MEMORANDUM

on the

Croatian 'Thesis for Discussion on Law on Media'

by

ARTICLE 19
Global Campaign for Free Expression

London
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A 'Thesis for Discussion on Law on Media' was elaborated by the Croatian Ministry of Culture in January 2002. This document will form the basis for elaborating an actual media law. ARTICLE 19 has been asked to comment on this document, referred to herein as the 'media law concept paper'.[1] This Memorandum sets out our main concerns with the media law concept paper, along with recommendations for reform.

There are a number of positive aspects in the media law concept paper. These include provisions for the protection of journalistic sources, on access to information and on media pluralism. The media law concept paper also recognises the need to harmonise Croatian media law and regulation with international standards, in particular the recommendations of the Council of Europe and the OSCE.

At the same time, ARTICLE 19 believes that the media law concept paper contains provisions which are contrary to international standards relating to freedom of expression. Particular concerns include the excessively detailed and onerous system

[1] We will refer to "Theses" rather than "Articles", consistent with the term used in the translation.

of regulation which is not sufficiently protected against government interference, the excessively detailed provisions on internal organisation of media bodies, the lack of a clear distinction between systems which apply to broadcasting and to the print media, and the unduly broad nature of the rights of correction and reply.

1. International and Constitutional Guarantees

1.1 International Guarantees

The *Universal Declaration of Human Rights* (UDHR)[2] is generally considered to be the flagship statement of international human rights, binding on all states as a matter of customary international law. Article 19 of the UDHR guarantees the right to freedom of expression and information 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 *International Covenant on Civil and Political Rights* (ICCPR),[3] a legally binding treaty which Croatia ratified in October 1992, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. In November 1997 Croatia also became a party to the *European Convention on Human Rights and Fundamental Freedoms* (ECHR),[4] which guarantees freedom of expression at Article 10(1) as follows:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by pubic authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Croatia is legally obliged to comply with the provisions of these international treaties.

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), which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[5]

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.

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[2] UN General Assembly Resolution 217A(III), 10 December 1948.
[3] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[4] E.T.S. No. 5, in force 3 September 1953.
[5] 14 December 1946.

The importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … 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 pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[6]

1.2 Media 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."[7]

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'.[8]

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.[9]

1.3 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.

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[6] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

[7] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *op cit.*, para. 34.

[8] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

[9] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).

However, any limitations must remain within strictly defined parameters. Article 10(2) of the ECHR lays down the benchmark, stating:

> 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 reputations or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[10]

This article envisages restrictions on freedom of expression but only where they meet a strict three-part test.[11] The jurisprudence of the European Court of Human Rights makes it clear that this test presents a high standard which any interference must overcome, because of the fundamental importance of freedom of expression in a democratic society. The Court has repeatedly 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.[12]

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[13] Second, the interference must pursue a legitimate aim. The lists of aims at Article 10(2) of the ECHR and Article 19(3) of the ICCPR are exclusive in the sense that no other aims are considered to be legitimate grounds for restricting freedom of expression. The listed aims include the protection of national security, public safety and the rights of others. 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.[14] Restrictions on freedom of expression that do not comply with these requirements are illegitimate under international law and would, if implemented, represent a breach of Croatia's obligations under both the ECHR and the ICCPR.

1.4 Constitutional Guarantees

Article 38 of the Constitution of the Republic of Croatia protects the right of freedom of expression in the following terms:

> Freedom of thought and expression of thought shall be guaranteed.

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[10] See also Article 19(3) of the ICCPR.
[11] See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[12] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[13] *The Sunday Times v. United Kingdom*, *op cit.*, para. 49.
[14] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

> Freedom of expression shall specifically include freedom of the press and other media of communication, freedom of speech and public expression, and free establishment of all institutions of public communication.
>
> Censorship shall be forbidden. Journalists shall have the right to freedom of reporting and access to information.
>
> The right to correction shall be guaranteed to anyone whose constitutionally determined rights have been violated by public communication.

The media law concept paper refers to international human rights mechanisms, for example at Thesis 3, where Article 10(2) of the ECHR is quoted in full, and at Thesis 66, on the independence of regulatory bodies. The media law concept paper is analysed here from the point of view of Croatia's responsibilities under international law, with particular reference to the ECHR and the jurisprudence of the European Court of Human Rights.

2. Access To Information

Thesis 3(2) states that freedom of the media is based upon "the accessibility of information." The media law concept paper then establishes mechanisms to obtain information held by public bodies, placing these bodies under an obligation to disclose information upon request. Thesis 5(2) states that editors and journalists have the right to seek information in order to disseminate it through the media. This reflects Article 38(3) of the Constitution, also limiting this right to journalists.

Under international law, everyone, not just the media, has a right to access information held by public authorities. Although there is nothing in principle wrong with including access provisions in a media-specific law, this should not be taken as relieving the authorities of their obligation to ensure access by everyone to information. Furthermore, a proper system for ensuring access to information requires far more detailed legal provisions than those contained in the media law concept paper. The ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Expression Legislation*, sets out in some detail what a legislative regime on freedom of information should contain.[15] Ideally, these provisions should be included in a law specifically dealing with this issue, which is of general application.

Thesis 5(4) of the media law concept paper states that information should be released by the authorities unless the requested information constitutes "a State, army, officials or business secret." International standards regarding freedom of information require that restrictions on the right to seek and obtain information meet the following strict three-part test:

(1) the information relates to a legitimate aim listed in the law;
(2) disclosure threatens substantial harm to that aim; and
(3) the harm to the aim is greater than the public interest in having the information.[16]

[15] (London: June 1999).
[16] *Ibid.*, Principle 4.

Thesis 5(4) clearly fails to establish these safeguards, instead setting out blanket bans on entire categories of information. Such blanket bans breach international standards in this area.

Recommendations:
- A fully developed freedom of information law should be adopted which applies to everyone, in accordance with the principles in *The Public's Right to Know*.
- The blanket bans provided for at Thesis 5(4) should be replaced by restrictions which incorporate the three-part test outlined above.

3. Regulatory Bodies

The law establishes three regulatory bodies as follows:

1. the 'competent administrative authority' (the Authority);
2. the Council for Radio and Television (the CRT); and
3. the Council for the Press (the CP).

The Authority is responsible for registering 'media publishers' in the Register of Companies (Thesis 10) and for registering media outlets in the Register of Media (Thesis 13). It is also responsible for the initiation of proceedings for the removal of a media outlet from the Register of the Media (Thesis 16) and for the issuing of a contravention report, potentially leading to a ban on its activity (Thesis 17).[17]

Thesis 15, which introduces the CRT for the first time, places an obligation on broadcasters to report to the CRT on their activities and on the realisation of their programmes. The CRT is described as "a new independent regulatory body covering the whole sector of radio and television." The text suggests that the CRT should function as a monitoring body, examining the reports submitted by broadcasters, while the Authority is responsible for registration.

Thesis 66 also states that a Press Council and a Radio and Television Council shall be established in order to monitor the implementation of the law and to supervise the media market and concentration of ownership. ARTICLE 19 assumes that this Radio and Television Council is the same body as the Council for Radio and Television introduced at Thesis 15.

3.1 Independence of Regulatory Bodies

The Authority is described at Thesis 2 as "a ministry or a governmental administrative organisation in charge of public information." No mention is made in the media law concept paper of its independence. In the case of the CRT and the CP, Thesis 66 states that the relevant bodies should be independent and that appointments should be made according to the recommendations on the independence of regulatory bodies of the Council of Europe and the OSCE. References to the harmonisation of such

[17] See below.

proceedings with the OSCE and the Council of Europe recommendations are also made at Thesis 67.

ARTICLE 19 very much welcomes these guarantees of the independence of the CRT and CP, but we are concerned about the apparent lack of independence of the Authority. Pursuant to international law, all public bodies that exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies that receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The rational behind this is that otherwise, the powers of these bodies might be abused for political ends, resulting in an unacceptable restriction on freedom of expression.

Independence should, among other things, be ensured through the rules relating to membership, which are not enumerated in the media law concept paper. The institutional autonomy and independence of regulatory bodies should also be guaranteed through the law 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;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.[18]

Recommendation:

- The independence of all bodies with regulatory powers over the media should be guaranteed, in accordance with the principles noted above.

3.2 Proliferation of Broadcast Regulatory Bodies

Pursuant to the media law concept paper, the broadcast media will be subject to regulation by both the Authority and the CRT. Furthermore, pursuant to broadcast legislation, broadcasters need to obtain a broadcasting license. Broadcasters will thus be subject to three separate regulatory bodies. This is clearly excessive. There is, for example, no reason why broadcasters should be required both to register and to obtain a license. Furthermore, duplication of regulatory bodies carries a number of risks. It imposes an excessively onerous burden on broadcasters, provides multiple opportunities for interference and may well lead to confusion and conflicting standards and approaches. ARTICLE 19 recommends that broadcasters should only have to go through one process to obtain a licence to broadcast, along with a frequency appropriate to that licence.[19]

Recommendation:

- Broadcasters should be subject to only one, independent regulatory body.

[18] See ARTICLE 19, *Access to the Airwaves. Principles on Freedom of Expression and Broadcast Regulation* (London: April 2002), Principle 10.
[19] *Ibid.*, Principle 21.4.

3.3 Registration of Media Outlets

Pursuant to Thesis 10, a publisher/broadcaster must be registered in the Register of Companies as a natural or legal person if he or she has a domicile in Croatia and a seat in the editorial board of Croatia, although these conditions can be waived by the Authority if it believes that the medium will "further the development of public information and the Croatian culture." In addition, a mass media outlet must, prior to the beginning of its activities, register with the Authority in the Register of the Media (Thesis 12).

To register, media outlets, both print and broadcast, need to submit documentation such as "a proof of incorporation, the Media Statute, the programme basis together with the fundamental premises for its realisation" (Thesis 12(3)). In the case of the broadcast media, it is also necessary to submit, together with the application, "photocopies of contracts and of other arrangements made with the organisations for protection of the copyright and similar rights regarding the works which will be broadcasted in its programme" (Thesis 13(4)).

The law thus provides for a two-tier registration process for all media outlets, print and broadcast. There are serious problems with this system both generally and from the perspective, respectively, of the print and broadcast media. As noted above, any regulation of this sort must be undertaken by an independent body, which the Authority is not. Furthermore, the Authority is given the power to waive the registration requirement on very subjective grounds. Such power in the hands of a body that lacks independence is a serious problem.

As regards the print media, under international law, technical registration requirements do not, *per se*, breach the guarantee of freedom of expression. However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries. In this respect, the situation of the print media is very different from that of the broadcast media where regulation is necessary, if only because of the limited availability of frequencies. ARTICLE 19 therefore recommends that the print media not be required to register. As the UN Human Rights Committee has noted: "Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[20]

Furthermore, even technical registration requirements breach the right to freedom of expression unless they meet the following conditions:[21]

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

[20] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.
[21] See, for example, *Gaweda v Poland*, 14 March 2002, Application No. 26229/95 (European Court of Human Rights).

The details of the registration scheme under the forthcoming media law are not clear from the media law concept paper but the system as outlined does not meet the above conditions. In addition to the lack of independence of the administering body, the requirement that print media outlets submit their programming bases is clearly illegitimate. In the first place, the authorities can have no legitimate reason to request this information. Secondly, it should be open to print media outlets to change their output as they wish, without needing to inform the authorities of such changes.

In the case of the broadcast media, it is recognised that a fair and transparent regime for allocating licences through an independent body, along with some regulation of technical and content standards, is required. A licensing system is, however, already provided for by other legislation. As noted above, imposing an additional registration requirement is unnecessary and open to abuse.

Furthermore, the registration scheme is unduly onerous. It is unreasonable, for example, to require broadcasters to provide in advance contracts relating to copyright. Such contractual arrangements, along with detailed programme planning, need to be made on a flexible basis to allow broadcasters to respond to the public interest and develop their programmes over time.

Recommendations:

- Theses 10 and 12 should be amended so that media outlets are not required to register.
- If registration is retained, it should not apply in addition to any licence requirement for the broadcast media and should be a simple and purely technical procedure, overseen by an independent body, for the print media. The information requirements relating to registration should be less onerous and, in particular, print media should not have to submit information on programme plans to register.
- Thesis 10 should not allow the Authority, at its discretion, to grant special treatment to certain media outlets.

3.4 Regulation of the Press

The media law concept paper also introduces a different regulatory system for the print media, dealing with issues such as content and undue concentration and overseen by the CP. As noted above, there are problems with duplication of regulatory bodies and, if both registration and this form of regulation are retained, they should both be overseen by one body.

Content and other regulation of the print media is a highly disputed area. ARTICLE 19 generally views this sort of regulation through press laws, and *ad hoc* regulation of the print media in other pieces of legislation, with caution, as it can be a tool for governments to abuse rather than protect the right to freedom of expression and information. At the same time, we understand the need to promote better professional standards in a country like Croatia. In our view, however, self-regulation remains the most appropriate means to achieve this objective. Any regulatory scheme must, at a minimum, be undertaken by a body that is independent of government and commercial pressures.

Recommendations:

- Ideally, a self-regulatory scheme should be established by the print media to deal with concerns relating to content.
- If statutory regulation is to be imposed on the print media, there should only be one regulatory body and its independence should be adequately guaranteed.

4. Structural and Other Media Responsibilities

4.1 Internal Structure

Theses 7 and 8, as well as the definitions at Thesis 2, establish that a distinction should be made between a publisher and an editor. A publisher is a "legal or physical person who enables the [dissemination] of the programme contents of media", while an editor-in-chief is the person who is responsible for the published information and is appointed by the publisher, in consultation with the editorial board. The definition of 'media publisher' in Thesis 2 suggests that the expression can also apply to a broadcaster and possibly the owner and/or head of a media outlet.[22] We will therefore refer here to 'publisher/broadcaster' for clarity.

The media law concept paper is excessively intrusive in stating how a media outlet should operate. Thesis 8 states that a media outlet "must have an editor-in-chief" and also establishes the right of journalists to be consulted in appointing an editor-in-chief. Thesis 18(4) states that before substantially modifying its programmes, a publisher/broadcaster has to refer to the opinion of the editorial board. In addition, the media law concept paper provides that the 'programme basis' (presumably a plan for programming) should be part of an employment contract between the publisher/broadcaster and the editor (Thesis 18(6)).

Thesis 22 provides that, within a media outlet, the relationship between the editor-in-chief, the publisher/broadcaster and the journalists, as well as their rights and obligations, are to be regulated by a media statute. The same Thesis also set out rules for the drafting of the media statute, and the possibility for the Authority, in co-operation with the Croatian Journalists Association, to step in if the editorial staff fail to put in place a media statute. The media law concept paper also regulates journalists' responsibilities, their right to resign and, if there are changes in management, their right to receive proper payment (Thesis 22(2)). Thesis 72 also prescribes that existing media will be required to harmonise their statutes with the newly-adopted provisions. Thesis 24 states that a journalist should have the right to refuse to work on a programme if its content is contrary to the rules of the journalistic profession.

Although at least some of these rules are intended to safeguard the rights of journalists, the internal structure of individual media outlets should not be imposed by law but should rather be dealt with through the market, unions and other private sector

[22] The provisions on concentration in the media law concept paper refer primarily to the 'media publisher'.

actors. Imposing rigid rules of this sort prevents the flexible development of a diverse media which responds to the public interest in receiving information.

Recommendation:
- The provisions noted above in Theses 8, 18(4) and (6), 22, 24 and 72 should be removed from the media law concept paper.

4.2 Must-carry requirements

Thesis 21 requires the media to carry, free-of-charge, various public messages, including "urgent information regarding the real jeopardy of lives, health or property of the citizens, the cultural and natural heritage and State security."

Requiring the mass media to carry certain types of messages is both unnecessary and open to abuse. 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 media, rather than by imposing obligations on the media.

Furthermore, positive obligations of this sort are open to abuse. Independent media 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 media. It is also not clear how a message concerning national and cultural heritage can be considered 'urgent'.

Even in the context of public service broadcasters, where obligations to promote national culture and to inform the public are common, 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.[23]

Recommendation:
- Thesis 21 should be deleted.

5. Penalties

Thesis 16 states that the Authority can initiate proceedings for removal of a media outlet from the Register of Media if the publisher/broadcaster "did not comply with the provisions in a separate law." Other grounds for removal are:

- If the publisher continues breaking the law in spite of warnings in writing;

[23] Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, adopted on 11 September 1996.

- If the media is not published/broadcast for more than 6 months; or
- If the publisher/broadcaster ceases to comply with the conditions of the Register of the Media.

When there is a violation under Thesis 16, the media outlet can also have its equipment confiscated. Decisions by the Authority to remove a media outlet from the Register also need the consent of the CRT, although the Authority makes the final decision.

Thesis 17 states that a broadcaster is not allowed to transmit a programme through a medium that is not registered in the Register of the Media. When this happens the Authority should issue a 'contravention report' and impose a ban on the broadcaster's activities through proceedings before a magistrates court.

Thesis 68 states that, in successive drafts of the law, penalties and fines shall be proposed in case of violation of its provisions.

Banning a media outlet is the most serious sanction possible and should be imposed, if at all, only in the very most egregious circumstances and after repeated and gross violations of the law which other penalties have failed to address. ARTICLE 19 is of the view that this sanction should never be imposed on a print media outlet and that fines and other measures, including possible criminal action against individuals, will always suffice. Regardless of this, a sanction of this magnitude should never be imposed through a registration process which, as noted above, is legitimate only if it is a purely technical process.

There are a number of other problems with Theses 16 and 17. The reference in Thesis 16 to complying with the provisions of another law is unclear. For example, would a small and technical breach of another law engage this provision? This lack of clarity means that there is wide scope to interpret the provision in a biased or subjective way, undermining freedom of expression. This is particularly the case given that the Authority, a body which lacks independence, is tasked with applying this provision.

As regards broadcasters, the media law concept paper should instead envisage a graduated hierarchy of penalties, including warnings, obligations to carry statements recognising a breach of the law and fines. Only after these sanctions fail to redress the offending behaviour should more serious sanctions, such as temporary suspension and finally licence revocation, be contemplated. Furthermore, broadcasters should have the right to appeal any administrative decisions imposing serious sanctions to the courts.

In all cases, sanctions should be proportionate to the harm done and, where other less intrusive means are available to deal with the problem, these should be applied.

Recommendations:

- Theses 16 and 17 should be amended to reflect the following:
  - The registration process should never be used to ban media outlets;
  - Print media outlets should never be subject to banning orders;
  - The reference to other laws in Thesis 16 should be removed; the sanctions regime in the law should apply only in the context of breaches of that law;

- Only an independent body should have the power to impose sanctions on media outlets;
- For broadcasters, a graduated regime of sanctions should be set out, in accordance with the recommendations above; and
- All sanctions should be proportionate to the harm done.

6. Right Of Correction / Reply

Theses 28 to 42 deal with the right of correction,[24] while Theses 43 to 45 deal with the right of reply. These provisions set out in great detail both the conditions under which a correction or reply may be requested and the process for appealing disputes relating thereto to the courts. Thesis 28 defines a correction to include not only false information but also "the publishing of facts and circumstances by which the wronged party disproves or essentially extends the quotations in the published text with an intention of disproving the same." A correction may be requested whenever someone feels his or her rights and interests have been transgressed. A right of reply may be claimed, pursuant to Thesis 43, whenever information is published referring to the claimant.

Thesis 33 sets out the circumstances in which a request for a correction may be refused, including where it would be contrary to law, is not signed or is disproportionately long. It is clear from these provisions that a correction in the media law concept paper is actually a reply as commonly understood, namely a submission drafted by the claimant setting out his or her views on the matter. Thesis 28 also provides for a correction in relation to a deceased person. Theses 35 to 42 set out the conditions for appealing to the courts regarding a correction, including very short time frames. For example, the first hearing must be held within 8 days and the court is to return a verdict in 3 days.

A mandatory right of correction and/or reply is a highly disputed area of media law. In the US it is seen as unconstitutional on the grounds that it represents an interference with editorial independence while in many Western European democracies, the right of reply is provided by law and works to a varying extent. Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. However, where the right of reply is provided by law, the following should also apply:

- the reply should be published or broadcast in a timely fashion;
- the reply should only be in response to incorrect facts or breach of a legal right, not to comment on opinions that the reader/viewer doesn't like;
- the reply receive similar prominence to the original material;
- a reply should be restricted to addressing the incorrect or misleading facts in the original text and *not* be taken as an opportunity to introduce new issues or comment on other correct facts.

The main problem with these provisions is that they may be claimed in excessively broad circumstances, as detailed above. A correction is not limited to correcting false facts, as is the practice elsewhere, and a reply is certainly not limited to cases where

[24] The right of correction is also provided for in Article 38(4) of the Constitution.

the rights of the claimant have been breached. Indeed, the law appears to place almost no conditions on the right of reply. As a result, these provisions are open to abuse. For example, political figures could claim a right of reply whenever an unfavourable article about them appeared in a newspaper, clearly not the intention behind a right of reply.

There are a number of other problems with these provisions. Generally, the provisions on the rights of correction and reply in the media law concept paper are far too detailed. This imposes rigidity on these rights and also gives the impression that undue weight has been accorded to them. There are also a number of specific problems. First, it is not acceptable to have relatives of a deceased person claim a right of correction or reply on behalf of the deceased. The right to a reputation is a personal right, which should not be able to be claimed by relatives. Second, although the list of grounds for refusing a correction is relatively broad, both corrections and replies should be limited to refuting the incorrect or misleading material; claimants should not be able to introduce new issues in a correction or reply. Third, the timeframes set out for appeals are excessively short. In particular, 8 days does not give defendants sufficient time to prepare an adequate defence while requiring the court to deliver a verdict within 3 days may unduly rush their consideration of the matter, leading to hasty and poorly thought-out decisions.

Recommendations:

- The scope of the right of correction should be limited to correcting false facts while a right of reply should only be available where the rights of the claimant have been breached.
- The provisions on these issues in the media law concept paper should be less detailed, leaving these matters to be agreed by media outlets and claimants or, if this fails, the courts.
- Relatives of deceased persons should not be able to claim a right of correction or reply.
- Media outlets should be able to refuse a correction or reply if it is used as an opportunity to comment on issues beyond the scope of the false or misleading material.
- The timeframes for appeals to the courts should be reconsidered in favour of longer time limits.

7. Measures To Promote Pluralism

7.1 Positive Measures

Thesis 4, in compliance with international standards, states that the State will take measures to promote media pluralism, including by providing financial support for minority language media. The State also makes a commitment to provide direct and indirect support for the development of not-for-profit media through measures that are to be "transparent and public" and approved by "independent bodies" (Thesis 4(3)). ARTICLE 19 welcomes this initiative but notes that funding mechanisms have in many contexts been used to support pro-government media to the detriment of

opposition or independent outlets. It is, therefore, of great importance that any body responsible for funding schemes be protected fully against interference.

Recommendation:

- The implementation of the commitments in These 4 must be done in a manner which ensures that the system is not susceptible to government or other political or commercial interference.

7.2 Concentration Measures

The media law concept paper contains detailed provisions limiting concentration of ownership in Theses 47 to 53. Thesis 47 provides that no person with more than 20% of the shares of a newspaper may be a co-founder of a radio or television outlet and that the publisher of a radio or television programme cannot publish or co-found a daily or weekly newspaper. Furthermore, all publishers are restricted to owning 20% of the shares of another mass media outlet. Thesis 48 prohibits anyone from attaining a dominant newspaper market position, defined as selling more than 30% of all daily or weekly newspapers sold. Thesis 51 prohibits anyone from being involved in both radio and television. In some cases, these provisions may be waived where special consent is provided (see Theses 47 and 51). Thesis 72 provides that "ownership shares and decision-making rights proportions" have to be brought into line with the provisions of the law within 18 months of its entering into force. The same Thesis provides that a 'competent administrative body' is to supervise this process.

To facilitate the application of these measures, media outlets are required to provide very detailed financial information to the authorities. Thesis 7(3) states that publishers/broadcasters have to inform the public on an annual basis of the programme for the upcoming year, as well as their ownership structure, financing and "other facts needed for the public to be able to estimate the value of the published information, ideas and opinions." Thesis 14(2) states that publishers/broadcasters should make available to the Authority for the Register of the Media "information on sources and means of financing", which must also be "accessible to the general public". Thesis 46 further states that publishers/broadcasters must, by 30 April, provide the Authority with a business report for the previous year, along with details of contracts and general data on their businesses. Furthermore, pursuant to Thesis 15, the Authority can request "other details", which the publishers/broadcasters are obliged to provide.

ARTICLE 19 recognises the need in some countries for provisions limiting overall market dominance and undue concentration of ownership. If the media are subject to excessive control by one or a small number of persons, the public's right to receive information from a diversity of sources will be undermined.

However, there are a number of problems with the provisions on this in the media law concept paper. First, for the most part they do not represent a logical approach to regulating ownership concentration. They would forbid, for example, anyone from owning 20% of the shares of both a small weekly and a local radio station, while they would not prevent someone from owning 100% of the shares of a large national

television. The approach adopted in Thesis 48, which looks at the issue from the perspective of market dominance, is better suited to addressing the problem.

Furthermore, the reporting requirements are extremely onerous and go far beyond what is necessary to regulate this matter. There is no need, for example, for media outlets to report on the marketing agencies they have employed or their contracts with publishers, as required by Thesis 46. Indeed, the various obligations on the media to report on financial matters, scattered throughout the law, are in some cases repetitive and difficult to understand. At a minimum, these should be brought together in one place.

Recommendations:

- The approach taken in the media law concept paper to preventing undue concentration of media ownership should be reconsidered in favour of a more general approach based on market share.
- The various provisions imposing reporting requirements on media outlets should be brought together and consideration should be given to reducing the reporting burden on the media.

8. Other Issues

8.1 Truthful and Accurate Information

Thesis 3(2) establishes the right of citizens to have "truthful, complete and updated" information. The dangers to freedom of expression, and the 'chilling effect' of the State prescribing what is and is not 'accurate', cannot be over-estimated. Even so-called 'false' statements clearly fall within the ambit of the international guarantee of freedom of expression. Most significantly, the question of what is true almost always involves a degree of subjective interpretation, not to mention the great difficulty of distinguishing facts from opinions. While professional journalists will strive to publish accurate information, it is not legitimate to penalise them simply for failing to reach this goal in the context of a given article. News and information of public interest are perishable commodities and it must be expected that even the most experienced journalists will make mistakes due to the need to publish news in a timely fashion. Obligations of media accuracy should be included in voluntary codes of conduct and reinforced through professional training. It is inappropriate for such matters to be dealt with through legislation.

In addition, Thesis 23(2) states that, prior to the dissemination of information, the journalist "must…, as much as circumstances permit, check the accuracy of the source of information". In general, it is a professional matter for journalists to decide the extent to which they must check their information while, at the same time, they must take responsibility for any breach of the law which ensues should they make a mistake.

Recommendation:

- The references to truthful and accurate information at Theses 3(2) and 23(2) should be removed.

8.2 Protection of Sources

Thesis 26(1) states that journalistic sources should be confidential. ARTICLE 19 welcomes this provision, as it is essential for the enjoyment of the right to freedom of expression. However, Thesis 26(3) states:

> [J]ournalists should notify the editors-in-chief about the fact from paragraph 1 [of this Thesis] before publishing and in a way prescribed by the media by-law.

The precise implications of this paragraph are unclear, in particular whether it means that journalists should communicate sources to editors-in-chief or that they should inform editors that they intend to benefit from Thesis 26(1). In either case, it is unnecessary and should be removed.

Recommendation:

- Thesis 26(3) should be deleted.

8.3 Harmonisation Issues

As mentioned above, the media law concept paper makes references to international standards, for example, at Thesis 3. ARTICLE 19 welcomes these references. However, Thesis 3(3) states: "Freedom of the media is subject to the limitations that are allowed only directly by the Constitution, and by the law within this frame only". The second part of this statement suggests that despite these references, international law is not directly applicable. A clear statement that, in case of conflict, international law should take precedence over national law, would be preferable.

Thesis 67 establishes that, in order to ensure consistency in the legislation, Chapter 7 of the Telecommunications Law and Theses 74 to 86 of the Radio and Television Law should be taken into consideration when drafting the media law. This should be clarified to make it clear whether the provisions of the new media law will supersede those in the Telecommunications Law and the Radio and Television Law, while at the same time being harmonising with international standards.

Recommendations:

- The provisions on international law should be clarified to make it clear that this body of law will prevail in case of conflict with Croatian law.
- Thesis 67 should be clarified to make it clear whether the provisions of the new media law will prevail over those in existing legislation.

8.4 Foreign Journalists and Editors

Thesis 9 provides that editors-in-chief must have Croatian citizenship and be resident in the country. This restriction cannot be justified as there is no reason why foreign editors and journalists should not also be able to work in Croatia, subject only to immigration rules.

In addition, Thesis 70 states that the Ministry of Foreign Affairs is to keep a register of foreign correspondents. This is legitimate only if this form of registration meets the conditions set out above for registration of the print media, including that it is purely technical in nature and is overseen by an independent body.

Recommendations:

- Thesis 9 should be deleted.
- Thesis 70 should be amended to clarify that the registration system for foreign journalists is purely technical in nature.