ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on a proposal for a

draft Law on Public Service Broadcasting Organisations and a draft Law on Radio and Television in Latvia

London
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Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

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1. INTRODUCTION

In 2004, the drafting of two new broadcasting acts was commenced in Latvia: a new "Law on Public Service Broadcasting Organisations" and a new "Radio and Television Law". Both are intended to replace existing broadcasting legislation. The latest version of the drafts, prepared by the Parliamentary Commission on Human Rights and Social Issues and amended by the Cabinet of Ministers, was made public in March 2005 and received some attention from, amongst others, the International Press Institute, who criticised the proposed funding structure for public service broadcasters.

ARTICLE 19 has been requested by the Representative on Freedom of the Media to examine the draft laws against international standards on freedom of expression and broadcasting regulation, with particular attention to the proposed new funding structure of public service broadcasting organisations and the envisaged guarantee for their independence. This Memorandum carries out that analysis and also looks at the proposed new regulatory plan for the broadcasting sector generally as well as a number of other matters, such as the envisaged new content restrictions and the proposed new structure for the right of reply.

Generally, we are very concerned that the new draft appears to place both the public service broadcaster and the broadcast regulator under an unacceptable degree of government control. The public utilities commission, a government-directed body, will be in charge of licensing while the ministries of culture and transport and communications will be charge of various other aspects of broadcasting regulation, such as deciding on complaints and issuing fines or revoking or suspending licences. This is in contravention of Council of Europe recommendations in the field. Public service broadcasting organisations are also insufficiently insulated from State interference, including through their funding structure and through the presence of government appointees on the National Council on public service broadcasting organisations. We are also concerned about the lack of pluralism and the right to freedom of expression generally as guiding principles in broadcast regulation.

We will elaborate on these and other recommendations in Section III of this Memorandum. In Section II, we provide an overview of international law and best practice on freedom of expression and broadcasting regulation. We will use this as a yard-stick by which to assess the draft laws, in Section III of this Memorandum.

2. INTERNATIONAL AND CONSTITUTIONAL STANDARDS

2.1. The Importance of Freedom of Expression

The right to freedom of expression has long been recognised as a crucial human right. It is of fundamental importance to the functioning of democracy, a necessary precondition for the exercise of other rights and, in its own right, it is essential to human dignity. The *Universal Declaration of Human Rights* (UDHR), the flagship human rights instrument adopted by the United Nations General Assembly in 1948, protects the right to freedom of expression in the following terms, at Article 19:

> 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. [1]

The *International Covenant on Civil and Political Rights* (ICCPR),[2] a legally binding treaty which Latvia acceded to in 1992, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also at Article 19. Freedom of expression is also guaranteed by the *European Convention on Human Rights* (ECHR),[3] ratified by Latvia in 1997. Global recognition of the importance of freedom of expression is furthermore reflected in the other two regional systems for the protection of human rights, the *American Convention on Human Rights*[4] and the *African Charter on Human and Peoples' Rights*, both of whom guarantee the right to freedom of expression.[5]

Freedom of expression is also protected, subject to certain restrictions,[6] in Article 100 of the Latvian Constitution, which states:

> Everyone has the right to freedom of expression which includes the right to freely receive, keep and distribute information and to express their views.
> …
> Censorship is prohibited.

International bodies and courts have made it very clear that the right to freedom of expression and information is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),[7] which refers to freedom of information in its widest sense and states:

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

[1] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[2] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[3] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953. As of 7 July 2003.
[4] Adopted 22 November 1969, in force 18 July 1978.
[5] Adopted 26 June 1981, in force 21 October 1986.
[6] Article 116 of the Constitution provides that freedom of expression "may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals." Pursuant to Article 89 of the Constitution, which effectively incorporates international human rights treaties into Latvian law, this has to be read in accordance with international law requirements regarding restrictions on freedom of expression, which are discussed below.
[7] 14 December 1946.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. This has been echoed by human rights courts. Fo example, the European Court of Human Rights has held:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. [8]

Statements of this nature now abound in the case law of the European Court, as well as in constitutional and human rights cases from around the world.

As these statements note, freedom of expression is fundamentally important both in its own right and also as the cornerstone upon which all other human rights rest. Only in societies where the free flow of information and ideas is permitted and guaranteed is democracy able to flourish. In addition, freedom of expression is crucial for the unveiling and exposure of violations of human rights and the challenging of such violations.

The right to freedom of expression is not an absolute right; it may, in certain narrow circumstances, be restricted. However, because of its fundamental status, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim. The right to freedom of expression may not be restricted just because a certain statement or form of speech is considered offensive or because it challenges established doctrines. The European Court of Human Rights has emphasised that precisely such statements are worthy of protection:

> [Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[9]

Article 10(2) ECHR lays down the narrow parameters within which freedom of expression may legitimately be restricted. It states:

> The exercise of [freedom of expression], 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 and impartiality of the judiciary.

This has been interpreted as establishing a three-part test, requiring that any restrictions (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.[10] The European Court of Human Rights has stated that the first requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[11] Second, the interference must pursue one of the aims listed in Article 10(2); the list of aims is an exhaustive one and thus an interference which does not

[8] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[9] *Ibid.*
[10] See, for example, *Sunday Times v. the United Kingdom*, 26 April 1979, Application No. 6538/74 (European Court of Human Rights).
[11] *Ibid.*, at para. 49.

pursue one of those aims violates Article 10. Third, the interference must be "necessary" to secure one of those aims. The word "necessary" has specific meaning in this context. It means that there must be a "pressing social need" for the interference;[12] that the reasons given by the State to justify the interference must be "relevant and sufficient" and that the State must demonstrate that the interference is proportionate to the aim pursued.[13]

2.2. Freedom of Expression and Broadcast Regulation

The guarantee of freedom of expression applies with particular force to the media, including both private and public broadcasters. The European Court of Human Rights has consistently emphasised the "the pre-eminent role of the press in a State governed by the rule of law." [14] 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.[15]

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

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[16]

This does not imply that the broadcast media should be entirely free and unregulated; Article 10 of the ECHR states that the right to freedom of expression "shall not prevent States from requiring the licensing of broadcasting … enterprises". However, there are a number of constraints to such regulation. First, and generally, any licensing system established by States must pass the 'prescribed by law' and 'necessary in a democratic society' parts of the three-part test for restrictions stipulated in Article 10(2) of the ECHR.[17] Second, an important goal of regulation must be to promote pluralism and diversity in the airwaves.[18] The airwaves are a public resource and must be used for public benefit, of which an important part is the public's right to receive information and ideas from a variety of sources. Third, any bodies with regulatory powers in this area must be independent of government.[19]

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[12] See, for example, *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40.
[13] *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.
[14] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[15] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[16] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights), para. 45.
[17] See, for example, *Informationsverein Lentia and Others v. Austria*, 28 October 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 32.
[18] *Ibid.*, para. 38.
[19] Recommendation (2000)23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000.

2.2.1. Regulatory bodies

Any bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments, including the Committee of Ministers of the Council of Europe's Recommendation (2000)23[20] and ARTICLE 19's *Access to the Airwaves*.[21] The latter is a compilation of best practice principles on broadcast regulation drawn from international and comparative law; the former a policy statement adopted by the Council of Europe's Committee of Ministers, of which Latvia is a member. Central to both documents is the idea that regulatory bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, and which includes guarantees against dismissal and rules on conflict of interest.[22]

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

> 3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.
>
> 4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
>   - regulatory authorities are under the influence of political power;
>   - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
>
> 5. Furthermore, rules should guarantee that the members of these authorities:
>   - are appointed in a democratic and transparent manner;
>   - may not receive any mandate or take any instructions from any person or body;
>   - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.
>
> 6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
>
> 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.
>
> 8. Given the broadcasting sector's specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence.

[20] *Ibid.*
[21] London, 2002.
[22] Articles 3-8 of Recommendation (2000)23 and Principle 13 of *Access to the Airwaves*.

Recommendation 1996(10) lays down similar principles in regard to regulatory bodies of public service broadcasters.[23]

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

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

The need for protection against political or commercial interference has also been stressed in a Joint Declaration by the three specialised mandates for the protection of freedom of expression, namely the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, issued in 2003, which states:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[24]

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."[25]

2.2.2. Pluralism

The need for pluralism in the media goes to the heart of the public's right to receive information. 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."[26] The Inter-American Court has similarly stated 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."[27]

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[23] Recommendation 1996(10) of the Committee of Ministers of the Council of Europe on the Guarantee of the Independence of Public Service Broadcasting.
[24] Adopted 18 December 2003.
[25] *Athukorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, (1997) 2 BHRC 610.
[26] *Informationsverein Lentia and Others v. Austria*, note 17, para. 38.
[27] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.

The obligation to promote media pluralism incorporates freedom from unnecessary interference by the State as well as the need for the State to take positive action to promote pluralism.[28] States may not impose restrictions which have the effect of unduly limiting or restricting the development of the broadcasting sector. At the same time, States should put in place systems to ensure the healthy development of the broadcasting sector, and that this development progresses in a manner that promotes diversity and pluralism. This has been affirmed at the constitutional level in a number of countries. Both the German and French constitutional courts, for instance, have held that the State is under an obligation, when designing a regulatory framework for broadcasting, to promote pluralism. The French Conseil Constitutionnel, when assessing the legitimacy of a 1986 law on communications, found that the principle of pluralism of information was of constitutional significance.[29] Similarly, the German Constitutional Court has held that broadcasting must be structured in such a way as to ensure the transmission of a wide range of views and opinions.[30]

2.2.3. Public service broadcasting

An important contribution to pluralism in the broadcast media can be made by 'public service' broadcasters, whose status and founding charters bind them to provide programming that caters to the needs of different groups in society. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism. For example, an EU Resolution adopted in 1999 recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public and notes that they are of direct relevance to democracy, social and cultural needs, and media pluralism. As a result, funding by States to such broadcasters is exempted from the general prohibition in EU law on state-funding for broadcasters.[31] For the same reasons, the 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.[32]

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994, promotes very similar principles. This resolution notes the importance of public service broadcasting to human rights and democracy generally, and the role of public service broadcasting in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the resolution recommends that member States guarantee at least one comprehensive public service broadcaster which is accessible to all.

The Council of Europe's Committee of Ministers has stressed that it is essential that public service broadcasters are independent from political and other undue influences. A public service broadcaster that is not independent from political or economic forces cannot properly serve the public interest. This is relevant not only in relation to the status of a public service broadcaster's regulatory bodies, as discussed in Section 2.2.1, above, but also in relation to its

[28] See Principle 3 of *Access to the Airwaves*.
[29] Decision 86-217 of 18 September 1986, Debbasch, 245.
[30] See the *First Television* case, 12 BverfGE 205 (1961).
[31] Official Journal C 030, 5 February 1999, clause 1.
[32] 9 October 1992, endorsed by the General Conference at its 28th session in 1995, Clause 5.

corporate status and in its funding structures. Public service broadcasters should be adequately funded by a means that protects the broadcaster from arbitrary cuts with their budgets or interference with their programming policy. The Council of Europe Recommendation states:

> The following principles should apply in cases where the funding of a public service broadcasting organisation is based either entirely or in part on a regular or exceptional contribution from the state budget or on a licence fee:
>
> - the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;
>
> - the level of the contribution or licence fee should be fixed after consultation with the public service broadcasting organisation concerned, taking account of trends in the costs of its activities, and in a way which allows the organisation to carry out fully its various missions;
>
> - payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;
>
> - the use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy mentioned in guideline No. 1;
>
> - where the contribution or licence fee revenue has to be shared among several public service broadcasting organisations, this should be done in a way which satisfies in an equitable manner the needs of each organisation. The rules governing the funding of public service broadcasting organisations should be based on the principle that member states undertake to maintain, and where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.[33]

We will elaborate on different funding models in Section XX of this Memorandum, which comments on the proposed future funding model for the Latvian public service broadcaster.

Finally, the remit of public broadcasters should be clearly defined in law. Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming. Their remit should include, among other things, the requirement to provide a service that:

- provides quality, independent programming that contributes to a plurality of opinions and an informed public;
- includes comprehensive news and current affairs programming that is impartial, accurate and balanced;
- provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
- is universally accessible and serves all the people and regions of the country, including minority groups;
- provides educational programmes and programmes directed towards children; and
- promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.[34]

[33] Note 19, Guideline V.
[34] *Access to the Airwaves*, note 21, Principle 37.

3. ANALYSIS OF THE DRAFT LAWS

3.1. Overview of the draft Laws

The draft Law on Public Service Broadcasting Organisations (draft PSBO Law) consists of six Chapters. Chapter I lays down the objective of the Law as "to provide production and broadcast of public service broadcasting … programs complying with the interests of the public"; its purpose is to "define the legal status of the PSBO, their activity and program production conditions, their management and the order of their supervision, as well as to envisage the financing resources". Chapter II lays down a number of principles concerning programme production. Pursuant to Article 4, "PSBO programmes shall provide comprehensive, neutral and balanced information to the public, it shall, as widely as possible, reflect different opinions as well as the political, philosophical, religious, scientific, economic and art tendencies". Chapter III lays down the legal status of PSBOs. It is envisaged that PSBOs are established as "derived public legal persons", run by a Board and Director General appointed by a Council. Chapter IV lays down principles regarding financing, establishing three separate sources of income for PSBOs: a direct annual subsidy from the State budget, income derived from commercial activities and income from donations, gifts and sponsorship. Advertising must be phased out by the beginning of 2008. Chapter V concerns the supervision of PSBOs. Article 14 establishes a PSBO Council, appointed by Parliament, responsible for the development of an annual programme plan. A final set of transitional provisions re-establish Radio Latvia and Television Latvia as new public service broadcasting organisations.

The draft Radio and Television Law (draft RTV Law) consists of 11 chapters and lays down a new regulatory framework for the entire broadcasting sector in Latvia. As indicated earlier, we will comment mainly on structure of the regulatory framework it establishes, particularly with regard to the extent to which the independence of the new regulatory system is guaranteed. The draft RTV Law proposes to establish a complex regulatory framework, placing the existing Public Utilities Commission in charge of issuing free-to-air broadcasting and programme production licences while establishing the Ministry of Culture as the licensing authority in regard to cable and satellite broadcasting. All licenses can be suspended by the Ministry of Culture for a variety of reasons. The Ministry of Transport and Communications, finally, is left in virtual charge of the Latvian Radio and Television Centre, the company that ensures the technical side of broadcast transmissions. Chapter IV of the draft RTV Law establishes a number of content restrictions, relating to such issues as pornography, the promotion of hatred or "the demeaning of national honour". Further Chapters in the draft RTV Law deal with advertising and sponsorship restrictions, the right to reply, and supervision of the Law by the Ministry of Culture.

Generally, we are extremely concerned about the level of State involvement in both public service broadcasting organisations – through the funding structure and the oversight mechanism – and in broadcast regulation generally. We are also struck by the absence of the right to freedom of expression of broadcasters and the public's right to receive information from a variety of sources as regulatory principles; and we are concerned about certain of the content restrictions imposed under the draft RTV law. These concerns are elaborated in the following paragraphs.

3.2. Protection of pluralism and broadcasters' right to freedom of expression

ARTICLE 19 believes that the public's right to know and broadcasters' right to freedom of expression should be at the basis of any broadcasting regulatory regime. Principle 3 of ARTICLE 19's *Access to the* Airwaves states:

> 3.1 Diversity implies pluralism of broadcasting organisations, of ownership of those organisations, and of voices, viewpoints and languages within broadcast programming as a whole. In particular, diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole.
>
> 3.2 The State has an obligation to take positive measures to promote the growth and development of broadcasting, and to ensure that it takes place in a manner which ensures maximum diversity. It also has an obligation to refrain from imposing restrictions on broadcasters which unnecessarily limit the overall growth and development of the sector.[35]

This derives from the European Court of Human Rights' dictum that the public's right to know cannot be fulfilled "unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor". The Court added that, "[t]his observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely."

In light of these important statements of principle, we are concerned about the absence of the right to freedom of expression and the public's right to receive information from a variety of sources as guiding lights in the draft RTV Law and, to a lesser extent, in the draft PSBO law. Neither of the draft Laws establishes the public's right to a vibrant and diverse broadcasting sector as a regulatory principle. The draft RTV Law fails even to mention the public's right to information from a variety of sources; Section 12 of the Act, entitled 'diversity', merely lays down some limited provisions to prevent the monopolisation of the market by powerful broadcasters. There is no requirement that diversity of broadcast content should be a regulatory principle, nor that it should at least be a consideration in issuing new licences. This means that there is no legal requirement for diversity in broadcasting; a major oversight. The PSBO law contains a few references to the public's right to know, particularly in Article 1(1), which mentions the need for PSBO programme production "complying with the interests of the public", and Article 3, which lists "the formation [of] a free and informed viewpoint of the public" as a PSBO programming objective. However, these are comparatively weak statements that are open to different interpretation.

Similarly, the draft RTV does not effectively affirm broadcasters' freedom of expression or their editorial independence. The only reference in the draft RTV Law at broadcasters' editorial freedom is in Article 25, which states that "[b]roadcasting organisation shall be free and independent in the production and distribution of its programs". However, the same paragraph adds the crucial qualifier, "insofar as they are not restricted by the Satversme (the Constitution), this Law and other laws, State technical standards and international agreements binding on Latvia". While the draft PSBO Law states that "public service broadcasting organisations are editorially and financially independent", this is contradicted by other provisions in the law regarding funding arrangements and the development of programme plans and policies.[36]

[35] Article 3
[36] Article 9(4). The independence of public service broadcasters is further discussed in Section 0.

Additionally, we recommend inclusion of a clause concerning the status of international human rights law. There is a developing practice whereby modern broadcasting laws in Council of Europe Member States include the express stipulation that they shall be interpreted in accordance with the European Convention on Human Rights and the jurisprudence developed by the European Court of Human Rights.[37] While we understand that the Latvian Constitution provides for the application of international human rights law, the inclusion of a clear statement to this effect in both draft laws would make this absolutely clear for broadcasting.

Recommendations:

- The right to freedom of expression of broadcasters and the public's right to know should be mentioned as regulatory principles in both laws.
- Both draft laws should include the express stipulation that they will be interpreted in line with the European Convention on Human Rights and the jurisprudence developed by the European Court of Human Rights.

3.3. State control over the broadcasting sector generally

Both the draft PSBO Law and the draft RTV law envisage an unacceptable degree of State interference with broadcasting regulation. The draft RTV Law establishes the Ministry of Culture, the Public Utilities Commission and the Ministry of Transport and Communications as the main regulatory authorities for the broadcast sector. Under the draft PSBO Law, public service broadcasters will be tied to the Ministry of Transport and Communications for their funding while five-yearly negotiations are envisaged with the Cabinet of Ministers to discuss PSBOs' "evolution principles".[38] The draft PSBO Law also envisages at least two direct government appointees to the PSBO Council.[39]

This regulatory model is highly problematic. First and foremost, the two ministries envisaged to be involved in regulation are part of the executive arm of government, headed by government ministers, and cannot be considered 'independent' of political interests. Their functions include drawing up the 'national concept' for broadcasting, issuing cable and satellite licences and, worryingly, imposing fines, suspending and revoking licences or taking other action in response to violations of the law.[40] The Ministry of Culture will have the power to receive complaints from viewers and listeners, and presumably to adjudicate on them, as well as to carry out random checks on "the content and quality of distributed programs".[41] Such direct interference by the executive arm of government in broadcasting regulation contravene the basic principles of freedom of expression and broadcast regulation outlined in Section 2.2 of this Memorandum.

Second, the role and status of the Public Utilities Commission is also problematic. Under the draft RTV Law, the Commission will be the body responsible for issuing free-to-air broadcast

[37] See, for example, the Broadcasting Law recently adopted in Montenegro.
[38] Section 13, draft PSBO Law.
[39] Article 15, draft PSBO Law.
[40] Section 24, draft RTV Law.
[41] Article 65, draft RTV Law.

licences as well as licences for programme production. Technically an arm of the Ministry of Economy,[42] the Commission is governed by a Council of five who are appointed by Parliament, on the nomination of the Cabinet of Ministers.[43] Although Section 11 of the Law on Regulators of Public Services does stipulate that the Commission is "independent in performing the functions set out in law", we are concerned that there will nevertheless be political influence through the fact that all five members of its Council are Cabinet nominees – even if they have been finally appointed by Parliament – as well as through the undefined 'supervisory' role of the Ministry of Economy.[44]

Together with the envisaged role for ministries, this regulatory set-up is wholly incompatible with the principle that broadcast regulators should be independent from the Government, as elaborated in Council of Europe Recommendation R(2000)23. This Recommendation provides, in Principle I:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

It also fails to meet the requirements regarding the independence of public service broadcasters set out in Council of Europe Recommendation (1996)10, which states that "[t]he legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy, especially in areas such as … the organisation of the activities of the service; … the management of financial resources; [and] the preparation and execution of the budget."[45]

ARTICLE 19 strongly urges a rethink of the entire broadcast regulatory model, eliminating completely the role of the Government from all aspects of broadcast regulation, including from the boards or councils of public service broadcasting organisations. Regardless of the regulatory model chosen, it should conform to the following basic principles, set out in *Access to the Airwaves*:

> 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. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:
>
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
> - through the rules relating to membership;
> - by formal accountability to the public through a multi-party body; and
> - in funding arrangements.[46]

We note that the Public Utilities Commission, as a body, complies with certain though not all of these principles. However, even if there is a rethink on matters such as the appointments

[42] Article 1, Regulation for Public Utilities Commission, Regulation No. 393.
[43] Section 7, Law on Regulators of Public Services.
[44] Article 1, Regulation for Public Utilities Commission, note 42.
[45] Guideline I.
[46] Note 21, Principle 10.

procedure, we doubt that it is appropriate for it to function as the broadcast regulator. Although we appreciate that the Commission has been set up as a so-called 'converged' regulator, unlike converged regulators in other countries its functions are not limited to the communications sector. It regulates the provision of energy, post and the railways as well as the communications sector. This is a very broad range of responsibilities. Communications regulation has developed to become a highly specialised activity, particularly in the digital and satellite era, and we simply do not see how a body whose functions are so broad can realistically develop the expertise needed to steer policy in the communications sector. The fact that it has only five board members is in itself a problem in this regard – it is simply impossible to concentrate the broad expertise and experience required for communications regulation within just five persons.

Recommendations:

- The regulatory structure should be redesigned to eliminate all direct government involvement as well as indirect interference with broadcast regulation, with the sole possible exception of the design of a national broadcasting concept for adoption by Parliament.
- The regulatory functions of the Public Utilities Commission should be reconsidered in favour of the establishment of a specialised communications regulatory body.

3.4. Regulatory structure of public service broadcasters

The draft Law on Public Service Broadcasting Organisations (draft PSBO Law) envisages two public service broadcasters, Radio Latvia and Television Latvia, set up as public law entities and whose 'Provisions' (which we assume to mean their statutes) are approved by the National Council of Public Service Broadcasting Organisations.

The National Council is envisaged as the pivotal body in terms of regulation and supervision. This Council is envisaged as an autonomous body, separate from the public service broadcasters, comprised of a variety of persons who will together represent 'public opinion'.[47] The primary function of the Council will be to supervise the public service broadcasting sector. It will develop the annual PSBO programming plan, in consultation with public service broadcasters, and it prepares the annual overall PSBO budget, submits it to the Cabinet and decides on its distribution among the two public service broadcasters.[48] With regard to each of the two public service broadcasters, it approves its Statutes, appoints and suspends directors General and members of the Board, and it supervises spending and programming by ensuring that this conforms to both the budget and the previously agreed program concept.[49]

The Council will consist of seven members, appointed by Parliament on the nomination of several groupings: Radio and TV Latvia will nominate one member each; unions and other 'institutions' will nominate two members; the President and Cabinet of Ministers will nominate one member each; and a final member will be nominated by a group representing at least one third of all parliamentary deputies. A list of all nominees will be published in the

[47] Article 14, draft PSBO Law.
[48] Article 18, draft PSBO Law.
[49] Article 18, draft PSBO Law.

official Gazette, and the parliamentary Human Rights and Social Affairs Commission will publish its opinion on each of the nominees, by secret ballot.[50] A number of exclusions apply to membership of the Council; for example, a Council member may not be a serving politician. Council members will serve five year terms and may not serve more than two consecutive terms. Council members may be recalled if they have not attended more than half the Council meetings in a three-month period without justification; if one of the exclusions mentioned elsewhere in the draft Law applies;[51] or is he or she has violated the PSBO law or has allowed a violation to occur that led to "substantial consequences". Council members will be paid a salary similar to that of Members of Parliament, while the chair person receives 50% extra.[52] Article 16(8) provides that no State or local authority may interfere with the work of the Council, except as provided by law.

In terms of day-to-day management, each of the two public service broadcasters – Radio Latvia and TV Latvia – is run by its own Director General and Board. The Director General is appointed by the National Council for a term of five years, while Board members are appointed for three-year terms. The Director General is also chair of the Board and he makes nominations to the Council for the appointment of new Board members.[53] Directors General may serve repeated terms, but no more than two consecutively. They may not be active in politics; any party memberships must be suspended for the duration of the term for which he or she is appointed. They may not have any interest in other broadcasters and may not hold any other paid jobs, except "in artistic, scientific or pedagogical activities". They may not be discharged except at their own request, or if one of the incompatibilities begins to apply (for example, if a serving Director General is elected a Member of Parliament). The Director General's duties are manifold but relate mainly to the running of the organisation; he or she will not have direct editorial responsibilities, although, with the board, the Director General is responsible for the formulation of a "program formation concept and basic directives".[54] We assume this to relate to the formulation of a periodic overall programming concept for the broadcaster rather than involvement in the development of individual programme concepts. Acting together with the Director General, the Board has co-responsibility for preparing the annual budget plan, concluding collective labour contracts, buying or selling real estate property and any financial deals greater than 5% of the previous year's overall financial turnover.

Analysis

In addition to our overall concern about State involvement in broadcast regulation generally, expressed in Section 3.3, we are highly concerned that the regulatory structure of public service broadcasters as described above gives the State undue influence over the public service broadcaster. In Section 2.2 of this Memorandum, we described, briefly, the main principles regarding the regulation of public service broadcasters. These principles have been elaborated in some detail in Recommendation 1996(10), issued by the Committee of Ministers of the Council of Europe, which lays out a number of principles that apply to the protection of the independence of public service broadcasters and their supervisory and

[50] Article 15(6).
[51] The reference given, to Article 43, is wrong (there is no Article 43 in the draft Law). We assume this refers to the exclusions regarding serving as a politician and other activities incompatible with Council membership.
[52] Article 19, draft PSBO law.
[53] Article 11, draft PSBO law.
[54] Article 12(9)(1), draft PSBO law.

management boards.[55] In our view, the envisaged regulatory structure fails to adhere to these principles, particularly in regard to the fact that at least two and probably three of the seven Council members are government appointees, and through the insufficient steps envisaged to protect the independence of the Council and Board as a whole as well as of individual Council and Board.

Under Recommendation 1996(10), the guiding principle on to the appointment of Board and Council members should be that the procedure should be "defined in a way which avoids placing the bodies at risk of political or other interference."[56] Under Article 15 of the draft PSBO law, there will be two direct government nominees on the Council, and a third nominee will represent a group of at least one third of all Parliamentary representatives. Given the nature of multi-party politics, it is highly likely that this third nominee will be nominated by the governing coalition and will in effect be the third governmental appointee. Added to the insufficient guarantees for the independence of the Council and its members, this number of governmental appointees means that there is a serious possibility that the board will be at risk of political interference.

ARTICLE 19 has recently published a Model Public Service Broadcasting Law that serves as an example of how public service broadcasters should be regulated in order to preserve both their independence and the public's right to information. Article 7 of this Model Law recommends the following clause to ensure the independence of members of the supervisory body of a public service broadcaster:

> (1) All members of the Board shall be independent and impartial in the exercise of their functions and shall, at all times, seek to promote the Guiding Principles [on public service broadcasting].
> (2) Board members shall neither seek nor accept instruction in the performance of their duties from any authority, except as provided by law.
> (3) Board members shall act at all times in the overall public interest and shall not use their appointment to advance their personal interests, or the personal interests of any other party or entity.[57]

We recommend that similar wording be considered in the draft PSBO Law.

We also recommend that Council Members should not receive remuneration for the exercise of their duties, other than a compensation for actual expenses, including travel, accommodation and subsistence, incurred as a result of their duties.

Recommendations:

- There should be no government nominees on the PSBO Council.
- The independence of the PSBO Council and its members should be guaranteed along the lines suggested above.
- PSBO Council Members should not receive any remuneration for the exercise of their duties other than a compensation for actual expenses.

[55] Recommendation (1996)10, note 23.
[56] *Ibid*., Principle III.2.
[57] ARTICLE 19, *A Model Public Service Broadcasting Law*, London: 2005, Article 7.

3.5. Funding of public service broadcasters

Article 13(1) of the draft PSBO law states the funding sources of public service broadcasting organisations as comprising the following:

- funds from the State budget;
- funds gained from independent entrepreneurial activities; and
- donations, gifts and sponsorship.

Article 3(4) states explicitly that "PSBO programs shall not include advertising and TV shopping." In recognition of the fact that currently, Radio and TV Latvia do carry advertising, and mindful of the need for a smooth transition, paragraph (4) of the transitional provision provides that until 1 January 2008, public service broadcasting organisations may carry advertising but must ensure that it will not exceed half of the maximum allowed under the existing Law on Radio and Television.

The adequate funding of public service broadcasters is crucial to their functioning as well as to their independence. It goes without saying that without funds, public service broadcasters will not be able to produce the kind of quality broadcasting needed to satisfy the public's needs. A steady supply of funding, with no political strings attached, goes a long way to guaranteeing the independence of public service broadcasters.

The guiding principle in Recommendation 1996(10) of the Committee of Ministers of the Council of Europe is:

> The rules governing the funding of public service broadcasting organisations should be based on the principle that member states undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.

In some European countries, this has been enshrined as a constitutional principle.[58]

This principle can be achieved in a number of ways, including through not only the sources mentioned in the draft PSBO law but also through advertising income, the concession fee paid by commercial broadcasters and through a licence fee. Public service broadcasters in different countries are funded through several of these models, and often through a mix of several of them. The following paragraphs briefly discuss the pros and cons of the main different funding methods.[59]

Broadcasting fee

In many European countries, public service broadcasting is financed through a fee collected from all owners of a radio or television set. In some countries, this is collected separately, while in others, it may be added to the electricity bill. The broadcasting fee has several advantages over other methods of funding of public service broadcasting: it is a stable and secure source of funding; it reduces dependency on other sources of income and in some cases it can be sufficient to finance most of the public service broadcaster's activities; and it creates

[58] The Italian Constitutional Court, for example, has held that the constitutional guarantee of freedom of expression obliges the government to provide sufficient resources to the public broadcaster to enable it to discharge its functions: Decision 826/1998 [1998] Guir. cost. 3893.

[59] At the request of the OSCE Representative on Freedom of the Media, we enter into some more detail than we normally would.

a bond between a public service broadcaster and its viewers and listeners. In many countries, public acceptance of the fee is surprisingly high.

However, this is not to say that a broadcasting fee is the ideal funding source in all circumstances. The income derived from the fee is stable but also static, leaving little room for growth; if more income is needed, raising the level of the fee may be unpopular and therefore difficult to achieve politically. Furthermore, it is by no means a given that public acceptance of the fee, where it exists, will remain at a high level. At a time of multi-channel digital and satellite TV, detractors of public service broadcasting will label the fee as an anachronism.

The collection of the fee may also be difficult to realise. In some countries, such as Germany, the fee is collected through public service broadcasters or through an agency set up by them. This can be costly, however. One of the motivating factors for the switch in the Netherlands from collection of a broadcasting fee to an indexed state contribution was the savings that could be achieved by abolishing the cumbersome and costly collection system. In other countries, existing tax or media authorities collect the fee,[60] or third parties appointed by law, such as public utility companies.[61] Depending on the method of collection, there is always a degree of evasion.

Finally, it must be noted that a broadcasting fee alone is rarely sufficient to wholly fund a public service broadcasting system. This is a simple matter of economics coupled with the political resistance likely to be encountered when the fee is set at the high level needed to provide whole-funding. High quality public service broadcasting cannot be provided on the cheap. In Europe, only some large countries with a high per capita income and an established tradition of public service broadcasting have been able to set the broadcasting fee at a level that is high enough to wholly fund the public service broadcaster.[62]

Direct public subsidies

Traditionally, many public service broadcasters also have been funded through a direct public subsidy. Direct State funding has several advantages: there isn't the problem of collecting a fee, the burden of paying for public service broadcasting is the same for everyone, and the level of funding can be easily and quickly adapted to the needs of public service broadcasters, However, there are also several disadvantages. Most importantly, direct State funding, as envisaged under the draft PSBO law, raises the spectre of political interference. Mindful of the potential for this, Recommendation 1996(10) of the Committee of Ministers of the Council of Europe states the following as guiding principles for PSBOs that are wholly or in part State funded:

> - the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;

[60] For example, France and Belgium.
[61] For example, in Greece, Cyprus, Turkey and the Former Yugoslav Republic of Macedonia.
[62] A report by the European Broadcasting Union published in 2000 suggests that only in the United Kingdom, Sweden and Norway the public service broadcaster is entirely funded through the broadcasting fee (see *The Funding of Public Service Broadcasters*, Legal Department, European Broadcasting Union, November 2000). Even in those countries, this claim is debatable: the BBC's own annual report for 1996/7 reports, for example, that the BBC derived 17% of its income from commercial activities.

> …
> - payment of the contribution … should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;
> - the use of the contribution … by the public service broadcasting organisation should respect the principle of independence and autonomy mentioned in guideline No. 1;
> - where the contribution … has to be shared among several public service broadcasting organisations, this should be done in a way which satisfies in an equitable manner the needs of each organisation.
>
> The rules on the financial supervision of public service broadcasting organisations should not prejudice their independence in programming matters as stated in guideline No. 1.

The first of these principles is clear: funding should never be used as a way to pressure public service broadcasters or interfere with their editorial independence or institutional autonomy. In order for this to be effective in practice, it is necessary that the measures outlined in Section 3.3 and 0, to protect the independence of public service broadcasters, also be put in place. The second principle emphasises that State funding should be stable and allow for long-term planning on the part of the broadcaster. It should not fluctuate from year to year; there must be a certain continuity. Ways of achieving this include defining the level of the subsidy as a percentage of the overall State budget or other forms of indexation, and providing for funding cycles that are longer than one year. For example, once a funding formula has been agreed upon, this could be set for a period of several years with a built-in annual rise for inflation. In order to provide for some flexibility, provision could be made for additional funding requests by the public service broadcaster to top-up the regular contribution if needed, or to break open the agreement hen it becomes clear the level of funding agree is not sufficient to guarantee a high quality of service.

It must also be noted that the funding of public service broadcasters – including through a licence fee – remains a difficult issue in the context of European Community competition law, in spite of the declaration that such broadcasters are exempted from the general ban on State aid.[63] Elaborating on the general exemption, the European Court of Justice has held that State funding of public service media can be allowed only if a number of conditions are cumulatively met:

1. the public service obligations must be defined in clear and unambiguous terms;
2. there must be pre-established parameters for determining the precise amount of public funding made available;
3. there must be no overcompensation; and
4. the public service provider must either have been selected through a competitive tender process, or the costs of running the broadcaster must be similar to those of a comparable and well-run undertaking.[64]

Even given those parameters, there remains scope for misunderstanding, particularly as regards the financing of on-line activities of public service broadcasters. Recently, the European Commission has requested Germany, the Netherlands and Ireland to clarify their policies on the funding of public service broadcasters.[65] This is the first step in an investigation that may ultimately lead to the Commission declaring that the funding models in

[63] As mentioned in Section 2.2.3 of this Memorandum.
[64] *Altmark Trans GmbH, Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, 24 July 2003.
[65] European Commission press release IP/05/250 of 3 March 2005, http://merlin.obs.coe.int/redirect.php?id=9587. See also the Commission's helpful FAQ on the subject: MEMO/05/73 of 3 March 2005 http://merlin.obs.coe.int/redirect.php?id=9588.

those countries constitute an illegal form of State aid, distort a free market in the broadcasting sector and must therefore be reformed.

Advertising and sponsorship

Several European public service broadcasters have historically been (part)funded through advertising.[66] Additionally, in recent years many broadcasters in eastern Europe have moved from State funding models to more commercial models.

Advertising income is a dynamic source of funding and provides a form of funding that is fully independent of government. It can have many advantages, including the creation of an incentive to respect public tastes and preferences, the facilitation of the production and acquisition of popular programmes, including large sports events, and helping ensure that the public service broadcaster does not get marginalized. The main disadvantage, however, is that there is a real danger that advertising brings the public service broadcasters into competition with commercial broadcasters, leading to programme choices being based on popularity rather than quality. This can only lower the quality and diversity of public service broadcasting, undermining the rationale for it. It is also striking that while the advertising market for television as a whole has increased dramatically throughout the 1980s and 1990s, the rise of commercial television has meant that advertising income for some public service broadcasters has actually decreased. Research published by the European Broadcasting Union reports that in Germany, ZDF and ARD's share of advertising income in the overall budget fell from between 15% and 40% in the 1980s to between 5% and 10% in the late 1990s. Furthermore, in countries with a weak economy or where the public service broadcaster has a very low audience share, advertising revenue may be very small.

Sponsorship, whereby commercial actors pay to 'sponsor' a particular programme, has made particularly headway in film and sports broadcasting. The advantages and disadvantages of programme sponsorship are similar to those associated with advertising, with the added disadvantage that sponsorship may lead to commercial pressure by the 'sponsor' to interfere with the content of the sponsored programme.

Concession fees from commercial broadcasters

In a few countries, public service broadcasting is funded through fees paid by commercial broadcasters. The advantage of this is that it allows for a stable source of funding that can grow together with income of commercial broadcasters. To the extent that it is usually combined with a ban on advertising on public service broadcasters, it also removes the competition for advertising revenue that is often blamed for the 'dumbing down' of public service broadcasting.

Finland is usually quoted as the typical exponent of this system. In 1999, it established a system whereby public service broadcasting is funded through an independently administered State Television and Radio Fund. Financed through a mix of fees paid by viewers and listeners and a concession fee paid by commercial broadcasters, the Fund is administrated by an independent body that distributes the income to the public service broadcaster. The 'quid pro quo' for the public service broadcaster is that it has been banned from carrying any advertising or sponsorship, with the exception of broadcasts of major events (usually sports events). Although the system is successful in Finland, it must be pointed out that it developed

[66] For example, in the Netherlands.

through the historical origins of commercial broadcasting itself – the first commercial broadcaster in Finland started its operations using the channels of the public service broadcaster, for which it paid a fee – and it may be difficult to replicate elsewhere. A similar system existed in the United Kingdom for some time, where Channel 4, a small public service broadcaster that also carries advertising, was for some time part-funded through the advertising revenue received by companies that had a licence to broadcast on Channel 3, ITV (which also has a limited public service remit). As Channel 4's own advertising income grew, this funding structure was eventually done away with.

The system has been tried in Estonia, where it has been reported to have failed because commercial broadcasters defaulted on their payments. This illustrates one of the disadvantages, which is that it is difficult to set the fee at a realistic and affordable level. Particularly in smaller and less profitable markets, there may simply not be enough money in commercial broadcasting to produce income sufficient even to part-fund a public service broadcaster. The same is true in markets where foreign (satellite) broadcasters have a large audience share, since one cannot impose a fee on broadcasters based abroad. Another disadvantage can be resistance from subscription or pay-TV channels, since these don't benefit from the ban on advertising for public service broadcasters.

Mixed funding

Given the disadvantages associated with most of the sources of income, and the reality that it is practically impossible to wholly fund a public service broadcaster through a single funding source, most European public service broadcasters operate on a mix of different sources of funding, often combining commercial revenue with income from a State subsidy or broadcasting fee. This has numerous advantages. First, as already noted, there mixing different sources of funding means that many of the disadvantages listed above can to some extent be neutralised. For example, the scope for political governmental interference with the independence of the public service broadcaster is greatly reduced if the broadcaster also derives income from commercial revenue, decreasing it dependency on income from the State.

Analysis of the draft Latvian PSBO law

The proposal to take public service broadcasters out of the advertising market and make them reliant on a public subsidy, complemented by some income from donations and entrepreneurial activities, is a significant one. As outlined above, one f the main advantages of advertising income is that it provides an income that is wholly independent from the State. It is important that whatever revenue stream replaces the lost income from advertising, it is provided in such a way as to guarantee the continued independence of public service broadcasters. In light of this consideration, we do have a number of concerns in relation to the proposed new funding model.

Article 13(3) envisages 5-yearly negotiations between the government and PSBOs to discuss the required funding level. The level of the State contribution is adjusted annually for inflation, and Article 13(4) provides explicitly that "[t]he financing allocated to the PBSO from the state budget shall not be smaller than in the previous year." In apparent contradiction with this, Article 18 envisages an annual discussion between the PSBO Council and the Cabinet regarding the state budget contribution to public service broadcasting, which is finally adopted in Parliament. This seems to be a different model than that envisaged in Article 13(3).

In light of the crucial importance of funding, the draft Law should be absolutely clear on the model envisaged, without any scope for misunderstanding.

We also note that the model described in Article 13(3) and (4) and the model described in Article 18 each have their own advantages and disadvantages. While paragraphs (3) and (4) of Article 13 are positive in that they provide for a long-term funding base, and that funding can only go up and not down, it does require direct 'negotiations' between the public service broadcasters and the Cabinet. This provides a major opportunity for political abuse of the financing system and should be removed. In contrast, under Article 18 the budget would be prepared by the Council, together with public service broadcasters, and submitted to the Cabinet and parliament. Provided that the independence of the Council is strengthened in accordance with the suggestions we provide in Section 3.4, this is in theory the better system – but only if Cabinet approval is replaced with explicit Parliamentary approval (this is unclear in the current drafting) and funding is for a multi-year period as suggested in Article 13(3), and rises at least in line with inflation, as provided in Article 13(4).

Finally, it would be good if the draft PSBO law explicitly stated that State funding will be sufficient to ensure a high quality public broadcasting service, taking into account public service broadcasters' other sources of income.

Recommendations:

- Any internal discrepancies regarding the precise method of agreeing the level of State funding should be cleared up.
- Funding discussions should not be conducted by the PSBOs themselves but through the PSBO Council.
- Funding should be guaranteed over long-term multi-year cycles.
- The level of the State contribution should always be such as to continue sufficient funding, taking into account income from other sources.

3.6. Miscellaneous

Finally, there are a few other matters that we recommend be addressed in future drafts of the Laws.

First, some of the content restrictions prescribed under the draft RTV Law are not sufficiently precise to pass muster under the three part test outlined in Section 2.1 of this Memorandum, or they pursue an illegitimate aim. This is particularly the case in for Article 26(1)(3), which provides that "[a] programme shall not include … incitement to … the demeaning of national honour and human dignity …"; and Article 31(2)(6), which states that "commercials and teleshopping may not … violate generally established moral, social or cultural norms …" In relation to the first, we point out that the 'national honour' cannot be legitimately serve as a limiting interest on freedom of expression. Full, free and frank and open political debate of the kind that is so vital to a democracy must allow vehement criticism of all affairs political or matters that are of current interest. Restrictions such as those aimed at protecting 'national honour' are easily abused to silence a critical media or political opposition, and should be removed from the law. With regard to the restriction on advertising that violates "generally

established moral, social or cultural norms", this is simply to vague to serve as a legitimate restriction on the right to freedom of expression.[67]

Second, the requirement under Article 6 of the draft PSBO law that the entire first channel of the PSBO shall be broadcast in Latvian with the exception for "original programs produced in Latvia", which may be subtitled, can be problematic in relation to minority languages. We are aware of the long-standing concerns on this issue, which have culminated in constitutional litigation, and recommend that this requirement be reconsidered or rephrased in such a way as to allow for minority language broadcasts, whether or not produced in Latvia.

Third, the right of reply and retraction schemes provided in Articles 41 and 42 of the draft RTV law appear to be problematic in that they provide a right of reply for potentially true information, and a retraction for the distribution of untrue information that does not harm a person. This means that a person could demand a right of reply or retraction even for the broadcast of true information, such as a finding of corruption. This cannot be seen as a legitimate interference with the right to freedom of expression. We are also concerned that the Law allows for a reply where a refutation ahs already been issued, even when the refutation suffices to repair any harm done, and that it appears to allow for disproportionately lengthy replies.

ARTICLE 19, together with other advocates of media freedom, suggests that rights of reply and refutation should be voluntary rather than prescribed by law. In either case, certain conditions should apply, namely:[68]

(a) A reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader/viewer doesn't like or that simply present the reader/viewer in a negative light.
(b) A reply should not be available where a correction or refutation suffices.
(c) A reply should receive similar, but not necessarily identical prominence to the original article.
(d) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
(e) The media should not be required to carry a reply which is abusive or illegal.
(f) A reply should not be used to introduce new issues or to comment on correct facts.

Finally, the civil liability that ensues under Article 43 for the broadcast of incorrect information unless a broadcaster can prove the truth of the information is incompatible with the right to freedom of expression. At the very least, there should be provision for an offence where the comment was on a matter of public interest and the broadcaster took steps to ensure the accuracy of the information.[69]

Recommendations:

[67] See note 11 and the accompanying text.
[68] See also the conditions elaborated in Council of Europe Recommendation (2004)16 on the right of reply in the new media environment, adopted by the Committee of Ministers on 15 December 2004.
[69] *Cf. Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 65.

- The restrictions on demeaning national honour and on advertising that violates "generally established moral, social or cultural norms" should be removed.
- The language requirements imposed on the first channel of the PSBO should be reconsidered in favour of allowing minority language broadcasts regardless of where they were produced.
- The right of reply and refutation should be amended in line with the suggestions above.
- There should be no liability for the broadcast of incorrect information if the broadcast concerned a matter of public interest and the broadcaster acted in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.