



MEMORANDUM
on

**The Law on the Independent Media Commission
and Broadcasting**

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This Memorandum analyses the draft Kosovo “Law on the Independent Media Commission and Broadcasting” (the draft Law), as received by ARTICLE 19 in February 2005. The present draft is apparently a revised version of an earlier document, which ARTICLE 19 commented on in May 2003. We note with satisfaction that many of the problems identified in that Memorandum have been addressed and that the present draft is on the whole very solid.

Amongst the most positive aspects of the draft Law is the strong commitment it evinces that the Independent Media Commission (IMC) should, indeed, be truly independent. The rules relating to the administration of broadcast licences are generally well-conceived, and should help achieve a distribution of the broadcasting frequency spectrum in Kosovo which promotes the public’s right to know. On the other hand, while the draft Law has obviously been written with the best intentions, in some areas it must be revised if its goals are to be realised in practice. Most importantly, the procedure for appointing civil society members to the IMC’s Council should be amended; the budgetary independence of the IMC should be better warranted; and the continuation in force of UNMIK

Regulation 2000/37, which would enable the IMC to regulate the print media, should be reconsidered.

The enactment of a broadcasting 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 instruments] and the best European practices.”¹ The purpose of this Memorandum is to evaluate the extent to which the draft as it stands conforms to international standards and to suggest amendments where necessary. Two standard-setting documents will be relied on in particular: Council of Europe Recommendation No. (2000) 23, on the independence and functions of regulatory authorities for the broadcasting sector,² and ARTICLE 19’s *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*.³ 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.

We note that the Temporary Media Commissioner has published his own analysis of the draft, suggesting several amendments.⁴ Where appropriate, this Memorandum will refer to that document. This Memorandum will not review Kosovo’s international and constitutional human rights obligations, on which we commented extensively in our May 2003 Memorandum.

II. Analysis of the draft Law

Overall, we roundly applaud the draft Law as a sincere effort to create the preconditions necessary for a vigorous free media. If adopted, the Law will establish Kosovo as a regional leader in terms of media regulation.

Like the Temporary Media Commissioner (TMC), whose proposals we largely endorse, we have a few relatively minor suggestions on how the draft Law might be improved yet further.

II.1. Independence and Composition of the IMC

Article 2 of the draft Law establishes the Independent Media Commission as an entity “independent from any political influence, of whatever type it may be” and consisting of two separate bodies: the Council and the Office of the Executive Director.

The Council

Pursuant to Article 4, the Council will be composed of two temporary international members and five resident members. The terms of the international members will

¹ Constitutional Framework for Self-Government, UNMIK/REG/2001/9, 15 May 2001.

² Adopted by the Committee of Ministers on 20 December 2000.

³ London, April 2002.

⁴ Published 1 February 2005.

terminate two years after the determination of Kosovo's final status, at which point the Council will be composed of five resident members only. Council members are to be appointed in three different ways:

- 1) International members will be appointed by the Special Representative of the Secretary General (SRSG) (Art. 4(2)).
- 2) One of the resident members will be nominated and appointed by the Assembly of Kosovo (the Assembly) in an "open and transparent" process, finalised by an Assembly vote of 60% or more (Art. 4(3)).
- 3) The remaining four resident members will be nominated and appointed by civil society organisations and individuals, such as broadcasting associations, non-governmental organisations in the area of media and free speech, and members of the academic and legal communities (Art. 4(4)). The selection procedure is initiated when the Executive Director issues a public invitation for nominations. Within three weeks after that, he invites the authorised nominators (i.e., the civil society groups mentioned above) to a meeting, in order to form a consensus on which candidates to select. The shortlist is then submitted to the Assembly, which is obliged to ratify it in a *pro forma* vote within 30 days. If the authorised nominators cannot reach a consensus, the IMC's Executive Director forwards the names of the candidates who enjoy the support of a majority of authorized nominators to the Assembly. The draft Law does not specify how the Assembly is to finally resolve such situations.

Article 4(6) requires all Council members to "possess relevant knowledge and experience that will enable them to make a significant contribution to the functions of the Council." Article 4(7) sets out a number of rules of incompatibility, namely that no person may become a member of the Council if s/he is permanently employed in the public service of Kosovo; holds an elected public office; is a member of the an executive body of a political party; has a direct or indirect financial interest or represents this interest or works in any of the telecommunications or broadcasting industries; has been convicted, after due process in accordance with internationally accepted standards, of a crime involving violence or dishonesty, for which he or she has not been officially and lawfully pardoned; or is engaged in activities that could be perceived as being in conflict with the functions of the Council. Article 4(8) adds that the composition of the Council should reflect the multiethnic character of Kosovo and that both genders should be represented.

Article 5 sets out the terms of Council members. As the terms are staggered, there will be an initial phase during which some members serve shorter-than-usual terms:

- 1) One of the international Council members will serve an initial term of 18 months, the other one of 12 months. Thereafter, both international members shall serve for the term "envisaged under Article 3.1." This is an apparent mistake, as Article 3.1 does not specify any duration.
- 2) Resident Council members will serve for two years, but initially two of the five members, to be chosen through a lottery, will serve for just one year.

The draft Law does not specify whether members may serve more than one term.

Article 6(1) provides for the removal of Council members by a 60% vote in the Assembly, if one of the situations listed in Article 6(2)-6(4) is present. These include the following:

- 1) The Council member seeks or accepts instructions from any other authority other than the Council (except where the Council member is forced by law);
- 2) The Council member abuses his/her position for personal gain, or for the benefit of any other party or entity other than the IMC;
- 3) One of the rules of incompatibility listed above applies; or
- 4) The Council member fails, without any valid excuse, to attend three consecutive meetings of the Council.

Under Article 7, the Council will meet at least once every three months, with the first meeting to be called by the oldest member no more than 30 days following the approval of appointments by the Assembly. Within three months of its establishment, the Council must adopt, in an open and transparent manner, its own rules of procedure (Art. 7(7)). Its quorum shall be reached when more than half of the members are present, and it will elect a chair and vice-chair from among its members who will serve renewable one-year terms.

The Office of the Executive Director

The Office of the Executive Director, the second formal body of the IMC, will be headed by the Executive Director, who is appointed by the Council for 3 years following an open and competitive process. A candidate needs the concurring vote of more than half the Council members to be elected. Similarly, a vote of more than 50% in the Council is required to remove the Executive Director from office; removal is possible if one of the rules of incompatibility applies, or if it becomes apparent to the Council that the Executive Director “is no longer able to fulfil his or her duties effectively” (Art. 9(4)).

The rules designed to ensure the independent functioning of the Executive Director and his staff mirror those pertaining to the Council. Pursuant to Article 9(3), the rules of incompatibility for the Executive Director are the same as those provided in Article 4(7) for Council members. Like Council Members, the Executive Director and his staff are prohibited from accepting instructions from any other authority and may not use their positions for improper benefit (Art. 10).

The Commission’s staff is to be recruited in an open, competitive and non-discriminatory fashion (Art. 10(4)). Though formally not civil servants, the conditions and benefits enjoyed by staff members shall be harmonised as much as possible with those of the civil service.

Analysis

ARTICLE 19 welcomes the Council’s establishment as an entity “independent from any political influence, of whatever type it may be.” This is a positive statement of principle, and the draft Law contains several strong safeguards of the Council’s autonomy.

In addition to what is already provided for, we believe the Council's independence could be further bolstered by the addition of three additional factors:

- 1) A determination in the draft Law of the IMC's legal status. At present, the law does not explicitly grant the IMC independent legal personality, an important matter closely linked to institutional autonomy.⁵
- 2) As the TMC has proposed, Article 2 could be made more forceful by referring to the guarantee of the IMC's independence contained in Article 11.1(e) of the Constitutional Framework.
- 3) Although the draft Law guarantees the IMC's freedom from political interference, it does not do so in respect of economic pressures or any other undue influences. A statement to this effect should be included in the draft Law.⁶

As noted above, Article 2(3) provides that the IMC shall be composed of two separate bodies, the Council and the Office of the Executive Director. We concur with the TMC that Article 2(3) should also include a new letter (c), listing the Media Appeals Board as the third IMC body. The Media Appeals Board is referred to throughout the law as if it were a separate organ of the IMC and formally constituting it as a separate body will enhance its independence.

With regard to the composition of the IMC Council, we welcome the important role assigned to the Assembly and civil society in the selection process. However, like the TMC, we are concerned that the procedure for the appointment of civil society members is unworkable in practice, for two reasons: 1) although the draft Law does sketch a profile of the types of organisations that are eligible, it does not specify who will make the final determination about which of them actually qualify for 'authorised nominator' status; and 2) the authorised nominators are supposed to reach a consensus on the four civil society members, but it is open to doubt that such a diverse array of organisations would ever be able to do so. Moreover, the fall-back option – that the Executive Director forwards a list with the names of those individuals with the greatest level of support to the Assembly – is inadequate, as it is not clear what the Assembly would be supposed to do with the list.

The TMC has proposed two options for an alternative procedure, along the following lines. First, the Executive Director would issue a public invitation for nominations, three months before the expiration of the term of office of a Civil Society Council Member. Any organisation or individual having its legal residence in Kosovo would be permitted to submit a nomination. Then, within six weeks after issuing the invitation, the Executive Director would convene a public meeting to release a list of those nominees who had agreed to be considered. Yet another two weeks later, he would submit a list to a selection panel (consisting under option 1 of the Presidents of the five District Courts, or under option 2 of a cross-party ad hoc Commission convened by the President of the Assembly), containing the names of the most qualified candidates. This selection panel

⁵ See Principle 10 of *Access to the Airwaves*, note 3.

⁶ Article 3 of the Council of Europe Recommendation No. (2000)23 on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, adopted by the Committee of Ministers on 20 December 2000; Principle 11 of *Access to the Airwaves*.

would then deliberate in private and select the four civil society members (N.B.: this is an apparent mistake, as Council members serve staggered terms) by consensus, endeavouring to reflect gender balance and representation of the various communities in Kosovo.

ARTICLE 19 believes a procedure along these lines might be more workable than the one envisaged in the draft Law, while still providing sufficient democratic safeguards. However, we believe that it, too, can be improved upon. Our main concern is with the role of the Executive Director, in whom the TMC proposes to vest an almost exclusive power to create a shortlist of civil society candidates. It might be better to form a small panel instead, consisting perhaps of the Executive Director, a civil society candidate and a third person, whose initial task would be to exclude from the nominees those persons who obviously and clearly fail to meet the criteria for appointment (ie. they have no knowledge or experience in any relevant field). Their decision could be open to judicial review. A shortlist could then be prepared in open hearings followed by a session of a parliamentary committee – meeting in public, not in private. With regard to the latter, we note that the parliamentary committee may not be able to reach consensus and that provision would need to be made for a voting procedure, perhaps allowing each member to rank the candidates in order of preference.

With regard to the rules of incompatibility and grounds for removal of members of the Council and the Executive Director, we believe that these are well-designed and adequate. We do note, however, that although the Council members are prohibited from accepting instructions from other authorities, the draft Law does not explicitly require them to serve in their individual capacity, independent from their nominators. A provision to this effect should be inserted, to make it clear that the civil society members are expected not to simply represent the agenda of the organisation that nominated them.

The TMC has suggested that the appointment and removal of the Executive Director should require a supermajority vote of the Council, rather than the present “more than 50%”. In light of the importance of the Executive Director’s role, we agree that appointment and dismissal should require the concurring votes of 5 out of 7 Council members initially, and 4 out of 5 after the departure of the international members.

Finally, we note that after the departure of the international members, the Council’s membership will go down from 7 to 5. Consideration might be given to replacing the two international members with additional local members. Bringing in extra members would broaden experience and might make it easier to achieve a proper gender balance and community representation within the Council’s membership.

Recommendations:

- The draft Law should recognise the IMC’s separate legal personality, and refer to the guarantee of its independence contained in Article 11.1(e) of the Constitutional Framework.
- The draft Law should explicitly guarantee the IMC’s independence from non-political forces, including the broadcast sector.

- The procedure for civil society nominations should be reconsidered in favour of a more workable procedure.
- The draft Law should specify whether Council members may serve more than one term.
- 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 number of votes required to appoint or remove the Executive Director should be a supermajority of the Council members.

II.2. Functions

The IMC generally

Article 2(4) of the draft Law states that the general function of the IMC is to “regulate and supervise all aspects of the civilian broadcasting system in Kosovo, including but not limited to the implementation of a broadcasting policy to be established by the Council”. To achieve this, Article 2(5) permits the IMC to issue such rules and regulations as it deems necessary.

The Council is charged primarily with the policy side of the IMC’s responsibilities. The task of the Office of the Executive Director is twofold: it runs the practical side of the IMC’s operations and it issues recommendations to the Council on various matters.

The Council

Pursuant to Article 3, the Council will draw up the broadcasting policy, in consultation with the Office of the Executive Director and other interested parties. 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,” as well as being “in full compliance with the respective legislation of Kosovo.” Article 3(3) specifies a number of goals for the broadcasting policy, such as the promotion of a diverse range of quality broadcasting services, serving all language and cultural groups in Kosovo; the promotion of locally produced programming; the encouragement of educational programming; the promotion of the use of new technology; and the prevention of broadcasting monopolies in Kosovo.

Article 3(7) states that the Council, together with the Office of the Executive Director, will draw up and annually review the frequency plan. The authority to decide on licence applications and to approve licence conditions resides exclusively with the Council. In addition, the Council may impose sanctions, upon the recommendation of the Executive Director (Article 3(11)).

The Office of the Executive Director

According to Article 8, the Office of the Executive Director will “administer all broadcasting policy aspects determined by the Council.” It may also “make

recommendations to the Council regarding policy matters, and matters relating to budget and administration.”

The key responsibilities of the Office are to draw up the annual budget proposal, which is approved by the Council (Art. 8(3)); to determine procedures for assessing licence applications (Art. 8(4)); to advise the Council with regard to the Broadcast Frequency Plan and the allocation of such frequencies which may become available (Art. 8(5)), and to carry out an annual performance review of the public broadcaster, RTK (Art. 8(6)).

Analysis

The TMC is concerned that the wording of Article 2(4), which allows the IMC to “regulate and supervise all aspects of the civilian broadcasting system in Kosovo” is overbroad. Although it is apparent from the rest of the law that the IMC’s powers are not unlimited, we agree that a more circumscribed phrasing would be preferable, making it clear that despite its licensing powers, the IMC does not have the right to manage broadcasters on a day-to-day basis.

The TMC has also suggested that a phrase should be added to Article 2(4), stating that the IMC will regulate “in accordance with best European practices.” While we certainly agree with this prescription, we note that Article 3(2) already mandates that the broadcasting policy “shall be in accordance with recognized international broadcasting and human rights standards, having full respect for democracy and the rule of law and the protection of the freedom of expression...” Instead of accompanying each power of the IMC by a separate statement that the power should be exercised in keeping with international law, we would recommend inserting a general paragraph in Article 2, covering all the IMC’s organs and their activities. Based on Article 3(2), such a paragraph might look like this:

The activities of the IMC as a whole, and of its organs individually, shall be in accordance with recognized international broadcasting and human rights standards, having full respect for democracy and the rule of law, and the protection of the freedom of expression. In addition, the IMC and its organs shall fully comply with the relevant legislation of Kosovo.

With regard to the goals of the Broadcasting Policy, as laid down in Article 3(3), we applaud the fact that the Council may no longer “require stations to set aside broadcasting time for public service announcements”, as was the case in the previous draft. This substantially reduces the potential for interference with broadcasters’ editorial freedom. On the other hand, we are concerned that the Council is still empowered to draw up rules to “promote locally produced programming” and to “prevent the monopoly of broadcasting in Kosovo.” While these are both legitimate and important goals, they raise complex and controversial issues that should be dealt with in the Law itself, rather than delegated to the Council.

For example, one of the risks associated with a local content requirement is that it will favour large broadcasters over small ones, as creating local programmes requires a substantial investment. To address this problem, the draft Law should set a low initial

percentage of local content, which would gradually increase over time.⁷ Similarly, with regard to media concentration, the draft Law should be more specific on the number of broadcast licences one person or group can hold simultaneously and whether there will be any restrictions on cross-media ownership.

Recommendations:

- The IMC’s mandate should be worded more restrictively.
- A general provision should be included in the law, to the effect that the IMC and its organs will respect international broadcasting and human rights standards.
- 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.

II.3. Licence Applications, Renewals and Conditions

Article 11 of the draft Law provides that no-one may broadcast in Kosovo without a licence issued by the IMC, although an exception is made for KFOR and the UN (Art. 11(6)).

Radio licenses are issued for a term of five years, television licenses for seven (Art. 11(2)). 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 (Art. 11(5)). Those licenses which have already been issued by the TMC are to remain valid until the IMC has adopted an open and fair process to obtain a long term licence, at which time all existing licensees shall be considered for long term licenses by the Commission (Art. 11(3)).

All licence applications are to be addressed to the IMC through the Office of the Executive Director (Art. 12(1)), which prepares a recommendation on the application to the Council. This recommendation must take into account a number of factors, including the applicant’s financial resources, the financial viability of the proposed operation, technical capacity to deliver the programming, the need to provide varied programming for all the citizens of Kosovo, the degree to which the proposed programming will contribute to the “development of programme production in Kosovo”, and whether there are any competing applications (Art. 12(4)).

Article 13 requires the Office of the Executive Director to widely publish a notice whenever it proposes to issue further broadcasting licences. The notice must explain the procedure and invite applications. Applicants may make representations before the Council (Art. 13(3)), and within 120 days of the closing date for tenders, the Office of the Executive Director shall inform all applicants of the result of their application. In an apparent mistake, Article 13(2) states that “[t]he Council may, upon the proposal of the

⁷ 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 October 2000, Article 10.

Office of the Executive Director, in exceptional circumstances, extend the sixty (60) day limit.”

Not everyone is eligible to apply for a broadcast licence. According to Article 12(3), political parties and groups or organisations substantially controlled by them are barred, as well as individuals who have been lawfully convicted of a crime involving violence or dishonesty.

Article 14 requires the licensing process to be fair and transparent. The Office of the Executive Director is required to provide written reasons to all applicants whose applications for a broadcasting licence or renewal are refused. The notification should apprise the unsuccessful candidates of their right to petition the Media Appeals Board for reconsideration.

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’ (Art. 18).

Analysis

The licensing process, on the whole, is fair and transparent. We welcome the opportunity accorded to applicants to make representations before the Council, and the requirement that written reasons will be in case an application is rejected. It is also very positive that holders of licences issued by the Temporary Media Commissioner will be automatically considered for renewal. However, we do have some suggestions for further improvement.

First, the factors which the Office of the Executive Director is bound to take into account when preparing a recommendation on a licence application are all appropriate. However, the list does not include one important factor for consideration, namely the wider broadcast policy of Kosovo.

Second, Article 11(5) states that licences may be issued subject to such conditions as may be imposed by the IMC. Although it is certainly proper that licences are issued subject to conditions, the draft Law should limit the discretion of the IMC by being more specific about the kind of conditions that may be imposed. In particular, any conditions imposed should be rationally related to the broadcast policy, and not more burdensome than necessary to achieve the intended policy goal.⁸ The TMC has suggested that conditions imposed should be “consistent with best European practice.” This would be one way of limiting the IMC’s discretion, although as discussed above, we recommend the insertion of a general provision to this effect at the beginning of the Law.

Third, we note that the TMC has also suggested that the exemption from the licence requirement for KFOR and the UN (contained in Art. 11(6)) is unnecessary, and that the

⁸ See Principle 22, *Access to the Airwaves*, note 3.

IMC should continue to grant them limited licenses as is the practice now. We agree with this suggestion.

Finally, we do not believe that the blanket restriction on persons who have been convicted of a criminal offence involving violence or dishonesty is justifiable. Instead, license applications should be considered on a case by case basis.⁹

Recommendations:

- An additional criterion for assessing licence applications should be the degree to which they would help fulfil the broadcast policy.
- The IMC should not be permitted to impose licence conditions which are not relevant to the broadcast policy, or which are more burdensome than necessary to achieve a broadcast policy goal.
- There should be no blanket restrictions on who is eligible to hold a licence other than for political parties and groups substantially controlled by them.

II.4. Breach of Licence Conditions and Sanctions

Pursuant to Article 19, the Office of the Executive Director will monitor compliance with licence conditions and investigate complaints regarding alleged breaches of licence conditions, with the exception of those that are manifestly unfounded or that appear frivolous (Art. 19(2)). 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 (Art. 19(3)). 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 broadcaster in question has the right to seek reconsideration from the Media Appeals Board (Art. 19(4)).

Upon the finding of a breach, the Council may issue a written warning or impose a variety of sanctions, ranging from an order to broadcast a correction to termination of the licence (Art. 20). Sanctions will be enforced by the Office of the Executive Director.

All sanctions may be appealed to the Media Appeals Board for reconsideration by submitting a petition within 30 days (Art. 25(1)). The Board will consider all petitions, except for those that it decides are frivolous, malicious, or unsubstantiated (Art. 25(2)), and inform each party of its final decision in writing (Art. 26(1)). All decisions will be made public and may be appealed to the Supreme Court of Kosovo on points of law (Art. 26(2)).

The rules regarding the composition of the Media Appeals Board have changed from the previous draft. According to Article 22, it will be composed of three members, including two citizens of Kosovo and one international member. However, the local members will now be appointed by the Supreme Court of Kosovo, upon the recommendation of civil society

⁹ See Principle 20, *Access to the Airwaves*, note 3.

organisations. They must have “relevant skills and experience.” The international member is still to be appointed by the Special Representative of the Secretary General, at the recommendation of the Deputy Special Representative of the Secretary General for Institution Building, as well as the local members of the Appeals Board. He or she “shall have a scientific degree in law and relevant experience in the field.” Two years following the definition of the status for Kosovo, the international member will be replaced by a third local member, appointed in the same way as other local members. Appointments are for three years, with the possibility of renewal. The same rules of incompatibility as determined for Council members and the Executive Director apply; and similarly, Board members may not accept external instructions or use their position for improper benefit.

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.

With regard to the conduct of investigations, we applaud the fact that the draft Law no longer obliges broadcasters to provide the Office of the Executive Director with documents or information for the investigation of an alleged breach. The deleted provision could have been used to require journalists to reveal their sources, in contravention of the right to freedom of expression. However, we believe the Law could still be improved further by adding an explicit statement to the effect that broadcasters may not be compelled to cooperate with an investigation against them.¹⁰

Article 20 sets out a range of sanctions which the Council may apply, including the ultimate sanction of licence termination. However, the draft Law fails to give any guidance on the circumstances under which each of the different sanctions may be imposed. Nor does it require that any sanctions imposed should be proportional to the breach found, a key requirement of Article 10 of the European Convention on Human Rights.¹¹ 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.¹² 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.

Article 8(4) states that the Office of the Executive Director may “impose sanctions through any mechanism available under the applicable law.” As the TMC has also pointed out, this is inconsistent with provisions elsewhere in the draft Law, and should probably read: “...may recommend that the Council impose sanctions through any mechanism available under the applicable law.”

¹⁰ See the principle against self-incrimination established under Article 6 ECHR in cases such as *Saunders v. United Kingdom*, 17 December 1996, Application No. 19187/91 (European Court of Human Rights).

¹¹ See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49 (European Court of Human Rights).

¹² Article 23 of the Council of Europe Recommendation No. (2000)23.

We note that the draft Law allows sanctions to be imposed only for a breach of licence conditions. There is no mention of any other relevant standards whose breach might lead to censure, such as a code of conduct. In contrast to the earlier, provisional regulation on broadcast licensing,¹³ which required the Temporary Media Commissioner to draw up a Code of Conduct, there is no mention of such a Code in the present draft Law. 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 its status in the future. This should be clarified.

With regard to the Media Appeals Board, we welcome its creation as a relatively independent body. The appointments procedure for members of the Board is overall well conceived. However, the manner in which civil society organisations are supposed to participate in the appointment process of local members is not clear enough. The Law should state that the Supreme Court, or perhaps the Executive Director, will publish an invitation for nominations a specified amount of time before a vacancy arises. The procedure here may be similar to the one for local Council members. We are also concerned by the fact that, once the international member has departed, the presence of at least one lawyer on the Board is no longer guaranteed. The Law should require that the third local member possesses a law degree and relevant experience.

Article 21(4) sets a good precedent, by requiring all deliberations of the Board 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. As stated above, we recommend that these norms should apply to all of the IMC's activities, although in the particular case of the Media Appeals Board there is some justification for reemphasizing them.

Finally, Article 24(2) mandates the Board to unanimously adopt and publish "a procedural framework for hearings, which shall guarantee fair and impartial proceedings." While there is no objection to allowing the Board to determine its rules of procedure, we believe the most fundamental matters should be dealt with in the Law itself. This applies in particular to the question whether the Board will decide by unanimity or majority, and under which circumstances it should entertain an appeal.

Recommendations:

- The draft Law should state explicitly that no broadcaster may be required to cooperate in an investigation against him.
- The draft Law should require all sanctions to be proportional to the seriousness of the

¹³ UNMIK Regulation 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo, sections 1 and 2(2).

breach and should allow the imposition of grave sanctions only after lesser sanctions have proved ineffective.

- Article 8(4), which states that the Office of the Executive Director may impose sanctions, should be corrected.
- 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.
- The manner in which civil society organisations can participate in the appointment of Media Appeals Board members should be clarified.
- Key questions of procedure, such as the amount of votes required for a decision should not be left to be resolved by the Media Appeals Board, but should be dealt with in the Law itself.

II.5. Transparency and Accountability

Article 3(8) requires the Council to draw up and submit to the Assembly, within two months of the end of the calendar year, an annual report “including full data related to the determination and implementation of broadcasting policy, issuance of licences, and complaints, implemented sanctions and decisions made in relation to them, financial activities, other activities of broadcasting and projected objectives for the next year.” The report shall be made public. Article 3(11) 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.

Article 3(12) gives the Council the power to “adopt codes, regulations, instructions, policies and duties that are necessary for the effective application of this law.” Whenever it intends to issue such an act, the Council must first widely publish its proposal and allow interested parties no less than 14 days to provide comments, which must then be taken into consideration (Art. 3(14)).

Analysis

These provisions are well drafted, and raise only one minor concern, namely that there is no guarantee that the Council will in practice pay attention to comments it receives from the public. In order to ensure that the concerns of interested parties really do come to the attention of the Council, hearings should be scheduled prior to the adoption of the most important acts, such as those relating to the broadcasting policy or the adoption of codes.

Recommendations:

- In addition to the existing consultation requirements, the draft Law should require the Council to schedule hearings before the adoption of important acts.

II.6. Funding the IMC

Article 28 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 Council is responsible for review the annual budget proposal of the IMC and submitting it to the Ministry of Finance and Economy for final approval (Art. 3(4)).

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 (Art. 16(1)). The schedule may be reviewed and amended every two years (Art. 16(2)), but existing licenses are subject to the same rate for the duration of their term (Art. 16(3)). All licence fees are paid into the Kosovo Consolidated Fund, as ‘general revenue’ (Art. 16(4)). The same applies to fines imposed on broadcasters (Art. 20(4)).

Analysis

In order effectively to guarantee the independence of the IMC, it is crucial that it should be given a stable funding base, which is de-linked as much as possible from political processes.

While it is important that the IMC’s budget should not be used irresponsibly, we are concerned that the requirement in Article 3(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.

Secondly, 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 itself. Possibly the purpose of the current arrangement is to prevent the improper use of funds, but this could also be accomplished without commingling the IMC’s funds with those of the government.

Recommendations:

- 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.
- The Assembly of Kosovo should be required to approve the licence fee schedule.
- The funding from licence fees should be specifically earmarked for the IMC rather than being run through the general budget.

II.7. Transitional Provisions

Article 30(3) 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 repeatedly 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”.¹⁴ We remain highly 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. In his comment to the present draft Law, the TMC concurs with us that “[u]pon the achievement of final status ... this provision could turn into state censorship of the print media.” We strenuously urge the authorities to reconsider this measure.

Recommendation:

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

¹⁴ ARTICLE 19 press release, 30 June 2000.