MEMORANDUM

on

the Draft Law on Radio and Television of the Republic of Bulgaria

by

ARTICLE 19
Global Campaign for Free Expression

London
April 2003

I. Introduction

This Memorandum is based on a version of Bulgaria's Draft Law on Radio and Television (draft Law) received by ARTICLE 19 in February 2003. We understand that the draft Law underwent a first reading by the Bulgarian Parliament towards the end of February and that further changes to the text are expected.

Our analysis is specifically in response to a request by the Association of Bulgarian Broadcasters (ABBRO). The current draft contains some improvements over the existing law, the Radio and Television Act of 1998, as amended, ARTICLE 19 believes that further amendments are needed to bring the law fully into line with international standards. To that end, ARTICLE 19 offers the following comments.

II. Overview

Relative to its predecessors, ARTICLE 19 notes that the draft Law provides better guarantees for the independence of the agencies responsible for regulating the Bulgarian broadcast sector. This is reflected, for example, by Article 7, which states that the law "guarantees the independence of radio and television operators and their activity from political and economic influences." In addition, Article 8 declares that

the principal regulatory agency – the National Council for Electronic Media (NCEM) – "shall be an independent specialized body".

The new Draft also includes changes to the sources of funding for the national broadcasters in order to ensure greater independence, including elimination of the Radio and Television Fund, increased advertising quotas and the creation of new governing bodies for the national broadcasters, namely the Administrative Councils of Bulgarian National Radio (BNR) and Bulgarian National Television (BNT).

Despite these positive developments, however, ARTICLE 19 has some concerns with the draft Law. Specifically, while the government has introduced some reforms to increase the apparent independence of the broadcast regulatory bodies, these do not go far enough. The process of appointing members to these bodies remains opaque, with little provision for public input. In addition, the composition of the bodies – despite providing for three NCEM positions to be filled with candidates recommended by nongovernmental organisations – is still excessively dominated by the ruling party.

The criteria for the grant of broadcasting licences and frequencies should be more specific, and it is not clear from the draft Law whether the broadcast frequency will be awarded at the same time as the license.[1] The draft Law continues to impose must-carry requirements on broadcasters (Article 71) and the limited range of sanctions available, which is restricted to the most intrusive forms of punishment, is inconsistent with the requirements of international law.

III. International and Constitutional Standards

A. International Guarantees of Freedom of Expression

The *Universal Declaration on Human Rights* (UDHR),[2] 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 UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),[3] a treaty with 149 States Parties, to which Bulgaria acceded in 1970, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

[1] Article 119 states that application papers will specify the criteria to be considered in the awarding of a broadcast license, but no further elaboration is contained in the draft Law.
[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.

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in Article 10 of the *European Convention on Human Rights* (ECHR),[4] which is binding on Bulgaria, as follows:

> (1)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 public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.

As a candidate Member State of the European Union in the pre-accession phase, Bulgaria has taken on a legal obligation to implement the full *acquis* of EU law in relation to broadcasting, which includes bringing national audio-visual policy into line with European regulations, such as the 1989 "Television Without Frontiers" Directive (TFT Directive).[5]

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. 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]

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised "the pre-eminent role of the press in a State governed by the rule of law."[7] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[8]

[4] Adopted 4 November 1950, in force 3 September 1953.
[5] Directive 89/552/EEC (as amended by Directive 97/36/EC).
[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] *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, 14 EHRR 843, para. 63.
[8] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.

B. Pluralism

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

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 stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[9] 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."[10]

This implies that the airwaves should be open to a number of different broadcasters, but also that the State should take measures to prevent monopolisation of the airwaves by one or two players. At the same time, anti-monopoly measures should not be such as to limit unnecessarily the overall growth and development of the sector.

C. Public Service Broadcasting

Public service broadcasting – through a non-profit broadcaster, independent of the State and with an overall mandate to provide a wide range of quality programming that serves all the people and that informs, enlightens and entertains – can make an important contribution to pluralism. The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.[11] For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

A *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural needs, and the need to preserve media pluralism. As a result, funding by States to such broadcasters is exempted from the general provisions of the Treaty of Amsterdam.[12] For the same reasons, the 1992

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[9] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 17 EHRR 93, para. 38.

[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85, November 13 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.

[11] See *Fourth Television* case, 87 BverfGE 181 (1992). In Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 58.

[12] Official Journal C 030, 5 February 1999, clause 1. See also EU Council Resolution of 21 January 2002 on the development of the audiovisual sector, OJ C32, 5 February 2002, p. 4.

Declaration of Alma Ata, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.[13]

D. Independence and Funding

The State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression, including publicly-funded broadcasters. This follows from a case before the European Court of Human Rights which decided that any restriction on freedom of expression through licensing was subject to the strict test for such restrictions established under international law.[14] In particular, any restrictions must be shown to serve one of the legitimate interests recognised under international law and, in addition, be necessary to protect that interest.

An important implication of these guarantees is that bodies that 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. The most important of these are Recommendation (96)10 on the *Guarantee of the Independence of Public Service Broadcasting* and Recommendation (2000)23 on the *Independence and Functions of Regulatory Authorities for the Broadcasting Sector*, both passed by the Committee of Ministers of the Council of Europe.[15] Governing and 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, guarantees against dismissal and rules on conflict of interest.[16] Similarly, the preamble to the European Convention on Transfrontier Television – which Bulgaria ratified in 1999 – reaffirms States', "commitment to the principles of the free flow of information and ideas and the independence of broadcasters."[17]

ARTICLE 19 has adopted a set of principles drawn from international law and comparative practice relating to broadcasting, entitled, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (ARTICLE 19 Principles).[18] Again, the issue of independence is central for both regulatory bodies and public broadcasters. Regarding the former, Principle 10 states:

> All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature.… Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:
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> - 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

[13] Adopted 9 October 1992 at a UNESCO conference in Alma Ata. Clause 5.
[14] *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, Application No. 10890/84, 12 EHRR 321, para. 61.
[15] 11 September 1996 and 20 December 2000.
[16] Articles 9-13 Recommendation R(96)10; Articles 3-11 Recommendation R(2000)23.
[17] 5 May 1989, European Treaty Series No. 132.
[18] (London: ARTICLE 19, 2002).

- in funding arrangements.

Principle 34 notes the need to transform government or State broadcasters into public service broadcasters, while Principle 35 notes the need to protect the independence of these organisations. Article 35.1 specifies a number of ways of ensuring that public broadcasters are independent including through oversight by an independent body, such as a Board of Governors.

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."[19]

Many of these standards reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. This is reflected, for example, in Principle 35.3 of the ARTICLE 19 Principles, which states: "The independent governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose prior censorship." The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

This approach is reflected in Principle 1 the Council of Europe Recommendation (96)10, which notes that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters. The Recommendation goes on to state that management should be solely responsible for day-to-day operations and should be protected against political interference, for example by restricting its lines of accountability to the supervisory body and the courts.[20]

Similarly, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. Principles 17-19 of the Council of Europe Recommendation (96)10 note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

E. 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.

[19] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.
[20] Articles 4-8.

However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet. It states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

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.

Restrictions must meet a strict three-part test.[21] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome in the strictest sense. The European Court of Human 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.[22]

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."[23] 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."[24]

F. The Bulgarian Constitution

Bulgaria is a member of the United Nations and a State Party to the ICCPR and ECHR. As such, Bulgaria is legally bound to protect freedom of expression in accordance with international law. Article 2(2) of the ICCPR states:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in

[21] See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.
[22] See, for example, *Thorgeirson*, note 7, para. 63.
[23] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49.
[24] *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40.

> accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Freedom of expression and freedom of the press are protected by Articles 39 and 40 of the Constitution of the Bulgarian Federation:

> Article 39
> (1) Everyone is entitled to express an opinion or to publicize it through words, written or oral, sound, or image, or in any other way.
> (2) This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of forcible change of the constitutionally established order, the preparation of a crime, or the incitement of enmity or violence against anyone.
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> Article 40
> (1) The press and the other mass information media are free and shall not be subjected to censorship.
> (2) An injunction on or a confiscation of printed matter or another information medium shall be allowed only through an act of the judicial authorities in the case of an encroachment on public decency or incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of violence against anyone. An injunction suspensions shall lose force if not followed by a confiscation within 24 hours.

Article 41 of the Constitution guarantees freedom of information:

> Article 41
> (1) Everyone is entitled to seek, obtain, and disseminate information. This right shall not be exercised to the detriment of the rights and reputations of others, or to the detriment of national security, public order, public health, and morality.
> (2) Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

Article 5 of the Constitution states that any international treaties that have been ratified by the government are part of the country's domestic law.

Article 5 of the draft Law states that radio and television activity will be carried out in conformity with Articles 39-41 of the Constitution. These Constitutional guarantees are largely consistent with international standards but the freedom protected by Article 39 is too narrowly construed. That Article protects only the right to express an "opinion" whereas under international law, all forms of expression are protected, subject only to such restrictions as can be justified according to the three-part test contained in the ICCPR and Article 10(2) of the ECHR.

Recommendations:

- Article 39 of the Bulgarian Constitution should be amended to protect all forms of expression, not merely "opinions".

IV. Analysis of the Law

A. Appointment of Members to the Regulatory Bodies

Article 8 of the draft Law states that NCEM shall be an "independent specialized body, a legal entity with a head office in Sofia and with an independent budget that regulates radio and television in conformity with this law." The NCEM is charged with issuing licenses and registering radio and television operators, and is to "supervise" the activity of broadcasters for conformity with the law.

The NCE consists of 11 members, five elected by the General Assembly, three appointed by the President, and three more elected by the General Assembly "on the suggestion of non-governmental organizations" (Article 10).

Under the existing Law on Radio and Television, the Electronic Media Council (whose purpose is roughly equivalent to the draft Law's NCEM) consists of nine members, five of whom are elected by the General Assembly and four appointed by the President (Article 24). This nomination procedure has been severely criticized for being opaque, for failing to guarantee the independence of the Council, and the for failing to ensure that its membership is representative.[25]

The new procedure is somewhat improved through the provision for three NCEM members to be nominated by NGOs. However, it still fails to address the lack of independence of the NCEM, the principal regulatory agency. This is highlighted by a scenario where the President belongs to a party that has majority control of Parliament, giving that party excessive control over the appointment process.

The Bulgarian draft Law provisions are not consistent with international standards. Principle 13.2 of the ARTICLE 19 Principles states: "The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interests, and should allow for public participation and consultation." The Council of Europe Recommendation (2000)23:

> 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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> 5. Furthermore, rules should guarantee that the members of these authorities:
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> - are appointed in a democratic and transparent manner;

Alternative mechanisms are available to create a more independent regulatory agency. For instance, members of the NCEM could be elected by Parliament with a qualified three-quarters majority or NGOs could be allowed to directly elect members.[26] At a minimum, we recommend that no members be appointed directly by the President and that the law require the process to be open and consultative.

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[25] C. Morrison and M.Wagner, *Comments on the draft Bulgarian Law on Radio and Television*, Council of Europe, July 1998. See also: C. Christophorou and W.Rumphorst, *Comments and Proposals on Bulgarian Law on Radio and Television*, ATCM (2002) 018, Council of Europe.

[26] See Note 25.

The lack of independence of the NCEM is passed on to the other regulatory bodies as the NCEM is empowered to elect and dismiss the members of the BNR and BNT Administrative Councils (Article 18(11)) and to elect and dismiss the BNR and BNT executive directors (Article 18(12)). The Administrative Councils in turn have the power to approve and terminate the work contracts of BNR and BNT management personnel and to set the professional requirements and job descriptions for all BNR and BNT positions (Article 36, sub-paragraphs (10) and (11)). The NCEM is also responsible for electing five of the 10-member Public Program Council of both BRN and BNT (Article 40). The other five members are to be elected by the journalists and art workers employed by the national broadcasters.

There is nothing wrong with a truly independent general broadcast regulator playing some part in the appointment of members of the governing councils of public broadcasters, but allocating full responsibility for this task to the general regulator is probably an excessive concentration of power. ARTICLE 19 would prefer to see a broader range of bodies directly involved in this task, including NGOs.

Recommendations:

- A different process for appointing members to the NCEM should be implemented better to ensure its independence, reflecting the following:
  - the process should provide for greater opportunity for public input and should be required to be transparent; and
  - the President should play no role in selecting candidates.
- A broader process for the appointment of members to the BNR and BNT Administrative Councils should be put in place, ensuring that the NCEM does not completely control the appointment process.

B. Membership Rules

Representativity

The draft Law fails to guarantee that membership of any of the three levels of regulatory authority it creates is representative of society. Article 11 states that a member of the NCEM Council must be a Bulgarian citizen with either higher education or professional experience in the fields of electronic media, telecommunications, journalism, law or economics, and at least five years work experience with a "prestigious and trustworthy" radio and/or television organization.

The Administrative Councils of the BNR and BNT – described in Article 34(1) as a "supervisory body of the operator" – will also be composed of Bulgarian citizens with higher education. At least one of the five members shall be a qualified lawyer and one an economist. The remaining three shall be prominent professionals in the media sector (Article 34(2)). The Public Program Councils, which are involved in formulating the editorial policy of the national broadcasters, "shall be prominent artists and professionals in the fields of culture, science, and media." (Article 40(3))

The ARTICLE 19 Principles require that, "[m]embership overall should be required to be reasonably representative of society as a whole."[27] The Council of Europe Recommendation 96(10) states that national rules governing the status of regulatory

[27] Principle 13.2

bodies should guarantee that appointed members "represent collectively the interests of society in general".[28]

Rules of Incompatibility

The 'rules of incompatibility' contained in the draft Law for the NCEM, BNR and BNT (Articles 12 and 34(3), respectively) also fail to conform to international standards. They are drafted in very broad terms and risk excluding a number of potentially well-qualified candidates while at the same time failing to protect against political or commercial conflicts of interest. For instance, Article 12 excludes individuals who have committed certain criminal offences, former members of the State security apparatus and "sole traders, owners of the capital of trade companies, or members of the managing or supervisory body of a trade company" from membership of the NCEM. Article 34(3) contains a similar list of exclusions for members of the Administrative Councils, adding, "[m]embers of the managing or supervisory bodies of non-profit legal entities."[29]

There is no obvious reason why, where there is no direct conflict of interest, directors of companies or non-profit legal entities should be excluded from membership on one of the regulatory bodies, particularly since these bodies may benefit from their specific type of expertise. At the same time, these rules fail to prohibit individuals with strong political connections, or which commercial interests in the broadcasting sector, from becoming members.

ARTICLE 19's Principles recommends the following rules of incompatibility:

> No one should be employed who:
> - is employed in the civil service or other branches of government;
> - holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government;
> - holds a position in, receives payment from or has, directly or indirectly, significant financial interests in telecommunications or broadcasting; or
> - has been convicted, after due process in accordance with internationally accepted legal principles, or a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.[30]

The Council of Europe Recommendation (2000)23 states:

> 4. For this purpose, specific rules [regarding appointment of members to regulatory bodies] 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. [31]

[28] Note 15, Principle III(2).
[29] Article 34(3).
[30] Note 18, Principle 13.3
[31] Note 15.

Dismissal

The grounds for dismissing members of the NCEM and the Administrative Councils of the BNR and BNT are listed in Articles 17 and 35, respectively. Articles 43 and 18(5) regulate the dismissal of members of the Public Program Councils.

Article 17 allows the President to issue a decree dismissing a member of the NCEM. Similarly, Article 18(1)(11) states that the NCEM has the power to dismiss members of the BNR and BNT Administrative Councils, while Article 18(1)(15) provides the same powers regarding members of the Public Program Councils. No reference is made either regarding the NCEM or the Public Program Councils to other groups who are responsible for electing members, such as the National Assembly or journalists and art workers. Article 17(2) sets out the grounds for dismissal for a member of the NCEM, while Articles 35(2) and 43(2) do the same, respectively, for the BNR and BNT Administrative Councils and Public Program Councils.

Both the Council of Europe Recommendation 2000(23) and the ARTICLE 19 Principles require that only the appointing body shall have the power to dismiss members of a regulatory body.[32] The Council of Europe Recommendation states:

> 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.
> 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 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.

Recommendations:

- Article 11 should be amended to require composition of the regulatory bodies should be made more representative of Bulgarian society as a whole.
- The rules of incompatibility contained in Articles 12 and 34(3) of the draft Law should be amended so that certain categories of exclusion are removed and others added, in line with international standards as reflected in the ARTICLE 19 Principles cited above.
- The relevant articles should be amended to ensure that groups responsible for appointing members are to the various bodies are similarly responsible for their dismissal.

C. Powers of Regulators

The NCEM

Article 18 of the draft Law sets out the extensive responsibilities and powers of the NCEM. In addition to administering the broadcast licensing regime, and being charged with electing and dismissing members of the BNR and BNT Administrative Councils, Public Program Councils, and executive directors (discussed above), the

[32] *Ibid.* and Note 18, Principle 13.4.

NCEM will "[t]ake a stance on the BNR and BNT subsidy project." (Article 18(16)) It is unclear what this entails, but it appears to be related to funding.

It is essential that decisions about funding are set out particularly clearly in the law and that they allow for a minimum of discretion. The ARTICLE 19 Principles state: "The framework for funding and for decisions about funding should be set out clearly in law and follow a clearly defined plan rather than being dependent on *ad hoc* decision-making."[33]

Administrative Councils of BNR and BNT

The Administrative Councils are charged with overseeing the day-to-day operations of the BNR and BNT, with their specific duties and powers set out in Article 36 of the draft Law. The Councils also have certain direct programme-related powers, pursuant to Article 36(1)(15), as follows:

> 15. [To] Take decisions related to including announcements of public interest and charity calls in the programs and inform the chairman and the vice-chairman of the Public Program Council in writing.

This allows the Administrative Council to influence the content of broadcasts, contrary to the established principle of editorial independence. The European Council of Ministers' Recommendation 96(10) states that: "[t]he supervisory bodies of public service organisations should not exercise any *a priori* control over programming."[34] The ARTICLE 19 Principles are even clearer on this point:

> The principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, should be guaranteed by law and respected in practice. It should be up to broadcasters, not the government, regulatory bodies or commercial entities, to make decisions about what to broadcast….[35]

Missing from the list of obligations assigned to the Administrative Councils is a requirement to operate in the public interest and actively to promote freedom of expression, diversity, accuracy and impartiality and the free flow of information and ideas.[36]

The Public Program Councils

ARTICLE 19 commends the inclusion in Article 39(1) of the draft Law the declaration to the effect that the members of the Public Program Councils shall be "governed by the public interests", and the statement, at Article 39 (2), that they shall be "independent in their activities".

Article 44 states that the Councils "shall represent the public interest regarding BNR and BNT programs by making sure that they cover a diversity of opinions of common citizens." While the goal of this provision is positive, it could be improved by deleting

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[33] *Ibid.*, Principle 17. While this Principle is stated in relation to the funding of regulatory agencies, it applies equally to the funding of public service broadcasters – Principle 36.
[34] Note 15.
[35] Note 15, Principle 2.1.
[36] *Ibid*, Council of Europe Recommendation 96(10), Principle II(2) and Note 18, ARTICLE 19 Principles, Principle 12.

the word "citizens" so as not to exclude certain classes of inhabitants, such as residents or refugees, from representation.

Recommendations:
- The powers granted by Article 18(16) should be clarified and, to the extent they relate to funding, any discretion should be circumscribed as much as possible.
- Article 36(1)(15) should be removed from the draft Law and, instead, a statement should be added to the effect that the Councils should operate at all times in the public interest and actively promote freedom of expression.
- Article 44(1) should be amended to delete the word "citizens".

D. Funding

NCEM

Article 9 of the draft Law provides that the NCEM will be funded through the following sources: fees collected from broadcasters, State subsidy, ten per cent of the fees collected from the public for the reception of radio and television programmes, grants and testaments, and interest rates.

While the funding of the NCEM as provided in the draft Law appears consistent with international standards, problems have been identified in the past regarding license fees that remain uncollected and systemic under-funding of the NCEM's predecessor, the National Radio and Television Council.[37]

BNR and BNT

Article 52(5) of the draft Law provides that the budget of BNR and BNT will be composed the following: fees charged to the public for reception of radio and television programmes, a national budget subsidy, proceeds from commercials and sponsorships, donations and testaments, interests rates, other income linked to radio and television activity, and "proceeds from other activities".

Article 53 specifies the level of fees to be charged to the public: a monthly fee equal to one per cent for radio, and three per cent for television, of the national minimum monthly salary, as determined by the Council of Ministers. BNR will receive 30 per cent of the fees collected, BNT 60 per cent, and the NCEM the remaining ten per cent. The fees have been increased from 0.6 per cent for individuals and 2.5 per cent for legal persons, companies and organizations, as provided for in the 1998 Law on Radio and Television. The new draft Law no longer differentiates between households and legal entities. Article 54 provides for certain exemptions from payment of the reception fees.

The fees charged to the public for reception of radio and television programmes have so far not been collected, although they were provided for in the previous law. Direct viewer/listener fees are regarded as an effective means of ensuring the independence of public broadcasters, but clearly this is only the case if they are actually collected.

[37] Note 25, and also: O. Zlatev, *Development of Public Service Broadcasting in Bulgaria: Activities, Problems, Perspectives*, MediaOnline, 2000.

The national subsidy will be an annual subsidy, "determined on the basis of a standard program per hour approved by the Council of Ministers," and a target subsidy for long term assets (Article 52(6)). The Administrative Councils of the BNR and BNT will approve a draft budget and present it to the NCEM for their views (Article 52(2) and then present a proposed amount for the national subsidy to the Minister of Finance, to be included in the year's draft budget law (Article 52(3)).

At least in the short term, it seems likely that the national broadcasters will remain heavily dependent on the national subsidy as a primary source of funding. Although an attempt has been made in the draft Law to insulate this from political interference, this remains a problem. This is exacerbated by that fact that Article 103 of the draft Law restricts BNT to only four minutes of advertising per hour, up to a maximum of only 20 minutes per day, and six minutes per hour for BNR. More advertising is allowed when an event of national or international importance is broadcast (Article 103(2)), but this is unlikely to be sufficiently frequent to underpin the operations of BNT and BNR. Given the obligations under Article 83 for BNT and BNR to produce their own programmes and broadcasts, it is clear that significant funding will be required. Additional advertising revenue would help to bolster the independence of BNT and BNR. It may be noted that Article 12(1) of the *European Convention on Transfrontier Television* restricts advertising for commercial broadcasters to 15% of daily transmission time. Even one-half of this, which would be more appropriate for a public broadcaster, is far more than the draft Law allows.

Finally, since BNT and BNR receive public funds, they should be held accountable to the public for how the funding is used by the organizations. Once way to achieve this accountability is to require the publication and dissemination of each organization's budget and annual report.

Recommendations:

- An effective system for collecting the reception fee from the public should be put in place as soon as possible.
- Article 103 should be amended to allow both BNR and BNT to derive more revenue from advertising.
- BNR and BNT should be made accountable to the public for how these use the funding received from the government.

E. Licensing and Registration

Article 18 of the draft Law empowers the NCEM to organize and implement Bulgaria's broadcast license and registration regimes. Terrestrial broadcasters are required by the draft Law to have a license, whereas non-terrestrial broadcasters must be registered (Article 114). Non-terrestrial broadcasters include satellite, the Internet and cable operators.

Article 115 lists the categories of persons that are not eligible to apply for a broadcast license, including bodies which have legal shareholders which have been bankrupt within the preceding five years or which are presently subject to such proceedings (subparagraph (6)). This exclusion is quite broad, and the level of interest of such shareholders should be pre-determined. Too low a limit would not be justified and may exclude a number of potential investors.

Legal entities engaged in sociological activity are also excluded from holding a broadcast license, although exactly what constitutes a "sociological activity" is undefined (subparagraph (8)). The ARTICLE 19 Principles state:

> There should be no blanket prohibitions on awarding broadcasting licences to applicants based on either their form or nature, except in relation to political parties, where a ban may be legitimate.[38]

There are no exclusions from the registration regime, but the NCEM may refuse registration if either the proposed program project, program concept, program profile or program scheme is inconsistent with the provisions of the draft Law. As a result, these are the only conditions placed on non-terrestrial broadcasters. Given that it is not feasible for any and all broadcasters to have access to a satellite, and since cable operators tend to operate as monopolies, ARTICLE 19 is of the view that these broadcasters should be subject to more significant forms of regulation than provided for.

Broadcasters that use the Internet, however, should be exempted from the registration regime, particularly as the scheme contains rules regarding permissible content (Article 135(4)). Under international law, registration requirements for the Internet cannot be justified as a legitimate restriction on freedom of expression. They significantly fetter the free flow of information, and they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for traditional broadcasting where limited frequency availability justifies licensing.

Regulation of the Internet is unnecessary and may be abused, and thus is not attempted in most countries.[39] ARTICLE 19 therefore recommends that the electronic 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."[40]

Licensing Process

The draft Law states that broadcast license applicants will be registered either under the Law on Non-Profit Legal Entities or under the Trade Act (Article 116). This clearly includes public broadcasters, defined by Article 58, and commercial broadcasters, defined by Article 60. It is not clear whether provision is also made for community broadcasters. The ARTICLE 19 Principles state:

> The frequency plan should ensure that the broadcasting frequencies are shared equitably and in the public interest among the three tiers of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local).[41]

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[38] Note 18, Principle 20.1.

[39] For example, Australia, Canada, the Members States of the European Union, the United States, and so forth.

[40] General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

[41] Note 18, Principle 9.3.

Within 14 days of receiving a license application, or on its own initiative, the NCEM will request information from the Communications Regulation Commission (CMC) regarding available radio frequencies and other technical information (Article 117). The draft Law states that the CMC will present their decision to the NCEM within three months of the request, or six months if a radio frequency band is necessary (Article 117(4)).

If the process has been commenced by the NCEM, then a competition will be initiated based on the available radio frequencies (Article 118). The announcement of the competition will be published in the State Gazette and the NCEM will make its decision no later than 30 days after the deadline for submitting applications. Although it appears to be implied, nowhere in the draft Law is it explicitly stated that the broadcast frequency will be awarded at the same time as the license. Principle 21.4 of the ARTICLE 19 Principles states that:

> Where licensees also need a broadcasting frequency, they should not have to go through a separate decision-making process to obtain this frequency; successful applicants should be guaranteed a frequency appropriate to their broadcast license.

The draft Law should be more explicit in this regard.

License applicants are required to submit information as specified in an application package issued by the NCEM. Article 119(11) states that this package will contain the evaluation criteria and "their importance in determining the overall evaluation by giving a priority to the evaluation of the program project." Article 124(2) further elaborates that: "The criteria under Article 119, Item 11 shall mandatorily include the evaluation criteria of a candidate regarding his or her creative, financial, and technical abilities and experience for carrying out the activity. If the overall evaluation and other conditions are equal, a priority shall given to their program project."

The ARTICLE 19 Principles state the following regarding license criteria:

> License applications should be assessed according to clear criteria set out in advance in legal form (laws or regulations). The criteria should, as far as possible, be objective in nature, and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant.[42]

The Committee of Ministers Recommendation (2000)23 also requires that criteria governing the granting and renewal of broadcast licenses be clearly defined in law.[43]

While ARTICLE 19 commends the draft Law for specifying the general criteria, these could be elaborated further. In particular, the criteria should include preventing undue concentration of ownership and, where competitors are otherwise equal, it should be clear which specific program projects will be favoured. In our view, the need to promote a diversity of viewpoints and content should be a deciding principle.

[42] Note 18, Principle 21.2.
[43] Recommendation (2000)23, Note 15, Principle 13.

Finally, while Article 18(4) states that the NCEM will "issue, amend, transfer, terminate and revoke licenses" with a decision, there is no requirement that the decision be in writing, with reasons, or that it be published. NCEM decisions, however, may be appealed to the Supreme Administrative Court (Article 22(3)).

The ARTICLE 19 Principles require that any refusal to issue a broadcast license should be accompanied by written reasons.[44] The Committee of Ministers Recommendation R(2000)23 state that "decisions made by the regulatory authorities [regarding issuing broadcast licenses] should be subject to adequate publicity."[45]

Recommendations:

- The draft Law should make provision for greater regulation of satellite and cable broadcasters, while Internet broadcasting should not be subject to a registration requirement. At a minimum, Internet broadcasters should not be subject to the content regulation provided for in Article 135(4).
- It should be clear that the draft Law includes community, as well as public and commercial, broadcasters.
- The draft Law should make it clear that frequencies will be awarded at the same time as the broadcast license.
- Article 124(2) should be amended to include more detailed licensing criteria.
- The NCEM should be required to issue its decisions in writing, with reasons, and these should be required to be published.

F. Content and Other Issues

Must-Carry Provisions

Article 71 requires broadcasters to "immediately provide program time free of charge for official announcements of representatives of State bodies in case of a calamity or immediate danger for the life, security and health of the whole population or of a group of persons."

Must-carry provisions of this nature are highly controversial as they are open to abuse by officials who may use them in circumstances for which they were not intended. These provisions are also generally unnecessary because any responsible broadcaster will carry information of public importance without a specific requirement to do so. Experience in countries all over the world shows that both public and private broadcasters provide ample coverage of national emergencies even in the absence of formal obligations to do so.

"Principles of Radio and Television Activity"

Chapter 7 of the draft Law contains numerous articles that set out rules regarding programme content. While some of these are consistent with international standards, others overly restrict freedom of expression. Article 62, for instance, contains principles that should "guide" all radio and television operators as they carry out their activities. Two of these are inconsistent with international legal standards.

[44] Note 18, Principle 21.3.
[45] Recommendation (2000)23, Note 15, Principle 14.

First, Article 62(1)(5) requires that broadcasters guarantee the confidentiality of sources. Failure to fulfil the guarantee can result in both fine and revocation of the broadcaster's license. Freedom of expression requires that journalists be protected against mandatory requirements to reveal their confidential sources of information.[46] But this is quite different from penalising journalists who do reveal sources, which should be a matter of professional ethics, not legal regulation.

Second, Article 62(2) of the draft Law requires that broadcasters prevent the dissemination of programmes that instigate "national, political, ethnic, religious and racial intolerance or vindicating cruelty or violence, or offending good manners." Violation of this provision can result in the revocation of the broadcaster's license (see the discussion regarding sanctions, below). It is not legitimate to penalise material which offends against "good manners". The guarantee of freedom of expression protects offensive material,[47] and many good programmes may be offensive to some people. It is significant, for example, that Article 22a of the TFT Directive, which deals with incitement, lists the other interests protected by this provision, but does not mention good manners. Furthermore, this term is in any case impossibly subjective to be applied with any degree of consistency and fails to meet the requirement that restrictions on freedom of expression be prescribed by law.

Recommendations:
- Articles 71 and 62(1)(5) should be removed from the draft Law.
- Article 62(2) should be amended so that "offending good manners" is not prohibited.

G. Revocation of License and Other Sanctions

Revocation of Broadcasting License

Article 131 of the draft Law lists the grounds under which a broadcast license may be revoked by the NCEM. The first is for "gross violations" of Articles 62(2) and (3). What constitutes a "gross violation" is not defined in the draft Law. Article 62(2) is discussed above. Paragraph (3) states: "Broadcasters shall be obliged to prevent dissemination of programs in violation of principles under Article 1, especially programs containing pornography or programs that can impair the physical, mental and moral development of under-aged minors."[48]

The second ground for revocation under Article 131 is for "systemic violations" [49] of the following provisions of the draft Law:
- Articles 62(1)(5) and (7) – confidentiality of sources and protection of copyright;
- Article 66(2) – news as "factual pieces of information" must be distinguished from commentary;

[46] See *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).
[47] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).
[48] This may be a misprint: Article 1 of the draft Law does not contain any principles, but merely defines what is meant by radio and television activity.
[49] Under the draft Law, "systematic" shall mean "committing a violation of the provisions of a Part of this Act three or more times." No time frame for logging in the three violations is set, such as three times in one year.

- Article 69(2): "A television operator who has exclusive rights on the coverage of an event of great public interest shall be obliged to give the national audience the possibility to follow this event live or by releases/reports on the free of charge television in conformity with the provisions of Article 18, paragraph (9)";[50]
- Article 72, which grants members of the public the right of reply;
- Article 79(4), which imposes an obligation on public broadcasters to produce and disseminate programs that, "[i]nclude news and information releases that present the different ideas and beliefs in society so that a balanced presentation of all viewpoints shall be provided on contentious issues of public interest";
- Articles 92(2), (3), (6), (7) and (12), which impose rules regarding the content of commercials, prohibiting pornography or incitement to violence or discrimination, advertising of tobacco products, narcotics or psychotropic substances, or paid reports in news and political broadcasts; and
- Article 94(1), which prohibits the broadcast of commercials with an erotic content that also contain the audio and/or audio-visual participation of under-aged minors, and/or which are targeted at minors.

The third and final ground of revocation set out in Article 131 is the "silent, factual change in the activity of a licensed broadcaster in regard to its type – public or commercial". If the NCEM makes such a determination, the license will be revoked, although Article 131(3) permits the broadcaster to apply for a license of the other type.

Article 132 spells out the procedure that the NCEM is to follow in order to revoke a license. The NCEM must first issue a written warning to an offending broadcaster, calling for the discontinuation of the alleged violation "within a certain timeframe." If the broadcaster does not discontinue the violation within this timeframe, then its license will be revoked, and it will not be able to re-apply for two years.

Analysis

Revocation of a broadcast license is an extreme sanction which should only be applied, if ever, after strict procedural and substantive safeguards have been observed. As with registration, government controlled or politically motivated bodies should never have the power to seek the revocation a broadcast licenser.

Revocation of a broadcast license constitutes a restriction on freedom of expression and thus the grounds for doing so must satisfy the three-part test for restrictions laid out in Article 10(2) of the ECHR, discussed above. For a number of reasons, the draft Law provisions regarding revocation fail to meet the "prescribed by law" and "necessity" elements of this test.

First, the revocation procedure does not provide for strict procedural and substantive safeguards. Article 132 states that the NCEM shall issue a warning prior to revocation, but the broadcaster is not even given the opportunity to be heard by the NCEM prior to its decision to revoke.

The ARTICLE 19 Principles state that:

[50] Article 18(9) of the draft Law, however, is not obviously related to Article 69 as it merely states that the NCEM will be responsible for determining quotas for local and/or regional public radio and television operators.

> Sanctions should never be imposed on individual broadcasters except in case of a breach of a clear legal requirement or license condition and after a fair and open process which ensures that the broadcaster has an adequate opportunity to make representations…Sanction decisions should be published and made widely available.[51]

Second, while the broadcaster is given time to discontinue its offending conduct, the draft Law does not specify how long this period of time will be. Thus the restriction on freedom of expression created by revocation of a broadcaster's license is overly vague and hence not "prescribed by law" as required by the ECHR. The warning is essentially of no value as revocation may be foregone conclusion.

Third, restrictions on freedom of expression must be necessary to achieve the desired aim. The breaches of the law which are addressed by revocation could, by-and-large, be addressed by less intrusive forms of sanction. As a result, revocation is not a legitimate sanction for these breaches. Examples are enforcement of the right of reply or the public broadcaster presenting balanced news.

Sanctions must be proportionate to the harm done and this requires that the authorities have at their disposal a range of graduated sanctions for breach of the law, so that a sanction corresponding to the nature and level of the breach may be applied. For this reason, the Committee of Ministers of the Council of Europe has recommended that broadcasting regulatory bodies should have the following powers:

> A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law.[52]

The Bulgarian government should consider the following guideline, taken from the ARTICLE 19 Principles:

> In most cases sanctions, particularly for breach of a rule relating to content, should be applied in a graduated fashion. Normally, the sanction for an initial breach will be a warning stating the nature of the breach and not to repeat it. Conditions should be placed on the application of more serious sanctions – such as fines and suspension or revocation of license – for breach of a rule relating to content. In such cases fines should be imposed only after other measures have failed to redress the problem, and suspension and/or revocation of a license should not be imposed until the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.[53]

Finally, most of the grounds for revocation arise from violations of the draft Law's content restrictions, some of which, as discussed above, are problematic. Two such examples are the obligation to prevent the dissemination of programmes that offend good manners contained in Article 62(2), and the prohibition against the representation of minors in erotic advertising, contained in Article 94.

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[51] Note 18, Principle 26.
[52] Note 15, Principle 23.
[53] Note 18, Principle 27.2

Administrative Penalty Provisions

Part Six of the draft Law lays out a system of Administrative Penalty Provisions, consisting of fines or property sanctions for breaches of the draft Law's programme content and advertising provisions. There are three fine "brackets", and thus the penalty amount will depend on the specific provision that has been breached. For example, violations of Articles 31(3), 62(2) and (3), 77(1), 83(3) and (5), 92, 94, 100, 107, 111, 121(2), and 134 carry a fine or property sanction in the amount of between 10,000 to 20,000 BGN (approximately US$5,500 - $11,000). The next bracket is 5,000 – 10,000 BGN (approximately US$2,250 - $5,500) and applies to another 25 of the draft Law's provisions. The last bracket is a fine or property sanction in the amount of 2,000 – 5,000 BGN (approximately US$1,125 - $2,250) and covers another 14 provisions. Article 139(3) states that in case of "repeated violation" a double fine and property sanction will be imposed. The draft Law does not define what constitutes a "repeated violation" and there is no ceiling on the number of times a broadcaster can be fined for the same offence in any given time frame.

Article 141 imposes a fine or property sanction of 5,000 to 20,000 BGN for any violation of the broadcast license terms, other than those already addressed by Article 139. A repeated violation within six months will result in a double fine. Article 142 imposes a fine of 5,000 – 8,000 BGN for any violation of programme project, programme concept, programme profile or programme scheme. A repeated violation within six months will result in a double fine.

Article 143 states that officials of the NCEM are responsible for establishing violations, and the Council's Chairman will issue the penalty decrees. Article 143(3) states that "establishment of violations, issuing, appeal and execution of penalty decrees" will be carried out in conformity with the procedure set out in the Administrative Infractions and Penalties Act.[54]

Part Six does not make any reference to other forms of penalty, so that it would appear that fines are not part of a graduated system of sanctions that starts with a warning and ultimately leads to suspension or revocation of the broadcast license. In addition, the sanctions appear to apply to all broadcasters, both radio and television, public and commercial, BNR and BNT.

There are numerous problems with this system of sanctions. First, the NCEM, which is not an independent body, is responsible for administering the regime. Principle 26 of the ARTICLE 19 Principles states that sanctions should only be imposed by a regulatory body that is independent of the government.[55]

Second, the NCEM is granted a considerable amount of discretion in the form of large ranges in the fine amounts, which creates the possibility of abuse through arbitrarily determined penalties. Article 141 allows the NCEM to impose a fine of anywhere from 5,000 to 20,000 BGN for violations of the terms of license. The law does not state what criteria will be applied by the NCEM to determine the fine amount, and there is no requirement of proportionality or reasonableness. For a regime of sanctions

[54] As the text of this Act was unavailable to us, ARTICLE 19 cannot comment on the nature and/or quality of the procedures it legislates.
[55] Note 18.

to be legitimate, the discretion of any administrative bodies responsible for its application must be as narrow as is reasonably possible.

Third, as noted above, the draft Law should provide a range of sanctions, starting with a warning. The draft Law sanction regime starts with either a fine or revocation, neither of which is likely to be proportional to a firs time violation. Both the Council of Europe and the ARTICLE 19 Principles recommend that the regulatory agency first issue a warning to the broadcaster before moving to penalties that will negatively affect the ability of the broadcaster to operate, and thus jeopardize the public's access to information.[56]

Finally, the following provisions in the draft Law attract both revocation and a fine if violated: 62(5), 69(2), 79(4), 92, and 94. ARTICLE 19 believes that this must be a drafting error, for if not it constitutes a gross violation of the principle of proportionality in sanctions. Fines and revocation of the broadcast license should be part of a continuum of penalties that has warnings at one end and fines, followed by suspension, and finally revocation at the other end. Each penalty should normally be an either/or option, and no more than one should be imposed on the broadcaster simultaneously. As stated by Principle 26 of the ARTICLE 19 Principles: "In assessing the type of sanction to impose, regulatory bodies should keep in mind that the purpose of regulation is not primarily to 'police' broadcasters but rather to protect the public interest by ensuring that the sector operates smoothly and by promoting diverse, quality broadcasting."[57]

Recommendations:

- The draft Law's regime of sanctions needs to be revised in accordance with the following considerations:
    - the system needs to be made much clearer and transparent procedures for imposing sanctions must be developed included in the Law;
    - the draft Law must incorporate a system of graduated sanctions to be administered by an independent body;
    - the draft Law should provide guidance to the NCEM as to when to apply each type of sanction;
    - license revocation should only be used as a last resort in the most extreme cases of repeated and gross violations which less intrusive sanctions are failing to address;
    - fines should also be used sparingly and only after less serious measures, such as warnings, have failed to produce a change in behaviour;
    - broadcasters should always have an opportunity to be heard when there is a possibility of sanctions being applied.

[56] Note 15, Council of Europe Recommendation 2000(23), Guideline 23, and Note 18, Principle 27.2.
[57] Note 18.