MEMORANDUM

on

Draft Broadcasting Law of Macedonia

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This Memorandum analyses a draft Broadcasting Law of Macedonia, as prepared by the "Macedonian Development Center" (MDC), a non-governmental organisation, in July 2003. The draft law is intended to form the basis of a formal proposal to be introduced in Parliament.

The draft Law proposes an entire overhaul of the legislative regulatory framework for broadcasting in Macedonia. It would set up a new broadcast regulator, as well as a new legislative framework for the establishment of a Macedonian public service broadcaster. It would also introduce a set of programme standards for all broadcasters – public and private – and it would protect the confidentiality of journalists' sources and require public authorities to release information on matters of public interest.

Generally, we believe that this draft has been based on international law and good comparative practice, and in many ways its implementation would significantly enhance the right to freedom of expression in broadcasting. However, the draft is still in an early stage of development and in many places requires substantial elaboration. To aid discussion on the further development of the draft Law, this Memorandum analyses the MDC proposal against international standards on freedom of expression and broadcast

regulation, providing a number of comments and suggestions. In light of its preliminary stage, it comments only those aspects of the draft that raise serious policy questions.[1]

In addition to general standards on freedom of expression as developed by international courts such as the European Court of Human Rights, this Memorandum relies on three standard-setting documents on freedom of expression and broadcasting in particular: Council of Europe Recommendation (96)10 on the guarantee of the independence of public service broadcasting (Recommendation (96)10),[2] Council of Europe Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (Recommendation (2000)23),[3] and ARTICLE 19's *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles).[4] The first two represent standards developed under the Council of Europe system and elaborate upon the guarantee of freedom of expression found in the European Convention on Human Rights, while the latter takes into account wider international practice, including under United Nations mechanisms as well as comparative constitutional law and best practice in countries around the world.

II. International and Constitutional Obligations

II.1. The Guarantee of Freedom of Expression

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

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

The right to freedom of expression is also guaranteed furthermore in the *International Covenant on Civil and Political Rights* (ICCPR),[6] also at Article 19, and the *European Convention on Human Rights* (ECHR),[7] which guarantees freedom of expression at Article 10. Both are legally binding treaties, ratified by Macedonia on 17 September 1991 and 10 April 1997, respectively. Through the Macedonian Constitution, the substantive rights guaranteed in these treaties are part of the internal legal order of Macedonia. The Constitution also guarantees the right to freedom of expression separately, in Article 16 ("freedom of conviction, conscience, thought and public expression") and Article 48 (freedom of expression of minorities).

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[1] The draft received by us contained numerous drafting errors. We assume this is because it was released for comment at an early stage and we trust the draft will be fine-tuned over time.
[2] Adopted by the Committee of Ministers on 11 September 1996.
[3] Adopted by the Committee of Ministers on 20 December 2000.
[4] London, April 2002.
[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[6] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[7] E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.

II.2. The Importance of Freedom of Expression

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I)[8] which states:

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

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

The European Court of Human Rights has held:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[9]

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

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[10] The European Court of Human Rights has held that, because of their pivotal role in informing the public, the media as a whole merit special protection:

> [I]t is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[11]

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

[8] 14 December 1946.
[9] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Inter-American Court of Human Rights (Ser.A) No.5, para. 34.
[11] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

> responsibilities – information and ideas on all matters of public interest. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[12]

II.3. Restrictions on Freedom of Expression

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

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

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

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

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

II.4. Broadcast Regulation

Article 10 of the ECHR states that the right to freedom of expression "shall not prevent States from requiring the licensing of broadcasting … enterprises". Two key principles

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[12] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights), para. 45.
[13] See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.
[14] See, for example, *Thorgeirson v. Iceland*, note 11, para. 63.
[15] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, para. 49.
[16] *Lingens v. Austria*, 8 July 1986, Application No.9815/82, paras. 39-40.

apply to broadcast regulation. First, any bodies with regulatory powers in this area must be independent of government. Second, an important goal of regulation must be to promote diversity in the airwaves. The airwaves are a public resource and they must be used for the public benefit, an important aspect of which is the public's right to receive information and ideas from a variety of sources.

II.4.1. Independent Regulatory Bodies

Any bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments, including Council of Europe recommendations R(2000)23 and R(96)10, and ARTICLE 19's Principles. Central to all three 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.[17]

Chapter II of the Appendix to Council of Europe Recommendation (2000)23 states:

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

[17] CoE Recommendation, note 3, Guidelines 3-8; ARTICLE 19 Principles, note 4, Principle 13.

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

Principle 10 of the ARTICLE 19 Principles notes a number of ways in which the independence of regulatory bodies should be protected:

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

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[18]

II.4.2. Promoting 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.

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 noted above. 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."[19] 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."[20]

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[18] *Athukorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, (1997) 2 BHRC 610.

[19] *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.

[20] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.

II.5. Public Service Broadcasting

Public service broadcasting – through a broadcaster which is not oriented towards profits, which is independent of the State and which has 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.[21] For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism. Although not all of these instruments are formally binding as a matter of law, they do provide valuable insight into the implications of freedom of expression and democracy for public service broadcasting.

A 1999 EU Resolution recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public.[22] 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 European Community law which otherwise prohibit subsidies of this sort for competitive reasons. 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.[23]

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.

In order to ensure that a public service broadcaster will be able to fulfil its mandate it is important that it is established by law as an independent entity, that its tasks are clearly defined and that governing structures are in place to insulate it from undue interference, whether by political or economic actors. Principle 35 of the ARTICLE 19 Principles states, in part:

> 35.1 Public broadcasters should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be … guaranteed and protected by law in the following ways:
>
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of goals, powers and responsibilities;

[21] See *Fourth Television* case, 87 BverfGE 181 (1992). In Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 58.
[22] 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.
[23] Adopted 9 October 1992 at a UNESCO conference in Alma Ata. Clause 5.

- through the rules relating to appointment of members;
- through formal accountability to the public through a multi-party body;
- by respect for editorial independence; and
- in funding arrangements.

…

35.3 The role of the governing body should be set out clearly in law. The role of the governing body should include ensuring that the public broadcaster fulfils its public mandate in an efficient manner and protecting the broadcaster against interference. 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. Management should be responsible for running the broadcaster on a day-to-day basis, including in relation to programming matters.

This approach is reflected in Article 1 of 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. This 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.[24] In a similar vein, Articles 20-22 of the same Recommendation note that news programmes should present the facts fairly and encourage the free formation of opinions. Public service broadcasters should be compelled to broadcast messages only in very exceptional circumstances.

In addition, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. Public service broadcasters can also only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of Recommendation No. R (96) 10 of the Council of Europe 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. Similarly, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression requires the government to ensure that sufficient resources are available to enable the public broadcaster to discharge its functions.[25]

III. Analysis of the Draft Broadcasting Law of Macedonia

III.1. Introduction

The draft Broadcasting Law proposes an overhaul of the entire regulatory framework for broadcasting in Macedonia. It allows for commercial, non-profit and public service broadcasting, and sets up a new independent regulatory body and licensing scheme for all of these. "Makedonska Radio-Televizija" (Macedonia Radio and Television, MRT), the

[24] Articles 4-8.
[25] Decision 826/1998 [1998] Guir. cost. 3893.

existing national broadcaster, is nominated as the national public service broadcaster. Finally, the draft Law lays down a number of content requirements, and it also proposes restrictions on foreign ownership and cross-media ownership.

In the following paragraphs, we analyse each of these proposals against international standards on freedom of expression and broadcast regulation. Recommendations and suggestions for further improvement are provided throughout.

III.2. Broadcasting Council

Article 21 of the draft Law establishes the Broadcasting Council as "an independent regulatory body that performs public competencies in the field of broadcasting/radio and television activities … to secure the freedom and plurality of expression, the existence of diverse, independent, and autonomous media, as well as … the realisation of the public interest and protection of the interests of the citizens in the broadcasting/radio or television activity." The draft Law envisages a number of different competencies for the Council, including issuing licences, drafting a national broadcasting plan, "participating in" frequency planning and monitoring broadcasters' obligations under the draft Law.[26]

Under Articles 22 and 23, the Council will consist of nine members, elected by Parliament by a 2/3 majority vote and serving a six year-term.[27] One candidate is nominated by the President, two candidates are nominated by a Parliamentary committee and the remaining six are nominated by various different groups, in the following manner:

- the Macedonian Academy of Arts and Sciences will nominate one member;
- all accredited universities, acting jointly, will nominate three members;
- the largest association of journalists will nominate one member; and
- the Chamber of Commerce will nominate one member.

A list of nominees will be published at least three months before the end of the term of any member whose position becomes vacant. Article 25 requires nominees to be experts in a relevant field, for example communication sciences, journalism, telecommunications, economy or law. Minority representation is to be ensured through internal Council regulations.

Article 31 excludes the following persons from Council membership:

1. Members of Parliament, Government ministers, managers and employees in the public administration or local self-government bodies, managers and Board members of public enterprises;
2. political party officials (presidents, their deputies, members of political parties' governing bodies) as well as leaders of religious communities;
3. persons who, as owners or shareholders, board members or employees work or have an interest in a broadcasting organisation or other companies that pursue similar activities (advertising, telecommunications and electronic or technical

[26] Article 34.
[27] Some of the first members of the Council will serve shorter terms. See Article 23.

goods retail are given as examples), along with members of their families, spouses and siblings; and

4. persons sentenced to a term of imprisonment for longer than six months.

Analysis

As currently envisaged, the draft Law would include a number of important guarantees aimed at safeguarding the independence of the Council, which are largely in line with international standards. However, in a number of respects, they could be added to or further improved upon.

First, although Article 21 refers to the Council as "an independent regulatory body", the guarantee of independence could be strengthened and given greater prominence in the draft Law. The ARTICLE 19 Principles suggest that the independence of regulatory bodies be guaranteed using wording such as the following:

> The [name of body] shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the [name of body] in the discharge of their duties, or to interfere with the activities of the [name of body], except as specifically provided for by law.[28]

The independence of the individual members of the Council could be strengthened along similar lines. The draft Law should include express stipulations to the effect that they should act in the interests of the public, not of political groups or individuals, and that they should neither seek nor take instructions from any individual or body, including commercial interests, except as provided for by law.

Second, both the ARTICLE 19 Principles and the Council of Europe Recommendation require that appointments processes for bodies with regulatory powers in the broadcasting sector should be conducted in a democratic and transparent manner, and that measures should be in place to avoid individual members coming under political influence.[29] Although eight of the nine members of the Council are appointed on the proposal of a Parliamentary committee or civil society groups, the President is still entitled to nominate one member. This means that this member may be seen as a political appointee, which is to be avoided. Additionally, the Law should be more specific regarding the number of nominees to be provided for each vacant position. As currently drafted, it appears that the nominators will provide one candidate for each vacancy, who is then to be confirmed by a 2/3 vote. This may be a drawback to the extent that, if a nominating group fails to produce a candidate that can command a 2/3 vote, there may potentially be repeated stalemates in Parliament. Consideration should be given to the idea of requiring nominators to put forward two or more candidates per vacancy, with the actual member then chosen by a Parliamentary vote.

[28] Note 4, Principle 11.
[29] CoE Recommendation, note 3, Guideline 5; ARTICLE 19 Principles, note 4, Principle 13.

Third, under Article 25, the important matter of minority representation is left to the Council to determine through internal regulations. We doubt whether this will operate satisfactorily. It is well-established that membership of bodies with regulatory powers in the broadcasting sector should be reflective of society as a whole, and it is unlikely that this important aim will be achieved through internal Council regulations. Instead, the draft Law should specifically require minority representation, which can be ensured through the nominations process (for example, by allowing additional or alternative groups of nominators, or by enlarging Council membership).

Fourth, the categories of persons excluded from Council membership are in some cases vague and open-ended. Article 31 excludes not only those with serious conflicts of interest from membership, but also persons who work for or have an interest in "broadcasting organisation or other companies that pursue similar activities [such as] advertising, telecommunications, retail sale of electronic or technical goods". This is an open-ended formula, far broader than the exclusions recommended in the ARTICLE 19 Principles[30] or Council of Europe Recommendation No. (2000) 23,[31] which would, for example, exclude anyone working for a retail televisions outlet, or even a vacuum cleaner salesperson. Although it is important to ensure that Council members do not have conflicting business interests, it is also important not to draw the exclusions excessively widely, ruling out large numbers of competent individuals.

Fifth, the draft Law provides that Council members may be dismissed only in a limited number of cases, including where one of the incompatibilities applies. Dismissal procedures are initiated by the Council and confirmed by Parliament, but there is no provision for the individual concerned to appeal to a court. This is an important oversight. Given that the conditions of incompatibility are somewhat imprecise, the possibility cannot be excluded that they may abused for political reasons. Although we understand that it might be constitutionally problematic to provide for an appeal from Parliamentary decision, it should be possible to appeal the initial Council decision.[32]

Finally, we note that the Council will only have a limited role to play in the adoption of the national broadcasting strategy and frequency plan. Given the expertise likely to be available in its membership, it should play a significant part in both. However, under Article 34, the Council's role is limited to submitting a proposal to the government for the national strategy and it merely "participates" in frequency planning. It is not clear who bears lead responsibility for frequency planning, nor is it clear what "participation" means. It is similarly not clear whether the government will have the power to issue the national broadcast strategy as a statutory instrument, or whether it would require Parliamentary approval. The draft Law should clarify all these points, unless another statutory instrument already does this.

Recommendations:

- The President should not have the power to nominate members of the Council.

[30] Note 4, Principle 13.3.
[31] Note 3, Guideline 4.
[32] See Council of Europe Recommendation 2000(23), note 3, under II.

- Consideration should be given to amending Article 23 to require nominators to propose at least two candidates per vacancy.
- The draft Law should be amended to provide for a more practical approach to ensuring minority membership on the Council.
- The Law should clearly affirm the independence of the Council and its members.
- Council members should have the right to appeal any dismissal before the courts.
- The draft Law should clarify the process for the adopting the national broadcasting strategy and frequency plan.

III.3. Licensing

The licensing process is set out in Articles 36-54 of the draft Law. Broadly, licences are to be issued through a process of open competition. For each licensing round, the Council will determine how many licences may be granted in accordance with the national broadcasting strategy and frequency plan, and announce the start of the competition in at least two national daily newspapers. In determining the type of licences that will be issued, Article 41 requires the Council to consider the need to provide diverse, quality programming, the need to develop a pluralistic broadcasting sector, the need to stimulate competition and the need to satisfy the needs of the public. Before announcing the competition, the Council has to conduct public consultations regarding the types of broadcasting services required.

In examining the licence bids received, the Council has to take into account a number of factors, including the kind of programming proposed, the diversity of programme contents, the needs of the audience, the technical facilities of the applicant and the financial viability of the proposal. The Council will then take a final decision on the basis of all materials submitted,[33] and the decision will be gazetted and all applicants notified. All decisions may be appealed, first internally to the Council, and then through administrative proceedings in court.

Once the Council has issued a licence, applicants are required additionally to obtain a licence from the telecommunications agency. Article 52 states that the Council should issue a request to this effect on behalf of the applicant. In response, the telecommunications regulatory body "is obligated to issue the license if the conditions prescribed by Law are fulfilled, and if the Council's request is in compliance with the Plan for allocation of radio frequencies."

Under Article 60, licences may be withdrawn in a limited number of cases, including if the licensee ceases broadcasting for one month or longer, if the licensee fails to pay the licence fee after repeated warnings, if the licensee infringes copyright or if "circumstances, which present legal hindrances for the licence holder to perform the broadcasting activity, occur". A decision to revoke a licence is taken by a 2/3 majority in the Council, must be accompanied by written reasons and may be appealed through

[33] We assume that Article 49, which refers to the decision-making process for licences, is also intended to incorporate Article 48, listing the criteria to be taken into account in evaluating licence applications.

administrative proceedings. Licence revocation is also available as an ultimate sanction for violations of the draft Law.

Analysis

The licensing process as envisaged by the draft Law is largely in line with international standards, except in two important respects.

First, applicants for a broadcasting licence are required not only to apply to the Broadcasting Council, but, having been granted a broadcasting licence, they must also apply to the telecommunications regulatory body for a separate licence. Although Article 52 attempts to make this process as straightforward as possible, there is still a possibility that the telecommunications agency will second-guess the Council's decision. This introduces a degree of uncertainty into the licensing process, which is unfortunate. The draft Law should provide for an integrated process whereby all relevant licences are issued in one procedure.

Second, Article 60 allows for a licence to be withdrawn following copyright violations or when 'legal hindrances' present themselves. The latter condition is very unclear and therefore open to abuse.[34] With regard to the former, there appears to be no requirement for warnings or fines to be issued prior to the imposition of the ultimate sanction of licence withdrawal. This is could lead to the imposition of disproportionate measures, out of line with the general chapter on enforcement, which requires a series of warnings and fines to be approached for violation of programme standards.

Recommendations:

- The draft Law should establish a one-stop process for licence applications.
- The draft Law should be clear and unambiguous in the criteria for licence withdrawal. In any event, licences should be withdrawn only as an ultimate sanction to be imposed in extreme cases, when all other means have proven ineffective.

III.4. Restrictions

The draft Law proposes a number of restrictions on who will be allowed to broadcast in Macedonia. First, under Article 14, political parties, religious groups, administrative bodies and state-owned enterprises are barred from owning or part-owning broadcasting organisations.

Second, there are a number of provisions that prohibit multiple ownership of broadcasting stations and cross-media ownership. Article 17(1) states: "A commercial broadcasting company may not found or co-found, or participate in the ownership of another commercial broadcasting company". Furthermore, Article 17(2) provides: "A commercial broadcasting company may not found or co-found, or participate in the ownership of a news agency, advertising agency, company that sells broadcasting equipment, publishing company, and vice versa." However, under the third paragraph of Article 17, a company that holds a majority share in a national commercial broadcasting

[34] Illegal concentration of ownership is provided as a separate ground for licence revocation.

organisation may invest in other national broadcasting companies, as long as its share does not exceed 49%. It may additionally hold a majority stake in one regional broadcaster and two local broadcasters. Under the fifth and sixth paragraphs of Article 17, a company without a national licence may own no more than three local broadcast licences, or one regional and two local broadcast licences. The final paragraph of Article 17 extends these restrictions to all "relatives and siblings" of those covered, as well as to companies in which a licence holder holds a majority stake.

Article 46 states that "organisations that hold [a] monopoly in a certain industry, insurance companies, researching agencies, telecommunications companies, cable and terrestrial operators, publishing companies and news agencies, as well as other legal entities that have capital-based relations with those entities, may not [apply for a licence]." However, there do not appear to be restrictions on any of these companies investing in another company that holds a broadcasting licence.

There are no restrictions on foreign ownership, although Article 5 does provide: "The freedom of reception of programmes from other states … may be restricted for exceptional cases and situations, in accordance with international documents ratified by the Republic of Macedonia."

Analysis

Restrictions on multiple ownership of broadcasting stations are a common and well-established way of protecting plurality in the broadcasting sector. However, in emerging markets any such restrictions have to be carefully balanced and not be so severe that they inhibit the growth of the sector as a whole. In Macedonia, it should additionally be considered that the domestic media market is a small one and in order to prevent the market being dominated by powerful international actors, to whom the draft Law gives free reign, it will be necessary to allow some large local media concerns to develop.

In this regard, both the absolute ban on cross-media ownership in Articles 17(1) and (2), and the odd prohibition in Article 46 on various other companies applying for a broadcasting licence, may not be justifiable. It is also striking that the draft Law does not distinguish between radio and television holdings. As drafted, the Law would prevent a corporation that owns a national radio station also to have a majority holding in a national television broadcaster. This may prove unduly restrictive.

Second, Article 17 appears to be drafted on the premises that a 49% interest will represent a minority stake. However, in practice, particularly for public companies, a much smaller interest will often prove dominant. If the draft Law intends to prevent one corporation controlling multiple national broadcasting stations, this should be borne in mind, and the reference should be to control, not to percentage stake.

Finally, the restriction on the reception of foreign programmes is unclear and should be clarified. Both the circumstances in which the restriction may be applied and the duration of any measures should be clearly indicated.

Recommendations:

- The restrictions on cross-media ownership in Article 17 should be reconsidered, as should the absolute ban on applying for a broadcasting licence, set out in Article 46.
- Consideration should be given to allowing a greater degree of simultaneous ownership of radio/television broadcasting licences.
- The draft Law should take into account that a share of less than 49% percent can represent a controlling stake.
- The restriction on the reception of foreign programmes should be clarified.

III.5. Non-Profit broadcasting

The draft Law provides a special category of "non for profit" local radio broadcasting organisations, which "[produce] and [broadcast] programmes that cater to the interests of specific target audiences, which [do] not have the goal to create profit and [use] all generated income for production and broadcasting of programmes."[35] Under Article 12, such stations can broadcast no more than six hours radio programming daily, are not allowed to broadcast advertisements, although they can broadcast sponsored programmes, and must be founded by an appropriately registered civil society organisation[36] or an educational, scientific or cultural institution.

Detailed rules regarding the conditions for obtaining permits and program content of non-profitable radio institutions are to be adopted by the Council, while the broadcasters should be organised according to the requirements provided in the Law on Culture.

Under Article 53, non-profit broadcasting licences are issued for a three-year period.

Analysis

Internationally, there is growing recognition of the important role non-profit, or community broadcasters can play by giving voice to small or local groups of the population whose voices would otherwise be ignored by commercial broadcasters, or drowned out by a national public broadcasting service.[37] Given its potential, we question why the draft Law places such a large number of restrictions on non-profit broadcasting, prescribing the form of ownership, apparently restricting it to radio broadcasting, requiring its internal organisation to be in accordance with rules adopted by the Council and cultural laws, prohibiting advertising and restricting broadcasts to six hours per day. Although we understand that it is important that commercial broadcasters should not be able to operate under the guise of a non-profit broadcasting licence, we question whether the extent of these restrictions can be justified. In particular, the prohibition on advertising is likely to make it very hard for non-profit broadcasting operations to be financially viable.

[35] Article 12.
[36] In accordance with the Law on Civic Associations and Foundations.
[37] See, for example, the special section on community broadcasting in the African Charter on Broadcasting, adopted May 2001.

The three-year licence term may also be problematic. The establishment of a broadcasting station is a significant operation requiring substantial financial support, which may not be forthcoming if the station can only be guaranteed a three-year licence.

Recommendations:
- The extent of the restrictions and prescriptions on non-profit broadcasting should be reconsidered.
- Non-profit broadcasters should be allowed to advertise so long as all revenues are channelled back into programme production.
- Consideration should be given to extending the period of non-profit broadcast licences.

III.6. Media support fund

Articles 56 and 57 of the draft Law establish a 'Media Support Fund' with the aim "to promote the plurality and diversity of the programmes of the broadcasting organizations and non-for-profit radio". The Fund will be financed through a percentage of the licence fee collected from broadcasters (30%) and the subscription fee paid by the general public (2%), and it will be administered by a Managing Board appointed by broadcasters, the Ministry of Culture, the Council, cable distributors and the national film archive. The draft Law states that the operation of the Fund "shall be regulated with an act adopted by the Managing Board, in accordance with the Law."

Analysis

In principle, the establishment of a Media Support Fund can be a positive development. As Council of Europe Recommendation R(99)1 on measures to promote media pluralism states: "Member States could consider the possibility of introducing, with a view to enhancing media pluralism and diversity, direct or indirect financial support schemes for both the print and broadcast media."[38] However such support should be administered carefully and without discrimination. As Recommendation (99)1 states, "any … support measures should be granted on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control." As currently framed, the draft Law fails to specify the criteria on the basis of which grants will be made, beyond the general principle that it shall be used to promote plurality in broadcasting.

Furthermore, exceptional care needs to be taken to ensure that any fund of this sort is managed in a way that is protected against undue influence, so that decisions on allocation of the funds can be made properly, based on established criteria. Far more attention needs to be given to the establishment of the Managing Board and to possible issues of conflict of interest.

Recommendations:
- Any media support fund should operate on the basis of equitable and unambiguous

[38] Recommendation R(99)1 on measures to promote media pluralism, adopted by the Committee of Ministers on 19 January 1999, under VI.

criteria that are laid down by law.
- The management of such a fund needs careful, detailed attention in the law, to ensure that it is protected against influence and makes decisions based on established criteria.

III.7. Programme standards, enforcement and sanctions

Articles 64-68 briefly set out the programme standards applicable to all broadcasters, both public and private. A number of general principles are provided, such as the requirement to respect privacy and moral values, and to promote tolerance. Article 65 prohibits incitement to a violent overthrow of the constitutional order, while Article 66 prohibits broadcasting pornography or programming that "propagandises violence". Articles 67 and 68 are aimed at protecting minors, establishing a watershed before which programming that might harm the "physical [or] moral development of children and youth" may not be broadcast.

All broadcasters are required to carry a certain percentage of programming that has been produced in-house, as determined by the Council, and specific requirements are established for election broadcasting, including a requirement for the Council to adopt a Code dealing with this issue.

With regard to advertising, the draft Law establishes a number of content restrictions, for example on the advertising of tobacco and alcoholic beverages. The draft Law also limits the amount of advertising broadcasters may carry. Under Article 93, films and certain other long programmes may be interrupted only once per 45 minutes, while Article 94 prohibits advertising in news or current affairs programmes under 30 minutes.

The general sanctions regime is set out in Articles 150-157 of the draft Law. The Council, as the main supervisory body, monitors broadcasters' obligations under the law, including adherence to programme standards and licence conditions. If it finds that a broadcaster has breached its obligations, the Council may impose a written warning, a public warning, temporary licence revocation, reduction of licence term or it may revoke a broadcaster's licence permanently. Confusingly, however, a second set of 'penal provisions' follows at the end of the draft, with a second set of provisions numbered Articles 155 and 156, providing for the imposition of a variable fine for various violations of the law. Second Article 155 appears to consider the possibility of the introduction of a 'must carry' provision not found elsewhere in the draft, providing that a fine may be imposed when a broadcaster "refuses, on demand by a proper competent authority, to broadcast public announcements, releases and warnings related to events such as natural catastrophes or epidemics". This may imply that a "must carry" provision is envisaged but the drafters have omitted to include it in this draft.

The first Articles 150-157 clearly state that sanctions should be imposed in a graduated manner, starting with a written warning, which shall be public in case the violation concerns a broadcast which could upset the constitutional order or harm the protection of children and youth, or which contains pornography or violence. Repeat offenders who ignore warnings may have their licence revoked temporarily, while permanent licence

revocation is imposed in cases where "the broadcaster continues with obvious violation of the legal provisions, the obligations deriving from the license, and the acts of the Council adopted in compliance with the Law and even after the pronouncing of the previous measures does not bring its operation in accord with the [law]". Under first Article 156, broadcasters will be given the opportunity to present arguments in their defence. Under Article 62, a decision to revoke a licence may be appealed to a court of law; it is not clear whether other sanctions may also be appealed.

The second set of Articles 155-156 prescribes specific penalties for specific violations of the draft Law, for example broadcasting without a licence. An appeals process is not specifically provided for.

Analysis

Articles 64-68 set out general programme standards in vague terms that are open to broad interpretation. In order effectively to implement these standards, it is necessary that a Code of Conduct be drawn up to elaborate how they will be implemented in practice. Such a Code could be drawn up by the Council, in consultation with both broadcasters and the wider public. As a related matter, the draft Law should provide for a specific complaints procedure by which members of the public can complain about violations of the Code, or licence conditions generally. This is an important aspect of broadcasters' accountability to the public, which should not be overlooked.

Second, although not specifically included in the draft Law, the second set of sanctions provisions indicate that a 'must carry' requirement is being considered to oblige broadcasters to broadcast certain public announcements. 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. Even in regard to public service broadcasters, Recommendation R(96)10 states that "[t]he cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations."[39] 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.

With regard to the sanctions regime, the confusion between the two regimes must be cleared up. We welcome that the first set of Articles 150-157 clearly specifies that sanctions should be imposed in a graduated fashion. However, although the Council has a range of sanctions at its disposal it is odd that it lacks a power to impose a fine for violation of programme standards or specific licence conditions; fines are provided for only in the second set of penalty provisions at Articles 155 and 156. Generally, broadcast regulators find the power to impose fines to be an important tool to penalise a violation of

[39] Note 2, under VI.

licence obligations without having to resort to such extreme sanctions as suspension or termination of the licence.

Finally, although it appears that, in principle, broadcasters may appeal a decision to terminate a licence through administrative proceedings, this does not appear to be possible with regard to the other sanctions. This is an important oversight which should be addressed.

Recommendations:

- The Council should be required to draw up a Code of Conduct on programme standards, following public consultation.
- The penalty for failing to obey a 'must carry' order should be removed and no such power for public authorities should be introduced.
- The sanctions regime should be clarified and any internal inconsistencies removed.
- The Council should have the power to impose fines as a sanction.
- Broadcasters should have the right to appeal all sanctions.

III.8. Public service broadcasting

Under Article 108 of the draft Law, MRT is appointed as the national public service broadcaster. Article 112 provides that it should "broadcast programs in the general interest that include informative, cultural, artistic, educational, scientific, children's, entertainment and sports programs that satisfy the needs of the citizens." With regard to news and current affairs programming, MRT should "observe the principles of impartiality and objectivity in the treatment of different political interests of different entities, to support the freedom of speech and the pluralism in the expression of the public opinion, as well as to prevent any kind of racial, religious, national, ethnic and other intolerance."

Article 113 imposes a specific further set of obligations on MRT, including:

- to ensure that all programming is shielded from any governmental or political party influence;
- to produce and broadcast programs for all segments of society, without any discrimination, having regard to the specific needs of groups such as such as children, minorities and the disabled;
- to provide direct access to political candidates, free of charge and without discrimination during election campaigns;
- to provide suitable conditions for the use and development of modern, up-to-date technical standards in programme production and broadcasting, and to prepare plans for the transition to the use of digital technology, in compliance with the broadcasting policy adopted by the Council.

Under Articles 115 and 116, MRT should produce at least 50% of its programming in-house, while 10% of its programming should be provided by independent producers. In addition, Article 115 requires that "MRT shall reserve a percentage of the total annual broadcast time to broadcasts of European works." The final paragraph of Article 115 provides: "The airtime dedicated to newscasts, sports' events coverage, games,

advertising, teletext services and shall not be counted in the total annual broadcast time in terms of previous paragraphs of this article."

Although MRT will be allowed to broadcast advertising, Article 87 provides that the total time dedicated to advertising on MRT should not exceed 4% of each hour and 4% of the total broadcast time per day. Furthermore, MRT is not allowed to air advertisements on television between 5pm and 10pm, or between 7am and 5pm on radio. Paid political advertising is prohibited on MRT.

MRT will be governed by a Managing Board composed of nine members serving six-year terms who are elected by a 2/3 majority of the Parliament.[40] Politicians, appointed public officials or persons who have a vested interest in broadcasting or other media bodies or their immediate family members are barred from serving on the Managing Board.[41] Board members may be dismissed if they are absent for more than three months or if any of the above conditions of incompatibility apply.[42]

Under Article 122, the competencies of the Managing Board include to safeguard the "public interest in the programs of MRT", to adopt general programme policy, to determine MRT's business policy, to adopt MRT's statute and to appoint its General Manager. The Managing Board should also submit an annual report on the operation of MRT to the Parliament.

The draft Law also provides for a "Supervision Board" of five members, appointed by Parliament and serving four-year terms, and "Programming Councils" for radio and television, appointed either by Parliament or by the Managing Board (the draft Law provides both options as alternatives). The task of the Programming Councils is to "review and monitor the programming concepts and contents of the Macedonian Radio and Macedonian Television, the requests and proposals submitted by the viewers and listeners regarding the programmes, and make proposals, give opinions and make suggestions on issues related to the production and broadcasts of programmes." The number of Programming Councils will be decided by the MRT Managing Board.[43]

MRT will be funded through a subscription, to be paid by every household that possesses a radio or a television.[44] The subscription fee is set at 2.5% of the average net salary.

Analysis

Although the public service remit of MRT is clearly set out, the draft Law simply provides an outline of its complex organisational structures. The draft Law provides for the establishment of various bodies, such as a Managing Board, a General Manager, a Supervisory Board and Programming Councils, but the specific tasks and competencies

[40] As is the case with the Council, the first set of members of the Managing Board will serve shorter, staggered terms.
[41] Article 118.
[42] Article 120.
[43] Article 128.
[44] Article 132.

of these bodies appear not yet to have been worked out in any detail. In particular, there appears to be an important overlap between the competencies of the Programming Council(s) and the Managing Board, both of whom will have an important role to play in programming policy. With regard to the Supervision Board, the draft Law merely states that it shall "control the material and financial operations of MRT", with no further detail as to the way in which it will operate, or how it will interact with MRT's other bodies.

Second, as the national public service broadcaster, it is important that MRT's Managing Board should reflect the diversity that exists in Macedonian society. Furthermore, the independence of both the Board as a whole and its members individually should be fiercely protected, as should that of its staff.[45] These guarantees are lacking. In contrast to the election procedures for the Broadcasting Council, which are set out in some detail, election procedures for members of the Managing Board as set out in the draft Law are prescribed only in the most general terms, with specific guarantees limited to the stipulation that they shall be elected through a 2/3 parliamentary vote. This section of the draft Law should be reworked to bring it in line with the standards set out in the ARTICLE 19 Principles[46] and Council of Europe Recommendation R(96)10.[47]

Third, although it is important that MRT is adequately funded, the level of the subscription fee is considerable. 2.5% of the average net income is a considerable amount – relatively far higher than in countries such as the UK or the Netherlands – and may well prove too high for a significant section of the public. As an alternative or additional source of revenue, consideration should be given to lifting the harsh advertising restrictions during prime time, while at the same time maintaining MRT's advertising ceiling and introducing measures against price-dumping, so as to guard against unfair competition.

Recommendations:

- MRT's internal organisational structure and the role of the various governing bodies should be laid down clearly and in some detail in the law.
- The Managing Board, as well as the other governing bodies, should be appointed in accordance with international standards, as set out above, and its independence should be guaranteed clearly and effectively.
- The level of the broadcasting subscription should be reconsidered.
- The advertising restrictions on MRT should be reconsidered, whilst guarding against unfair competition.

III.9. Miscellaneous

Right to reply and correction

Article 142 of the draft Law provides: "Every physical or legal entity has the right to demand from the person in charge of the radio and/or television organisation to broadcast

[45] See, generally, Recommendation (96)10, note 2, Section IV.
[46] Note 4, Section 10.
[47] Note 2.

free of charge a correction, i.e., reply to the broadcast (incorrect) information that violates the legitimate rights or interests of the person, i.e. his/her dignity, honour, or reputation." Requests for such a reply or correction must be submitted within eight days of the broadcast, state the programme and information to which the correction or reply refers, as well as the date of its broadcasting. Under Article 144, a broadcaster is not allowed to comment on the correction or reply.

Internationally, the right of reply or correction is controversial. In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence.[48] In Europe, however, many countries guarantee some form of the right of reply in law, but only to the extent that the media have broadcast factually incorrect information that has violated the rights of an individual.[49] ARTICLE 19, together with other advocates of media freedom, generally suggest that a right of reply should be voluntary rather than prescribed by law.

As presently drafted, a key qualifier of the right of reply, that the original information was incorrect, remains in brackets. This should be rectified and the right apply only to incorrect information.

Access to information

Article 146 requires all public authorities as well as private individuals and bodies who carry out a public function "to provide, for the purposes of broadcasting on the media, correct, complete and timely information on issues from their domain." Furthermore, all bodies that carry out a public function are under an obligation to provide broadcasters with a report of at least 90 seconds on all events of public interest. This implies that such bodies would not be able to issue a 'no comment' statement, except in case of a threat to public order and security or where the information "may hurt the feelings of the participants". Other broadcasters are allowed to quote from such reports, provided they acknowledge the source of the report.

ARTICLE 19 welcomes this inventive approach to the problem of public bodies that, as a matter of policy, refuse to comment on events of public interest. We note, however, that it cannot substitute for the full implementation of comprehensive access to information legislation. We also suggest that the wording in the exceptions clause be clarified. In particular, the provision that a report may be refused where this "may hurt the feelings of the participants" requires substantial clarification. In addition, the draft Law should provide that an individual may refuse to comment in cases where to do so might adversely affect his or her legal rights, such as the fair trial right to remain silent.[50]

Protection of sources

Article 149 states: "This Law guarantees the confidentiality of the sources of information used in the programs of the broadcasting/radio and/or television organisations. The

[48] *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974).
[49] For a set of minimum standards on the right of reply, see Council of Europe Resolution (74)26, adopted 2 July 1974.
[50] See Article 6, ECHR.

journalist has the right not to reveal the source of the information [or] any data that may reveal the source."

Although ARTICLE 19 welcomes this statement of principle, we doubt whether it is appropriate to introduce this in broadcasting legislation. The right to protect the confidentiality of sources of information should be enjoyed by all media professionals, not just broadcast journalists, and to this end it should be introduced in separate, more general, legislation. We note that, like the right to freedom of expression, the right to protect the confidentiality of sources is not absolute. Under international law, a journalist may be ordered to reveal his or her sources, but only pursuant to a court order when reasonable alternative measures to the disclosure do not exist or have been exhausted, and the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure.[51]

Recommendations:

- The right to reply should be limited to responding to factually incorrect information that has violated a right of the individual concerned.
- The exceptions to the right to require a response from a body that exercises a public function should be clarified, and should not interfere with the right to a fair trial.
- The privilege of confidentiality of sources should apply to all media, not just broadcasters, and be further elaborated to indicate the narrow circumstances under which it may not apply.

[51] See, generally, Council of Europe Recommendation (2000)7, adopted 8 March 2000, and its accompanying Explanatory Memorandum.