nations mechanisms as well as comparative constitutional law and best practice in countries around the world. This Memorandum first outlines Kosovo's international and constitutional obligations, emphasising the important of freedom of expression and its implications as regards broadcast regulation. It then examines the draft law in further detail, offering suggestions for improvement.

II. International and Constitutional Obligations

II.1. The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[5] a United Nations General Assembly Resolution, guarantees the right to freedom of expression in the following terms:

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

The right to freedom of expression is also guaranteed in the *International Covenant on Civil and Political Rights* (ICCPR),[6] also at Article 19, and the *European Convention on Human Rights*,[7] which guarantees freedom of expression at Article 10. Under Chapter 3 of UNMIK Regulation 2001/9, all three instruments are binding on the Kosovo authorities and are directly applicable within Kosovo.[8]

UNMIK Regulation 2001/9 guarantees to "all persons in Kosovo … without discrimination on any ground and in full equality, [the enjoyment of] human rights and fundamental freedoms."[9] The right to freedom of expression and information is protected separately through Article 4(4) of that Regulation, which states that communities and their members "shall have the right to … enjoy access to information in their own language [and] provide information in the language … of their community, including by establishing and maintaining their own media."[10]

[3] Adopted by the Committee of Ministers on 20 December 2000.
[4] London, April 2002.
[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[7] Adopted 4 November 1950, in force 3 September 1953.
[8] Note 1.
[9] Note 1, Article 3(1).
[10] Note 1, Article 4(4), at (c) and (i).

II.2. The Importance of Freedom of Expression

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I)[11] which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

The European Court of Human Rights has held:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[12]

Statements of this nature now abound in the case law of the European Court and in cases decided by constitutional and human rights courts around the world.

II.3. Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 10(2) of the ECHR also recognises that freedom of expression may, in certain prescribed circumstances, be limited:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

It follows that restrictions must meet a strict three-part test, requiring any interference to be (1) prescribed by law, (2) pursue one of the legitimate aims listed and (3) be necessary in a democratic society.[13] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human

[11] 14 December 1946.
[12] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[13] See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.

Rights has stated:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[14]

The European Court of Human Rights has held that the requirement that an interference is 'prescribed by law' will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[15] Second, the interference must pursue a legitimate aim. These are the aims listed in Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be "proportionate to the aim pursued."[16]

II.4. Broadcasting Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[17]

Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

> [I]t is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[18]

This applies particularly to information which, although critical, is important to the public interest:

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[19]

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[14] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[15] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, para. 49.
[16] *Lingens v. Austria*, 8 July 1986, Application No.9815/82, paras. 39-40.
[17] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser.A) No.5, para. 34.
[18] *Thorgeirson v. Iceland*, note 14, para. 63.
[19] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights), para. 45.

This does not imply that the broadcast media should be entirely unregulated; Article 10 of the ECHR states that the right to freedom of expression "shall not prevent States from requiring the licensing of broadcasting … enterprises". However, two key principles apply to broadcast regulation. First, any bodies with regulatory powers in this area must be independent of government. Second, an important goal of regulation must be to promote diversity in the airwaves. The airwaves are a public resource and they must be used for the public benefit, an important part of which is the public's right to receive information and ideas from a variety of sources.

II.5. Independent Regulatory Bodies

Any bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments, including both Council of Europe Recommendation (2000)23 and ARTICLE 19's key standard-setting work in this area, *Access to the Airwaves*. Central to both is that regulatory bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, and which includes guarantees against dismissal and rules on conflict of interest.[20]

Chapter II of the Appendix to the Council of Europe Recommendation states:

> 3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.
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> 4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
>   - regulatory authorities are under the influence of political power;
>   - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
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> 5. Furthermore, rules should guarantee that the members of these authorities:
>   - are appointed in a democratic and transparent manner;
>   - may not receive any mandate or take any instructions from any person or body;
>   - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.
>
> 6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
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> 7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person

[20] Articles 3-8 of the CoE Recommendation; Principle 13 of *Access to the Airwaves*.

concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.

8. Given the broadcasting sector's specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence.

Principle 10 of *Access to the Airwaves* notes a number of ways in which the independence of regulatory bodies should be protected:

> Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
> - through the rules relating to membership;
> - by formal accountability to the public through a multi-party body; and
> - in funding arrangements.

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[21]

II.6. Pluralism

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights has stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[22] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[23] This implies that the airwaves should be open to a range of different broadcasters and that the State should take measures to prevent monopolisation of the airwaves by one or two players. However, these measures should be carefully

[21] *Athukorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, (1997) 2 BHRC 610.
[22] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, para. 38.
[23] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* note 17, para. 34.

designed so that they do not unnecessarily limit the overall growth and development of the sector.

The same approach is reflected in many national policies and laws. Both German and French constitutional courts, for example, have held that the State is under an obligation, when designing a regulatory framework for broadcasting, to promote pluralism. The French Conseil Constitutionnel, assessing the legitimacy of a 1986 law on communications, found that the principle of pluralism of information was of constitutional significance.[24] Similarly, the German Constitutional Court has consistently held that broadcasting must be structured in such a way as to ensure the transmission of a wide range of views and opinions.[25]

The obligation to promote media pluralism incorporates both freedom from unnecessary interference by the State, as well as the need for the State to take positive steps to promote pluralism.[26] Thus, States may not impose restrictions which have the effect of unduly limiting or restricting the development of the broadcasting sector and, at the same time, States should put in place systems to ensure the healthy development of the broadcasting sector, and that this development takes place in a manner that promotes diversity and pluralism.

III. Analysis of the draft Broadcasting Law

III.1. Overview

The draft "Law on Broadcasting through the Establishment of the Independent Media Commission" is based on Article 5(4) of UNMIK Regulation 2001/9, which states:

> The Provisional Institutions of Self-Government shall [regulate] broadcast media consistent with [human rights treaties] and the best European practices through an independent media commission, whose members will be appointed by the Provisional Institutions of Self-Government from nominations submitted by non-governmental and non-political organisations in Kosovo; these members will include both genders and will reflect the ethnic and regional diversity of Kosovo society.

In accordance with this mandate, the draft Law establishes, in section 1, an Independent Media Commission to regulate and supervise all civilian broadcasting in Kosovo. Under Chapter II of the draft Law, the Commission will be composed of two bodies: a seven-member Council (to be reduced to five members two years after determination of Kosovo's final status) and the Office of the Executive Director. The Council will draw up a broadcasting policy and a frequency plan, and it will have exclusive authority to decide on licence applications and impose sanctions for a breach of licence conditions. The Office of the Executive Director will implement broadcast policy, issue licences (following a determination of the Council) and make recommendations to the Council, for example to institute sanctions. Council members will be nominated and appointed by the Special Representative of the Secretary General (until determination of Kosovo's

[24] Decision 86-217 of 18 September 1986, Debbasch, 245.
[25] See, for example, the *First Television* case, 12 BverfGE 205 (1961).
[26] See Principle 3 of *Access to the Airwaves*, note 4.

final status) together with the Assembly of Kosovo and civil society while the Executive Director will be appointed by the Council. Chapter III of the draft Law sets out the regime for issuing and renewing broadcast licences, including the determination of specific licence conditions. Breach of licence conditions may lead to sanctions imposed by the Council upon the recommendation of the Executive Director. Chapter IV specifies the Commission's sources of funding and Chapter V contains transitional provisions.

In the following sections, we analyse each of these chapters in detail, providing suggestions and recommendations. We found several apparent drafting errors and internal inconsistencies throughout the draft Law; we have indicated them in footnotes.

III.2. Independence and Composition of the IMC

Section 1 of the draft Law establishes the Independent Media Commission (IMC) as an entity independent from other government organs, consisting of two bodies: the Council and the Office of the Executive Director.

Section 3 provides that the Council will be composed of seven members, two of whom will be international members and five resident members. This is a temporary situation; two years after the determination of Kosovo's final status, the Council will be composed of resident members only. The international members will be appointed by the Special Representative of the Secretary General (SRSG). One of the resident members will be nominated and appointed by the Assembly of Kosovo (the Assembly), in a process that is open and transparent. This member will be approved by an Assembly vote of 60% or more. Four other members will be nominated and appointed by "registered journalists' associations, broadcasters' associations (excluding associations of public broadcasting services), and non-governmental organisations involved in the media sphere and protection of freedom of speech." The procedure for nominations will be initiated when the Executive Director sends an invitation to all authorised nominators (the groups mentioned above). The authorised nominators will nominate, by consent, one member for each vacancy, which the Assembly is obliged to ratify in a *pro forma* vote. If the authorised nominators cannot reach a consensus, the draft Law provides two, inconsistent, procedures. Section 3(4)(f) requires the Deputy SRSG/OSCE Head of Mission to make an appointment while pursuant to section 3(4)(h), the Executive Director is to forward to the Assembly those candidates supported by the majority of nominators. It is possible that the former procedures is intended as an exceptional measure pending determination of final status, although this is not mentioned explicitly.

Section 3(6) requires all Council members to "possess expertise and experience that will enable them to contribute significantly to the functions of the Council." Section 3(7) sets out a number of rules of incompatibility, namely that no person may become a member of the Council if s/he is in active employment of the public service, holds elected public office, is a member of the executive body of a political party, has direct or indirect financial interests in broadcasting or telecommunications industries or has been convicted of a crime involving violence or dishonesty for which s/he has not been pardoned.

According to section 4, international Council members will serve 18-month terms – the initial term of one of them being twelve months – while resident Council members will serve terms of two years – the initial term for two of them, to be determined through a lottery, will be one year. Council members may be re-appointed for one or more additional terms. Section 5 provides for the removal of Council members by a 60% vote in the Assembly on the grounds that one of the rules of incompatibility applies, that the member has failed, without valid excuse, to attend three consecutive meetings, or that the member is using his or her appointment for personal benefit or for the benefit of any party other than the IMC.

Under section 6, the Council will meet at least once every three months, its quorum shall be four and it will elect a chair and vice-chair from among its members who will serve one-year terms (renewable).

The Office of the Executive Director, the second formal body of the IMC, will be headed by the Executive Director. An initial, acting Executive Director will be appointed by the Assembly in consultation with the Government and will remain in office until the Council appoints[27] the first formal Executive Director by a majority vote of at least four, following an open and competitive process. The rules of incompatibility for the Executive Director are the same as those provided in section 3(7) for Council members. The Council may remove the Executive Director from office if one of the rules of incompatibility applies, or if it becomes apparent that s/he is no longer able to fulfil his or her duties effectively.

Section 9(2) states explicitly "The Executive Director and staff shall neither seek nor accept instruction in the performance of their duties from any authority other than the, except as provided by law (*omission in original*)". Section 9(3) provides: "The Executive Director and staff shall not use their appointments for personal benefit, or for the benefit of any party or entity other than the IMC."

Analysis

Section 1 states that the IMC shall be established as a body independent of other government entities. While this is a positive statement of principle, independence could be further bolstered by the addition of two key factors. First, nowhere does the draft law establish the exact legal status of the IMC. There appear at least two possibilities. The IMC could be a public law entity, or the IMC could be a government organ. The mention that the IMC shall be independent from other government entities suggests the latter, but this is not clear. Clarity of legal status is an important matter, closely linked to institutional autonomy, and needs to be addressed in the law.[28] Second, the draft Law fails to establish an overriding guarantee of independence, protecting the IMC not only from interference by government entities but also from political parties, economic pressures and any other undue influences. Principle 11 of *Access to the Airwaves* provides the following drafting recommendation:

[27] There is a drafting error in section 2(7), which sets out two quite different rules which should be separate paragraphs.

[28] See Principle 10 of *Access to the Airwaves*, note 4.

> The [regulatory body] shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the [regulatory body] in the discharge of their duties, except as specifically provided for by law.

The kernel of such a protection is provided to the staff of the Office of the Executive Director, through section 9(2),[29] but the same is not extended to the IMC as a whole or to members of the Council. Similarly, although section 5 provides for the removal for a member of the Council for use of his or her position for personal benefit, or for the benefit of others, the draft Law fails to require that they should serve in their individual capacity, independent from their nominators, and that they should exercise their functions at all times in the public interest. Such a requirement has been provided with regard to the Executive Director and his or her staff, in section 9(3).

Another important requirement for the IMC, as mentioned in the Constitutional Framework for Provisional Self-Government, is that the IMC as a whole should be gender-balanced and reflect the ethnic and regional diversity of Kosovo society.[30] This requirement is lacking from the draft Law.

With regard to the composition of the IMC Council, we welcome the inclusion in the appointment process of both the Assembly and civil society actors. However, we are concerned that the procedure for the appointment of civil society members will be problematical in practice. The procedure appears to require a number of civil society actors to achieve consensus on their nominations for theses positions. We are concerned that such co-ordination may in reality not be possible. If this is the case, the fall-back option – that either the SRSG/Head of Mission or makes a recommendation to Parliament or that the Executive Director will nominate those individuals with the greatest level of support – will become the rule rather than the exception. The latter process, in particular, could be controversial and could lead to a situation where the Executive Director played a decision-making role in the appointment of his or her own governing board. We suggest that other avenues are sought to provide for civil society nominations. For example, civil society groups could be required to provide a shortlist of candidates, which the Assembly votes on. Alternatively, different positions could be allocated to different sectors of civil society, and these sectors asked to provide a shortlist of that position.

We are also concerned that the group of 'authorised nominators' from civil society is too narrow and should be broader than the journalists and media freedom groups mentioned. For example, NGOs with a more 'general' human rights focus should be included, along with minority rights groups. Consideration should also be given to including professional groups, such as academics and/or the legal profession. The activities of the IMC will have an important impact on the right of Kosovo society as a whole to receive information, not just broadcasters' right to freedom of expression.

[29] Again there is a drafting error and part of the sentence in section 9(2) is missing.
[30] Note 1, Article 5(4).

Finally, pursuant to section 6, the quorum of the Commission shall be four. While this will be appropriate in the initial phase, when there will be five resident members and two international members, this should be lowered to three when the two international members leave office and membership is reduced to five.

Recommendations:

- The draft Law should specifically protect the independence of the IMC, its bodies, members and staff.
- The draft Law should require that the Council as a whole should reflect the diversity of Kosovo society, including in relation to gender.
- The draft Law should require that Council members shall serve in their individual capacity, independent from their nominators, and that they shall exercise their functions in the public interest.
- The procedure for civil society nominations should be reconsidered in favour of a more workable procedure.
- A wider section of civil society actors should be included in the nominations process.
- When the membership of the IMC Council is reduced to five resident members, the quorum should be set at three.

III.3. Functions

Section 1 of the draft Law states that the general function of the IMC is to "regulate and supervise all aspects of the civilian broadcasting system within Kosovo, including the implementation of a broadcasting policy". To achieve this, section 1(5) states that the IMC may issue rules and regulations as it sees fit, subject to the approval of the Assembly of Kosovo. Section 28 specifies that implementing rules are issued by the Office of the Executive Director, following public consultation with 'civil society elements'.

Pursuant to section 2, the Council will draw up the broadcasting policy in consultation with "such interested parties as [it] may wish to consult". The broadcasting policy should be consistent with international standards, having "full respect for democracy and the rule of law and the protection of freedom of expression." Section 2(3) specifies that the broadcasting policy "shall promote locally produced programming … promote a diverse range of quality broadcasting services and programming serving the widest possible geographic distribution serving all language and cultural groups in Kosovo … require stations to set aside broadcasting time for public service announcements … and respond to the public's right to know through the promotion of accurate and informative programming. It shall contain provisions that prevent the capture of excessive market share of broadcasting … by establishing objective criteria for media ownership … The … policy shall be subjected to public review and debate through open fora with leaders of civil society, government, the Assembly, and broadcasters."

Section 2(5) states that the Council, together with the Office of the Executive Director, will draw up and review annually the frequency plan.

Under section 2(9), the Council will have "exclusive authority" to decide on licence applications and to approve licence conditions.

Section 7 provides that the Office of the Executive Director will "administer all facets of the broadcasting policy", "taking into account community needs and market capacity" (section 7(5)). Section 7(2) states that the Office may "make recommendations to the council regarding matters of policy, and matters relating to budget and administration." Pursuant to section 7(3), the Office draws up the annual budget proposal, to be approved by the Council. The Office will also be the body that physically issues licences, upon approval of an application by the Council. In addition, it will determine procedures for assessing licence applications. Finally, under section 7(6) the Office will carry out an annual performance review of the public broadcaster, RTK.

Analysis

Section 2(3) is unnecessarily vague and open-ended and we are concerned that some of the functions are not compatible with the right to freedom of expression. This is specifically the case with the requirement that all stations should set time aside for public service announcements. Requiring private broadcasters to carry certain types of messages is both unnecessary and may be abused. Public messages are a matter for editorial decision-making and should not be imposed as a legal requirement. Such requirements are very rare in other countries and yet media coverage of matters of public importance is perfectly adequate. The best way to ensure such coverage is by promoting a diverse, independent broadcast media, not by imposing obligations on the media.

Furthermore, positive obligations of this sort are open to abuse. Independent broadcasters may be harassed, and even closed, for allegedly failing to fulfil these vague requirements. In addition, public bodies may abuse their right to have messages carried in the broadcast media. Even in relation to public service broadcasters, the Committee of Ministers of the Council of Europe has voiced concern over "must-carry" requirements, stating:

> The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.[31]

In addition, it is not sufficient merely to empower the Council to draw up rules to prevent media concentration or to promote local content. Both are complex and highly controversial issues that will have a significant impact on the ability of persons and groups to have access to the broadcast media. Rather than to leave these matters for the Council to decide, the draft Law should provide detailed criteria. For example, with regard to the promotion of local content, the draft Law could set a minimum percentage, to be implemented gradually.[32] Similarly, with regard to media concentration, the draft

[31] Recommendation R (96) 10 on the guarantee of the independence of public service broadcasting, adopted 11 September 1996, clause VI.

[32] See the *European Convention on Transfrontier Television*, E.T.S. 132, in force 1 May 1993, as amended by the *Protocol Amending the European Convention on Transfrontier Television*, E.T.S. 171, in force 1

Law should be more specific on the number of broadcast licences one person or group can hold simultaneously, and whether there should be restrictions on cross-media ownership.

Finally, section 1(5) appears to require all rules and regulations issued by the IMC to be approved by the Assembly. We doubt whether this is necessary. In practice, such a requirement may even prove to be counterproductive, delaying and potentially politicising even purely technical regulations.

Recommendations:

- The functions of the Council should be stated in clear and detailed terms.
- The draft Law should provide specific rules on concentration of ownership and on the minimum required level of local programming, taking into account the overall financial and economic situation of the broadcast sector.
- The 'must carry' requirement in section 2(3) should be removed.
- The requirement that all rules and regulations issued by the IMC shall be ratified by the Assembly should be reconsidered.

III.4. Licence Applications, Renewals and Conditions

Sections 10 and 11 of the draft Law provide that no-one may broadcast without a licence issued by the IMC, except for KFOR and the UN. Only residents of Kosovo, or entities with recognised legal status in Kosovo, may hold a broadcast licence. Political parties, or groups or organisations controlled by them, may not hold a broadcast licence, and individuals who have been convicted of a crime involving violence or dishonesty are similarly prohibited from holding a broadcasting license. The IMC may issue licences subject to such conditions as it deems necessary, with the proviso that licences of the same class should be subject to the same conditions. Radio licences will be valid for a period of five years and TV licences for a period of seven years. There is a presumption of renewal, unless the broadcaster was in material breach of licence conditions during the previous license period.

All licence applications are to be addressed to the IMC, and in considering the application the Council has to take into account a number of factors, including the financial viability of the proposed operation, technical capacity to deliver the programming, the need to serve all communities in Kosovo, the degree to which the proposed programming will contribute to the "development of programme production in Kosovo",[33] and whether there are any competing applications. Section 12 requires the Office of the Executive Director to widely publish a notice inviting applications whenever it proposes to issue further broadcasting licences. Applicants may make representations, and within 60 days of the closing date for tenders, the Office of the Executive Director shall inform all applicants of the result of their application. Section 13

October 2000, Article 10.

[33] Section 11(4)(e).

requires the licensing process to be fair and transparent. The Office of the Executive Director is required to provide written reasons for all decisions taken with regard to licence applications. Any refusal may be appealed for reconsideration to the IMC Council (mentioned, confusingly, in the part headed 'sanctions reconsideration process'). Council decisions shall be made public, except for those portions that contain sensitive or proprietary information from the applicant.

Every broadcaster is required to submit to the IMC an annual report including information on programming and compliance with licence conditions, a detailed financial report and such other information as the Office of the Executive Director deems necessary. All reports will be made public, with the exception of those portions that are sensitive 'as determined by the Office of the Executive Director'.

Analysis

The licensing process, on the whole, is fair and transparent. We welcome that written reasons will be provided for every application, and that applications for the renewal of licences issued by the Temporary Media Commissioner will be approached on the basis that they should be renewed. However, we do have two recommendations.

First, the factors which the Council shall take into account when considering a broadcast licence are in themselves non-controversial. However, they omit to mention one important further consideration, namely wider broadcasting policy.

Second, section 10(5) states that licences may be issued subject to such conditions as may be imposed by the IMC. Although it is non-controversial that licences are issued subject to conditions, the draft Law should be more specific on the kind of conditions that may be imposed to limit the discretion of the IMC. In particular, it should require that conditions may be imposed only where these are consistent with broadcast policy, and that licence conditions shall be reasonable and realistic given the licensee.[34]

Recommendations:

- An additional criterion for assessing licence applications should be the degree to which they would help fulfil the broadcast policy.
- No licence conditions may be imposed that are not relevant to broadcasting and that do not serve the objectives of the broadcast policy. Any conditions imposed should be reasonable and realistic.

III.5. Breach of Licence Conditions and Sanctions

Pursuant to section 18, the Office of the Executive Director will monitor compliance with licence conditions; it may also receive complaints regarding alleged breaches of licence conditions. All complaints shall be investigated, with the exception of those that are manifestly unfounded or that appear frivolous, and broadcasters are required to submit to

[34] See Principle 22, *Access to the Airwaves*, note 4.

the Office of the Executive Director any information and documentation requested by it in the investigation of an alleged breach. The Office of the Executive Director will provide broadcasters with written notice of an alleged breach and will ensure that the broadcaster is given a reasonable opportunity to make representations and to produce evidence. Upon completion of an investigation, the Office of the Executive Director will inform the Council of its findings and the Council will render a decision, in writing, providing full reasons. The Council may impose a variety of sanctions, ranging from an order to broadcast a correction to termination of the licence. Sanctions will be enforced by the Office of the Executive Director.

All sanctions may be appealed to the Council for reconsideration. The Council will consider all petitions, except for those that it decides are manifestly unfounded or frivolous, and inform each party of its final decision in writing. All decisions will be made public and may be appealed to the Supreme Court of Kosovo on points of law.

Analysis

It is essential that the draft Law should require the highest procedural standards in the consideration of complaints and the investigation of alleged breaches of licence conditions. Section 20(2) sets a good precedent, by requiring all deliberations of the IMC Council upon requests for reconsideration to be in accordance with internationally recognised broadcasting and human rights standards, to be consistent with the intent and purpose of relevant Security Council resolutions, to respect democracy, the rule of law and protect freedom of expression, and to be open to the public. We recommend that these standards should, as far as possible, be implemented during any all the procedures of the IMC.

With regard to the conduct of investigations, we are concerned that the draft Law fails to protect the principle of confidentiality of sources. Under section 18(3), all broadcasters and their employees are obliged to provide the Office of the Executive Director with any documents or information needed to investigate an alleged breach. As there are no conditions on the use of this power, it could be used to require journalists to reveal their sources, in contravention of the right to freedom of expression. In this regard, the European Court of Human Rights has held:

> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States … Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with [the right to freedom of expression] unless it is justified by an overriding requirement in the public interest. [35]

[35] See *Goodwin v. the United Kingdom*, 27 March 1997, Application No. 17488/90, para. 39.

The draft Law should ensure that confidential sources are excluded from the ambit of any mandatory disclosure scheme. Similarly, consideration should be given to ensuring that the rules on providing evidence are consistent with the principle against self-incrimination, protected by the ECHR.[36]

Section 19 sets out a range of sanctions, including the ultimate sanction of licence termination. However, the draft Law fails to give any guidance on the circumstances in which the different sanctions may be imposed, or even to require that any sanctions imposed should be proportional to the breach found, a key requirement of Article 10 of the ECHR.[37] The draft Law should not only provide for a graduated sanctions regime, but it should also require that sanctions such as licence suspension or termination are imposed only after lesser sanctions have failed to address the problem. A licence should be terminated only after repeated suspensions have proved ineffective, and a suspension should be imposed only in cases of repeated and gross abuse and when lesser sanctions, such as fines, have proved ineffective.

Finally, we note that sanctions may be imposed only for a breach of licence conditions. There is no mention of any other relevant standards, in particular a code of conduct, and neither the Council nor the Office of the Executive Director are specifically charged with drawing up such a code. This stands in contrast to the earlier, provisional regulation on broadcast licensing,[38] which required the Temporary Media Commissioner to draw up a Code of Conduct. Similar codes of conduct can be found in broadcasting laws of countries around the world, and provided they are properly drafted and respect both the public's right to know and broadcaster's right to freedom of expression, have been shown to make a significant contribution to a well-functioning broadcast sector. In any event, the omission of any reference to the previous Code leads to uncertainty with regard to the status of that Code and the standards it required of broadcasters, which should be clarified.

Recommendations:

- The draft Law should require that confidential sources are excluded from the ambit of any mandatory disclosure scheme and should ensure that no person may be required to incriminate him/herself in the commission of a crime.
- The draft Law should require all sanctions to be proportional to the seriousness of the breach and should allow the imposition of grave sanctions only after lesser sanctions have proved ineffective.
- The status of the previous Code of Conduct, drawn up under UNMIK Regulation 2000/36, should be clarified and consideration should be given to providing the IMC with a mandate to adopt and apply a new code of conduct.

[36] See *Saunders v. the United Kingdom*, 17 December 1996, Application No. 19187/91, para. 68 (European Court of Human Rights).
[37] *See Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49 (European Court of Human Rights).
[38] UNMIK Regulation 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo, sections 1 and 2(2).

III.6. Transparency and Accountability

Sections 2(6) and 2(7) require the Council to draw up and make public, within two months of the end of the calendar year, an annual report "including information related to the establishment and implementation of Broadcasting Policy, licensing and complaints, sanction applied and decisions relating thereto, financial activities, other broadcasting activities, and objectives and projections for the coming year." Section 2(8) states that all meetings of the Council shall be open to the public and that all its decisions must be in writing and be released to the public within two business days.

Section 6 gives the Council the power to determine its own rules of procedure. As noted above, section 20 requires all Council procedures that affect the licensing or sanctions process to be in accordance with internationally recognised standards.

Analysis

In addition to the measures already provided, we believe that the transparency and accountability of the IMC could be enhanced in a number of ways. First, while we welcome the requirement in section 28 that hearings on proposed new rules shall be announced at least five days in advance, we note that there is no general requirement for hearings to be held (as opposed to announced when they are held) and there is no a requirement that the draft rules themselves should be made public, although this may be implied. This is particularly important with regard to the broadcasting policy and any proposed amendments to it (section 2(1) merely refers to parties the Council "may wish to consult" in this process).

Second, as mentioned above regarding the fairness of complaints procedures, the standards set in Article 20(2) for the reconsideration of petitions should apply across the board to all procedures. For example, Article 6(7), on rules of procedure for the Council, should also be subject to these requirements.

Third, in a number of places the draft law mentions that 'sensitive' or 'proprietary' information may be withheld from certain public reports. There is very little indication of what constitutes 'sensitive' information, a potentially very broad term. Section 17(3), however, refers to "commercially sensitive" information, a term which is far more precise than merely 'sensitive' information (although section 17(1) undermines this, allowing the Office of the Executive Director to remove 'sensitive' information from published reports). This potentially undermines the otherwise open and transparent procedures set out in the draft Law.

Recommendations:

- All proposed new rules and regulations, including in relation to the broadcasting policy, should be made public for consultation, and hearings should be required to be held before these are adopted.
- All IMC procedures should be subject to the standards set out in section 20(2).
- The draft Law should provide specific criteria to determine what kind of 'sensitive'

information may be withheld from the public.

III.7. Funding the IMC

Section 24 provides that the IMC will be funded by licence fees and donor grants, while additional funding may be provided from the general consolidated Budget of Kosovo. The licence fee schedule is set by the Office of the Executive Director, and approved by the Council, taking into account prevailing and projected market conditions. The schedule may be reviewed and amended every three years. All licence fees are paid into the Kosovo Consolidated Fund, as 'general revenue'.

Analysis

In order effectively to guarantee the independence of the IMC, it is crucial that it should be given a stable funding base, de-linked as much as possible from political processes. In this regard, while we welcome that licence fees will provide a prime source of income for the IMC, we are concerned that the mechanism as provided leaves some scope for political interference.

If licence fees are to be used to fund the IMC, we question why it is necessary that those fees are to be paid into the general budget of Kosovo, without apparently being earmarked for the IMC. It would be far preferable if licence fees were to be collected and managed by the IMC, thus bypassing the governmental budget altogether. At the very least, licence fees should be specifically earmarked for the IMC, rather than go into general governmental accounts.

At the same time, there is a potential conflict of interest in the system whereby the IMC sets the very fee schedule which provides its budget. This could lead to a situation where the IMC set fees at an unrealistically high level to ensure sufficient funding for its own operations. At a minimum, the Assembly of Kosovo should be required to approve the fee schedule.

We recognise that the IMC's budget should not be used irresponsibly, but we are concerned that the requirement in Article 2(4) for the budget proposal to be approved by the Ministry of Finance and Economy leaves scope for political interference. It would be preferable if this budget were considered in an open process by the Assembly of Kosovo or some other cross-party political body.

Recommendations:

- The funding from license fees should be specifically earmarked for the IMC rather than being run through the general budget.
- The Assembly of Kosovo should be required to approve the license fee schedule.
- Budget approval for the IMC should not be done by the Ministry of Finance and Economy but instead by an open, multi-party body, such as the Assembly of Kosovo.

III.8. Transitional Provisions

Section 26 provides that, pending the establishment of effective self-regulatory systems for the print media, the IMC will carry out the functions of the Temporary Media Commissioner with regard to UNMIK Regulation 2000/37 on the Conduct of Print Media in Kosovo.

ARTICLE 19 has criticised this Regulation as setting a dangerous precedent and being "a gift to any government seeking for examples to use when reining in the media".[39] We remain very concerned about the provisions of the Code, which prescribes content standards in very broad terms. We believe that government regulation of the print media, even in temporary form, is neither appropriate nor the most effective way to raise professional standards in journalism and we urge the authorities to reconsider this measure.

Recommendation:

- The continuation in force of UNMIK Regulation 2000/37 should be reconsidered.

[39] ARTICLE 19 press release, 30 June 2000.