Organisation for Security and Co-operation in Europe
OSCE Representative on Freedom of the Media

ANALYSIS AND REVIEW OF

LAW No. 8410 of 1998 (as amended)

ON

PUBLIC AND PRIVATE RADIO AND TELEVISION

IN THE REPUBLIC OF ALBANIA

By

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INTRODUCTION

This review, commissioned by the Office of the OSCE Representative on Freedom of the Media, aims at establishing whether Law No. 8410 of 1998 (as amended) on Public and Private Radio and Television in the Republic of Albania complies with European standards and whether it meets the criteria of effective regulation of broadcasting in Albania in line with "The Fundamental Principles for the Conduct of Radio-Television Activity", as defined in Articles 4 and 5 of the law.

By "European standards" will be meant primarily standards defined by the OSCE itself [1], as well as those established by the Council of Europe, derived primarily from Article 10 from the European Convention on Human Rights, and developed further in a number of conventions, Committee of Ministers recommendations and declarations, as well as in the case-law of the European Court of Human Rights.

With a view to Albania's future accession negotiations with the European Union [2], also EU criteria will be applied.

The EU appraises the candidate countries' readiness to join on the basis of the Copenhagen criteria, including the political criteria, whereby "membership requires that the candidate country ensures stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities". This is ascertained by means of analysing political institutions and the relations among them, in order to assess how democracy actually works in practice, in terms of how various rights and freedoms, such as the freedom of expression, are exercised, through, for example, the role of political parties, non-governmental organisations and the media and especially respect for fundamental rights, including freedom of expression and association.

Article 6 of the Treaty on the European Union specifies that the Union respects Fundamental Rights as guaranteed by the European Convention on Human Rights, including freedom of expression and information. More generally, the EU often refers to "European standards" in the media field, as defined by the Council of Europe and the European Court of Human Rights. The EU also relies on its own "Charter of Fundamental Rights".

As far as Chapter 20 (culture and audiovisual policy) of accession negotiations is concerned, it focuses on the degree of approximation of national broadcasting legislation to the EU legal framework, and primarily the Television Without Frontiers (TWF) directive. In June 1995 the European Council at Madrid highlighted the importance, not only of incorporating the acquis into national legislation, but also of ensuring its effective application through appropriate administrative structures. This forms the basis of a systematic assessment of the candidate countries' administrative capacity that takes place in the context of the accession negotiations.

[1] See i.a. Freedom of Expression, Free Flow of Information, Freedom of Media. CSCE/OSCE Main provisions 1975 – 1999. Vienna: The Representative on Freedom of the Media, July 2000; OSCE Human Dimension Commitments A Reference Guide. Warsaw: ODIHR, 2001

[2] See the Declaration adopted at the EU-Western Balkans Summit in Thessaloniki, 21 June 2003, where the the EU reiterated its unequivocal support to the European perspective of the Western Balkan countries, including Albania, and stated "The speed of movement ahead lies in the hands of the countries of the region".

I. GENERAL ASSESSMENT OF THE LAW

This law provides a relatively full, extensive and detailed framework for broadcasting regulation. In terms of general European standards and democratic organization of the broadcasting system, it accords far too much direct power over broadcasting to Parliament, potentially reducing the independence of both the National Council for Radio and Television (NCRT) and of the public service broadcaster. Also, it introduces central control and licensing of areas of activity which are not licensed in other countries.

In any case, it is not certain that this law vests the NCRT with sufficient status and stature to enable it to perform its tasks effectively and to deal with State and government bodies in the pursuit of its duties.

The law does not call for, nor does it require or guarantee the independence of the public service broadcasting organization, itself a major departure from European standards. By giving Parliament the power to approve the Charter of the public service broadcaster, it gives parliament control over every aspect of the PSB broadcaster's organization and activities, preventing rapid change of structure, competencies or methods of operation which a PSB broadcaster operating on a competitive market must be capable of introducing.

The law seems to assume a static situation from a technological point of view. Many of its provisions are rigid and inflexible, providing no procedure for a change, when necessary.

II. GENERAL COMMENTS ON THE LAW

1.

Though some terms used in the law are defined in various places, clarity and legal certainty would be enhanced if all the necessary definitions were consistent with European practice and were grouped in one article and then applied consistently throughout the text of the law.

2.

The law appears to lack technological neutrality, resulting in separate provisions on the licensing of programme services transmitted terrestrially, via cable and via satellite. This unnecessarily complicates the law.

3.

There was no general press or media law in Albania when the law was being drafted. Hence the introduction of provisions (Articles 44, 45, 47) on confidentiality of sources of information, responsibility for programme content, right of reply etc., which would normally be placed in such a law. These provisions are not always consistent with European standards.

4.

The law creates a system of centralized control and licensing of types of activity which in other countries are approached differently. This assumes licensing and control of production of programming, licensing of cable operators, of operators of terrestrial booster transmitters rebroadcasting foreign programme services. Such provisions are cause for

concern, as they introduce excessive controls over important aspects of the exercise of freedom of expression and freedom to impart and receive information.

5.

Parliament is given wide-ranging competencies and a great deal of direct power over the NCRT and Albanian Radio-Television (ART). Though according to Art. 8 the NCRT is to "act independently", this puts the independence of both these key elements of the Albanian broadcasting system in serious doubt, potentially constituting a serious violation of European standards (see below).

Parliament nominates 6 out of 7 members of NCRT and appoints all 7, also determining their remuneration. It also appoints its Chairman. The Parliamentary Media Committee considers the yearly financial statement and report of NCRT. The report is submitted to the Permanent Parliamentary Commission for the Public Information Media and to the entire Parliament. Parliament has the power to reject the report of NCRT, potentially leading to the dismissal of all members and appointment of new ones.

As far as ART is concerned, Parliament appoints its Steering Council. It also approves the ART Charter and any changes in it, and considers the annual report on the ART activities.

All this amounts to a violation of the principle of separation of powers. The intervention of Parliament into the operation of public service broadcasting should stop at the statutory level. The role of Parliament is to define the legal framework and not to exercise administrative powers, related to the structure, organization and day-to-day operation of ART, as defined in the Charter.

In any future revision of this law, serious consideration should be given to changing this situation as it may mean a considerable degree of subordination of the regulatory body and the public service broadcaster to political interests represented in Parliament.

6.

Some provisions of the law appear to be expressive of a bias against foreign programme services reaching Albania and to suggest that Albania seeks to extend its jurisdiction to these programme services. These provisions may not be compatible with European standards. Application of Chapters IX and X by NCRT requires very careful analysis (the law itself does not provide sufficient grounds for complete comprehension and analysis of the legal framework itself, leaving aside the practice of their implementation) in terms of compatibility with Article 10 of the European Convention of Human Rights which guarantees the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

7.

The law attaches insufficient importance to the rights of minorities, as defined by a number of OSCE and Council of Europe documents, while at the same time introducing excessive and unjustified requirements regarding the language of broadcasting.

8.

A great deal of work remains to be done to achieve a satisfactory level of approximation to EU standards. With the exception of the basic provisions on advertising (but not teleshopping), areas where harmonization is yet to be achieved include all the main rules and principles of the TWF directive, including some aspects of freedom of reception

and retransmission, jurisdiction, events of major importance for society, promotion of distribution and production of television programmes (European quota, independent production quota), protection of minors and public order.

The same is true of EU rules as regards State aid to public service broadcasters.

III. DETAILED COMMENTS ON THE LAW

Articles 1, 2, 3, 7, 73

Articles 1 and 2 state that "this law regulates the activity of the public and private radio and television in Albania" and then define "radio-television activity" as including "production, broadcast and rebroadcast of programs and information of any kind by means of sound, image, coded signals, writing, intended for the public via electromagnetic waves, cables, responders, satellites or by any other means".

This definition of the field of application of the Act potentially raises serious problems because of:

- its extension to "production" of programmes:
- and the implied suggestion that it may cover the distribution of programme services by the Internet ("any other means").

On the first question, this would mean State regulation of the "production" of programmes. In this light, the provision of Art. 3 ("In order to exercise a private radio-television activity, any natural or legal person is issued a license") could be interpreted to mean that a licence is needed not only to broadcast a programme service, but also to produce the contents of that programme service. Art. 73 in fact mentions "licensed subjects to produce audio and video programs or movies", though there is no mention of who licenses these "subjects" (i.e. probably independent producers) and on what grounds, or by what procedures.

Art. 7, item 10 then explicitly gives the National Council for Radio and Television the power to "determine the norms for the production and broadcast of the public and private electronic media".

This (i) potentially violates journalistic and artistic freedom and goes far beyond the limits of State intervention into the exercise of freedom of expression set by Article 10 of the European Convention of Human Rights and the case-law of the European Court of Human Rights; and (ii) unjustifiably extends State legislation and supervision to the process of programme production, which should be treated as an unregulated area of creative and/or entrepreneurial activity.

"Broadcasting activity", as understood in international law, does not by definition include programme production. It is, in fact, possible to be a broadcaster without producing a minute of programming.

Article 1 of the TWF Directive defines "television broadcasting" as "the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public". It then defines "broadcaster" as "the natural or legal person who has editorial

responsibility for the composition of schedules of television programmes […] and who transmits them or has them transmitted by third parties". An identical definition of "broadcaster" can be found in Art. 2 of the European Convention on Transfrontier Television.

Regulation should therefore concern the editorial responsibility of the broadcaster for the contents of programming and not the act of the production of programming. This also points to the need for more extensive and carefully drafted definitions of terms used in this law, ideally to be done in a separate article devoted to this purpose.

On the second question, nothing in the law supports its potential application to webcasting, streaming media or multimedia content available on the Internet. However, it could be applied in this way. **It could hardly have been the intention of the legislator to extend the scope of this law beyond the sphere of broadcasting, but the present wording of Art. 2 could create legal uncertainty for Internet content providers, especially in the case of multimedia content.**

Article 6, 137/5

This article describes the National Council of Radio and Television (NCRT) as an "independent body acting on the basis and for the implementation of the provisions of this law".

The NCRT must, in the execution of its duties, have dealings with the legislature, as well as the government and the judiciary. Its description as an "independent body" does not adequately define its status in a way which would give it a strong enough position in relation to Parliament, Government and State administration.

This was probably the reason why article 137/5 was added when the law was amended in 2000, but this is only a partial remedy, ensuring cooperation from local public and police authorities.

The Council's formal status should be defined more precisely, especially in terms of its place vis-à-vis other organs of the State at the national level [3].

Article 7

Among other powers and competencies granted to the NCRT are those to "grant and revoke licenses for the instalment of radio-television booster transmitters rebroadcasting foreign programme services in various areas of the country" and to "grant and revoke licenses to rebroadcast foreign radio and television in the territory of the Republic of Albania for the public in Albania".

[3] Article 20 of the French Freedom of Communication Act No. 86-1067 of 30 September 1986 (as amended) states that "To carry out the assignments entrusted to the Conseil supérieur de l'audiovisuel pursuant to this Act, the chairman thereof shall be empowered to take legal action in the name of the State". Article 5 of the Polish Broadcasting Act of 1992 (as amended) defines the National Broadcasting Council as "the state authority competent in matters of radio and television broadcasting".

The exercise of these powers should be conducted with a view to implementing a wide variety of international legal and political texts which guarantee freedom to receive and impart information regardless of frontiers, including the European Convention of Human Rights, the document adopted at the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (June 1990), as well as Article 4 of the European Convention on Transfrontier Television, and Article 2a of the TWF Directive – both guaranteeing the freedom of reception and retransmission of transfrontier television programme services.

The law should guarantee that the NCRT will not exercise these powers in violation of these principles.

Articles 8, 11, 13

According to article 8, "The financial budget of the National Council of Radio and Television is covered by the state, to the extent its normal functioning allows". Unless there is a mistake in translation, this may mean that the NCRT is not guaranteed a stable budget and the State may at any time decide that the budget should be cut.

Moreover, the remuneration of the members of this Council is determined by Parliament – again, with no guarantees of its level or stability.

Both these provisions give the State and Parliament considerable leeway in determining the level of funding of the NCRT and the level of remuneration of NCRT members. This could potentially be used to exert pressure on the regulatory authority, or to disrupt its work.

If so, this would directly contradict principles laid down in Recommendation (2000) 23 of the Council of Europe Committee of Ministers on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector. The Recommendation calls on member states to "include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner". The Appendix to this recommendation calls for arrangements for the funding of regulatory authorities to be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently. Further, public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities. Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on ad-hoc decision-making of public or private bodies.

Art. 8 fails to comply with any of these principles, laying the NCRT open to precisely the dangers described in Recommendation (2000) 23. There is a clear need for this to be changed in a future revision of the law.

NCRT's dependence on public funding is somewhat alleviated by its other sources of funding listed in Art. 11. However, the possibility that it may receive donations, despite all the precautions listed in Art. 13, could also lay it open to external influence or pressure.

Articles 9, 15

NCRT members are appointed by Parliament. One candidate is nominated by the President of the Republic; the other six candidates are proposed by the Permanent Parliamentary Commission for the Public Information Media, representing equally the ruling and opposition parties in the parliament. Also the chairman of the National Council of Radio and Television is elected by Parliament from among its seven members, out of two candidates proposed by secret ballot by the NCRT.

Members of the NCRT may be dismissed by Parliament when:

- they are sentenced by a final court decision for committing a crime;
- become incapable to perform the duty due to illness;
- are absent from more than one-third of the meetings of the Council held in a year;
- incompatibilities specified in Article 14 are not observed.

While reasons for possible dismissal are largely in compliance with the principles laid down in Recommendation (2000) 23, the method of appointment cannot be said to meet the requirement that "the regulatory authorities should not be under the influence of political power" and "may not receive any mandate or take any instructions from any person or body".

As with the Steering Council of ART (see below), civil society and professional organizations should be given a clear role in nominating all (or a clear majority) of members of the NCRT, who would then be appointed by Parliament. This would meet the requirement specified in Recommendation (2000) 23 that they should be appointed in a democratic and transparent manner.

Article 10

This article, dealing with the organization and functioning of the NCRT, is important in terms of the future accession negotiations with the European Union.

A European Commission paper Main Administrative Structures Required For Implementing The Acquis (Brussels, 10 April 2002) specifies a number of criteria that are applied in the area of audiovisual policy. This includes the fact that regulatory systems should have basic powers which allow for the effective application and enforcement of audio-visual legislation. In terms of the audio-visual acquis, the regulatory systems should be in a position to address basic notions such as applicable law, jurisdiction, measures for the promotion of European and independent works, regulation of advertising, tele-shopping and sponsorship, protection of minors and the right of reply.

Such powers include the need for:

- adequate monitoring powers: the ability to monitor the content output of broadcasters, including the possibility to oblige broadcasters to provide data on their broadcasting activities. Regulatory systems must be in a position to provide, to the Commission, detailed reports on the implementation of, and compliance with, the broadcasting legislation. The ability to exercise such powers presupposes that the regulatory systems

have adequate technical facilities, technical know-how and human resources to carry out the monitoring functions.

- adequate sanctioning powers: the ability to impose a range of sanctions for breaches of the law and/or licence conditions, weighted according to the seriousness of the breach. Such powers should include the ability to issue warnings, impose fines and, ultimately, the power to prohibit broadcasting/revoke broadcasting licences (for serious breaches of the law, having regard to the transfrontier nature of the audio-visual acquis). Regulatory systems should be accorded such powers in a way that allows for transparent application.

It is not possible to judge on the basis of the law itself whether the NCRT has the administrative capacity required for the execution of these tasks. However, this should be closely considered when analyzing the effectiveness of the law, and when preparations for accession negotiations begin.

Chapter IV "Licensing"

This chapter refers solely to the licensing of terrestrially transmitted programme services, with the licensing of "cable radio-television programs" and of satellite broadcasting covered elsewhere. This means that the law is not technologically neutral and creates different legal regimes for different transmission technologies. All cases of issuing licences to broadcast should be covered in this chapter.

Article 20

Several provisions of this article require consideration:

1. The fact that only national and local licenses can be issued;
2. The fact that only joint stock companies established in the territory of the Republic of Albania may receive national licences to broadcast;
3. And the fact that these must be joint stock companies established with the sole purpose of conducting radio and television.

These provisions are mostly a matter of policy choice for Albania and the matter of their compatibility with European standards does not arise. Nevertheless, they merit some attention.

It could be surmised that the requirement that only joint stock companies may receive national licences is meant to promote transparency of ownership and of funding (incidentally, a principle promoted by Recommendation No. R (94) 13 of the Council of Europe Committee of Ministers on Measures to Promote Media Transparency). **Nevertheless, in other legal systems it is possible for individuals to apply for and be awarded a national licence to broadcast.**

The requirement that only national and local licenses can be issued may be intended to protect local radio and television stations, and therefore programme services reflecting issues of importance to local communities (see also Art. 29). **However, in many other jurisdictions also regional stations are licensed. Moreover, given the relatively large number of television stations (56 in Nov. 2003) and the necessarily small advertising**

market, it is doubtful whether local stations can indeed afford to produce much new and valuable programming.

Finally, the requirement that national licences can only be awarded to joint stock companies "established with the sole purpose of conducting radio and television" can be understood as reflecting a desire to protect broadcasting from unwanted economic and commercial pressures which might be unavoidable if they constituted part of larger economic entities. **However, the undesirable effect of this provision may be the financial weakness of national broadcasting stations, potentially resulting in their inability to offer original programming and in their openness to pressure, as they look for sources of finance. This may also be the unwanted consequence of relatively strict anti-concentration and cross-ownership provisions laid down in Art. 20 and elsewhere.**

Articles 23, 24

Article 23 requires that the licence application specify "the content of the programs to be broadcast". Then Article 24 states that "For the approved applications, the decision contains the contents and quantity of programs, in compliance with this law". This could be interpreted to mean far-reaching NCRT control over the contents of programming, far beyond the acceptable limits of interference by the State or public authorities into how freedom of expression is exercised.

In the application of these provisions, care should be taken to avoid giving the NCRT the power to interfere into the contents of radio or television programming (beyond what is necessary for the regulatory authority to know what kind of programme service it is licensing, and to establish criteria for its monitoring in terms of compliance with the terms of the licence). Any future revision of the law should remove this suggestion that the NCRT has the power to determine the contents of programme services.

Article 31

The power of the NCRT to unilaterally "change the conditions mentioned in the license even without the approval of its holder, when these changes are dictated by the observation of international conventions signed by the Republic of Albania" appears excessive. **Conclusion of international conventions and their subsequent ratification take sufficient time for the NCRT to be able to agree with the broadcaster on changes in licence terms and conditions.**

Articles 36, 37, 66, 68

Under Article 36, public and private radio and television programs must "respect the constitutional and human rights of national minorities in compliance with international conventions signed by the Republic of Albania" and "the Albanian religious diversity". Article 66 commits ART to serve all the groups of society, including national minorities.

These provisions appear to go some way towards meeting the requirements of such CoE documents as the Framework Convention for the Protection of National Minorities (Art. 9), and especially the European Charter for Regional or Minority Languages (see Art. 11).

However, Article 37 provides that the use of the Albanian language is obligatory for all programs, except programs intended specifically for national minorities, and programs of local radio-television subjects licensed to broadcast in the language of minorities.

The OSCE Participating States recognise the right of persons belonging to national minorities to "disseminate, have access to and exchange information in their mother tongue" (Vienna Document, para. 45; Copenhagen Document, para. 32.5). This approach is developed i.a. in the OSCE Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998) and OSCE Guidelines on the Use of Minority Languages in the Broadcast Media (October 2003).

This latter document formulates the principle that States should guarantee the freedom of choice by creating an environment in which a variety of ideas and information can flourish as communicated in various languages. It also states that "in regulating the use of language in the broadcast media, States may promote the use of selected languages. Measures to promote one or more language(s) should not restrict the use of other languages. States may not prohibit the use of any language in the broadcast media. Measures to promote any language in broadcast media should not impair the enjoyment of the rights of persons belonging to national minorities".

It is not clear whether the law meets all the requirements formulated in these documents. For example, the 2003 Guidelines calls on States to "prescribe appropriate requirements for State or public service broadcasters with regard to the provision of programming in minority languages". States should also "ensure that the amount of time allocated and the scheduling of minority language broadcasting should reflect the numerical size and concentration of the national minority and be appropriate to their needs and interests". However, Art. 68 only requires ART to provide "information" to national minorities. The Guidelines also say that "States should also consider creating favourable conditions (financial or otherwise) to encourage private minority language broadcasting" and that "Where there is no private minority language broadcasting, States should actively assist its establishment, as necessary". **There is no evidence in the law of a clear policy to pursue these aims.**

Article 39

It is not uncommon for broadcasting legislation to require broadcasting stations to provide free air time for official announcements at times of emergency or natural disasters. However, the provision of this article extends far beyond that, forcing public and private

radio stations to broadcast free of charge any "messages of social benefit or of great interest for the general public", as defined by the NCRT.

This is a case of unjustified interference into the editorial freedom and independence of broadcasters, turning them into state information agencies. This provision should be removed.

Article 40/1

The intention of this article is to protect copyright. In this sense, it naturally deserves support. However, the requirement that broadcasters should submit to the National Council of Radio Television "documents that verify that they have the right to broadcast programs in accordance with selling, exchanging or donating contract" for each and every programme item is hardly realistic or practicable. The NCRT can hardly be capable of processing all these documents in good time, meaning that either they would have to be filed a long time in advance of actual broadcasting time, or this is in reality a dead-letter law, since such documentation is not verified before the programme item is broadcast.

This is an excessive requirement, involving additional obligations, administrative effort and costs for broadcasters, potentially hampering their ability to react quickly to unfolding events by producing programming that covers them in a timely manner, and overloading the NCRT with paper work beyond its capacity to process it. This is a bureaucratic solution incapable of solving a real problem. It should be reconsidered.

Article 40/2

The "prohibition of broadcasting programs under the logo of foreign radio and television operators" also appears to be **disproportionate and excessive** – especially if it is interpreted to mean also a ban on showing clips of other stations' newscasts or sports coverage in the news programmes of Albanian television stations.

Article 41

The requirement that public and private national radio and television stations must broadcast news every day is unobjectionable in itself. **However, it appears to be based on the assumption that all programme services will be generalist ones. This might preclude the possibility of licensing thematic channels whose specialization might exclude news. Sooner or later, the development of the audiovisual market will lead to the emergence of such channels, but the law could constitute a barrier in this respect. To prepare for such an eventuality, a definition of a specialized channel should be added, as well as provisions in the chapter on licensing on special terms for thematic channels.**

Article 43

This article appears to be based on the "media chronology" as it was defined in the TWF Directive before it was amended in 1997. Since then, a strictly defined "media chronology" has been removed from the directive and Article 7 now reads: "Member States shall ensure that broadcasters under their jurisdiction do not broadcast cinematographic works outside periods agreed with the rights holders". **Nevertheless, it is a matter of policy choice for Albania – until it begins accession negotiations with the European Union – whether it wants to retain such a provision or not.**

Article 44

While protection of the confidentiality of sources of journalistic information offered by this article is welcome, the vague requirement that these sources must be "disclosed only in special cases as provided in the law" is cause for concern.

Recommendation No. R (2000) 7 of the Council of Europe Committee of Ministers on the right of journalists not to disclose their sources of information contains very clear guidance on limits to the right of non-disclosure. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the European Convention on Human Rights. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member states should pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that: (i) reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and (ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that: an overriding requirement of the need for disclosure is proved; the circumstances are of a sufficiently vital and serious nature; the necessity of the disclosure is identified as responding to a pressing social need, and member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

An Appendix to the Recommendation further specifies conditions concerning disclosures [4].

[4] *a.* The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

b. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

It is to be hoped that application of this article proceeds in line with this Recommendation and broadcast journalists are granted a very strong right to protect their sources of information.

Article 45

This article touches on a very sensitive issue in media regulation and its vague and general wording are a serious cause for concern.

A regional Council of Europe Conference on defamation and freedom of expression in South-East European countries (17-18 October 2002) found that that the laws on defamation and insult in some countries in South-Eastern Europe fail to give sufficient weight to the right to freedom of expression; that even where these laws are satisfactory, the practice of implementing them often fails to give sufficient weight to the right to freedom of expression; and that public officials and others sometimes abuse these laws.

The participants unanimously agreed that there should be defences of truth and fair comment where journalists have acted reasonably and in good faith; that the burden of truth should in principle rest with the plaintiff in cases of defamation. Where the burden of proof is placed on the defendant, the latter should be able to be exonerated from his/her responsibility if he/she is able to provide reasonable evidence that he/she had acted reasonably and in good faith; that there should be no special protection in both substantive and procedural laws or in practice for public officials (including Heads of State), in accordance with the jurisprudence of the European Court of Human Rights; that alternative effective remedies to litigation, such as mediation or the publication of an apology or a correction or a reply, should be encouraged in cases of defamation and insult in order to reduce the number of lawsuits on these grounds. Where such alternative remedies are used, it should not be possible to have recourse to court proceedings; that measures should be taken to prevent excessive litigations.

The issue is also covered at length in the Council of Europe Committee of Ministers Declaration on freedom of political debate in the media, adopted in 2004.

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c. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Any future revision of this law should develop this provision to build in safeguards of freedom of expression along the lines suggested above [5].

Article 46

The requirement that reviews of daily and periodical press on radio-television programs "should be broadcast only with the permission of the publisher of each press organ" imposes an unnecessary and disproportionate obligation on broadcasters. It should be removed.

Article 47

The English translation of this article suggests an approach which is not really borne out by its contents. It concerns, in reality, a right or rectification (correction) of false information, often called "a right of reply", and not a right of rebuttal, which would allow the claimant to enter into a debate with views expressed in a radio or television programme service.

Chapters VI and VII

These chapters on advertising and sponsorship do not in their present form raise particular objections. However, a comparison with both the European Convention on Transfrontier Television and the "Television Without Frontiers" directive will show that they do not regulate teleshopping, or broadcasters' self-promotional activities.

Future harmonization of this law with EU standards will require full transposition of the provisions of the TWF directive and incorporation of the approach on new advertising techniques adopted in the European Commission's Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising in the "Television Without Frontiers" Directive, C (2004) 1450, Brussels, 23.4.2004.

Articles 64-67

These articles define the status, role and general programme obligations of ART as a public service broadcaster. In terms of EU law, they must be seen as provisions which entrust the public service mission to ART, complemented in this respect by the Charter of Albanian Radio-Television, approved by Parliament in 2000.

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5 See also Toby Mendell, Background Paper on Freedom of Expression and Defamation for the International Seminar on Promoting Freedom of Expression With the Three Specialised International Mandates, London, 29-30 November 2000.

In its Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, the Council of Europe Committee of Ministers recommended that member states "include in their domestic law or in instruments governing public service broadcasting organisations provisions guaranteeing their independence". An Appendix to this recommendation, adds that the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy.

It has to be noted that these articles do not describe ART as an independent broadcasting organization, nor do they say that it should enjoy editorial independence and institutional autonomy – only that it is committed to "impartial coverage of national and international news" (Art. 66). As we will see below, the method of appointment of its Steering Council by Parliament, and the fact that the ART Charter also has to be approved by Parliament, create potential mechanisms for outside interference into, and exertion of pressure on, ART.

From this point of view, it may be significant that the legal form and status of ART are not defined in any way, except that it is described as an "institution" in Art. 64 (and a "national institution" in Art. 1 of the Charter).

Art. 64 states that "The activity of the Albanian public radio-television is regulated by this law". It is to be hoped that the law and the Charter are indeed the only legal instruments governing ART.

There is a clear need in any future revision of the law for unequivocal provisions, both stating ART's independence and providing guarantees of its independence.

Article 69, 148

Article 69 confines ART to the use of traditional broadcast technology only. As such it provides no legal basis for a potential teletext service, nor even for the establishment of a website. **This is not a forward-looking approach and may in the future hamper the development of ART and its entry into the world of new technologies.**

This should be rectified in a future revision of the law, so that the door is open for ART to use new technologies whenever the need and opportunity arise.

Recommendation Rec (2003) 9 of the Council of Europe Committee of Ministers on Measures to Promote the Democratic and Social Contribution of Digital Broadcasting calls on member states to "create the financial, technical and other conditions required to enable public service broadcasters to fulfil this remit in the best manner while adapting to the new digital environment". It goes on to say that "the means to fulfil the public service remit may include the provision of new specialised channels, for example in the field of information, education and culture, and of new interactive services, for example EPGs and programme-related on-line services. Public service broadcasters should play a central role in the transition process to digital terrestrial broadcasting".

Article 148 provides that "All the frequencies presently used by the ART, from the moment this law enters into force, will be available for use by this institution for a 10-year period". **There is no mention of what will happen afterwards. This is not a secure foundation upon which to build the future of public service broadcasting in Albania. This provision should be removed.**

Article 70

This article provides a full list of programme services to be broadcast by ART. This approach is correct, since the obligations of a programme service broadcaster should be defined very clearly. However, this is a closed list, allowing for no possible changes or additions of new programme services, should such a possibility arise.

It would therefore be advisable to supplement this article with provisions opening the way to changes in this list and describing the procedure by which ART would receive permission to establish possible new programme services, preferably from the NCRT.

Articles 72-76

These articles relate to the required share of in-house production, co-productions and independent production in the air time of ART (at least 50%, with the ART entitled to use up to 25% of its production budget for independent productions).

These provisions will have to be substantially changed in the process of harmonization with the TWF directive, by the introduction of a European quota (at least 50% of air time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping) and an independent production quota (at least 10% air time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or at least 10% of the production budget, or both, with an adequate proportion of recent works, that is to say works transmitted within five years of their production) for all television broadcasters. Under EU rules, any provisions discriminating against producers from other member states will have to be eliminated (i.e. the proportion of ART in-house production), but it is possible to introduce a quota – again for all television broadcasters – of works originally produced in the Albanian language.

Some EU member states introduce different quota levels for private and public television broadcasters.

Given that Albania signed and ratified the European Convention on Transfrontier Television in 1999, some of these provisions (i.e. the European quota) should in the meantime have already been introduced into Albanian broadcasting legislation.

Article 77

This article vests ART with exclusive broadcasting rights for cultural, artistic and sports activities of national interest organized by state central or local public authorities or funded from the State Budget, as well as for sports activities on the territory of the Republic of Albania by national teams of the Republic of Albania, where the national sports federations, Albanian games committees or any other Albanian public institutions hold the copyright or broadcasting rights.

This system of protecting the public service broadcaster against competition from commercial broadcasters will also have to be entirely changed. In its present

form, it could be regarded as conferring an unfair advantage on the public service broadcaster, and as being anti-competitive. Albania has the option to introduce a system designed to protect the right of the public to follow events of major importance to society. Both the European Convention on Transfrontier Television (see Art. 9a) and the TWF directive (see Art. 3a) provide a legal basis for introducing such a system, whereby no broadcaster under the jurisdiction of a State Party to the Convention, or a member state of the EU may broadcast on an exclusive basis events which are regarded by that country as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television (whether public or private).

Another way to protect the right of the public to information is to introduce legal measures foreseen in Art. 9 of the European Convention on Transfrontier Television, providing for a right to short reporting on events of high interest for the public for which a broadcaster has obtained exclusive rights for transmission or retransmission (see also Recommendation No. R (91) 5 of the Council of Europe Committee of Ministers on the Right to Short Reporting on Major Events Where Exclusive Rights for Their Television Broadcast Have Been Acquired in a Transfrontier Context).

Articles 85, 115-120

Articles 85 and 115 permit ART to engage in commercial activities, with prices for the use of ART facilities and equipment by outside entities to be verified by the NCRT with a view to ensuring fair competition among broadcasters.

This article and the entire system of ART funding will have to be adjusted to EU requirements regarding State aid, as laid down in Article 87(1) of the Treaty [6], the Amsterdam Protocol [7] and the Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04).

EU Member States are free to choose the means of financing public service broadcasting, but this cannot affect competition in the common market in a disproportionate manner. This means that the level of public funding (broadcasting fee, State subsidies and grants, etc.) may not exceed the level necessary for the performance of the public service mission. Also, ART will have to introduce dual accounting: (a) the internal accounts corresponding to different activities, i. e. public service and non-public service activities, will have to be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively

[6] It reads: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market".

[7] It states that funding for public service broadcasters should not "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established.

ART will need to do this and to introduce fair-trading rules in order to show that there is no cross-subsidization of commercial activities from public funding.

Articles 86-90

These articles list the governing bodies of ART and describe the manner of appointment of the Steering Council.

The ART Steering Council is composed of 15 members appointed by Parliament, including:

- 10 members equally elected among twenty candidates proposed by majority and opposition, according to their representation in the Assembly;
- 3 members selected from among 6 candidates proposed by: the Academy of Sciences; Tirana University; Writers and Artists' Associations;
- 2 members appointed from among four candidates proposed by the journalists' associations.

In an Appendix to its Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, the Council of Europe Committee of Ministers calls for the rules governing the status of the supervisory bodies of public service broadcasting organisations, especially their membership, to be defined in a way which avoids placing the bodies at risk of political or other interference.

It says further:

"These rules should, in particular, guarantee that the members of the supervisory bodies:
- are appointed in an open and pluralistic manner;
- represent collectively the interests of society in general;
- may not receive any mandate or take any instructions from any person or body other than the one which appointed them, subject to any contrary provisions prescribed by law in exceptional cases".

Given that 10 members of the ART Steering Council are political appointees, and that they have a clear majority in the Council, it can hardly be said that these conditions have been met in Albania: (1) the manner of appointing the Council is only partly open and pluralistic; (ii) the members do not fully represent collectively the interests of society in general; and (iii) it is likely that at least some of the members may be open to political instructions. The current system is designed so that each party represented in Parliament will have its representative in the Council, making the Council an extension of Parliament, and potentially turning ART not into a public, but a "parliamentary" broadcaster.

It would be best if all candidates for membership in the Council were proposed by national civil society and professional organizations and bodies, to be appointed by Parliament from among two candidates proposed for each seat. For this purpose, the law would have to list 15 "nominators" (single organizations or bodies, or groups of

similar organizations empowered to nominate candidates for one seat), selected so that the Council members would indeed represent collectively the interests of society in general.

Article 90

The list of incompatibilities for members of the Steering Council should be extended to cover independent producers and their staff, and owners and employees of advertising agencies.

Articles 99-114

These articles describe the competencies and mutual relations between the three "steering bodies" of ART.

The division of labour between them could be described as follows:

- The Steering Council is concerned with administrative, organizational and programming matters;
- The Administrative Board focuses primarily on financial matters;
- The Director General manages ART in the area of programming, financial and business activities.

This system gives rise to a number of questions:

1. According to art. 99, the Steering Council is deprived of virtually any supervision over the finances of ART. The ART Charter does give it the power to approve the annual financial plan and the budget of ART and its constituent units (see Art. 16, para. 1, item dh of the Charter), but this is unsupported by the law. An amendment of the Charter could deprive it of this competence. **This should be corrected and this power of the Steering Council should be guaranteed by the law, since it is impossible for the Steering Council effectively to supervise the activities of ART if it is deprived of any say in financial matters.**
2. Why has some decision-making power (see Art. 113) in this crucial area been given to the Administrative Board, which is described in Article 104 as "a consultative body of the Director General" and which is not really independent of the Director General (he/she proposes candidates for appointment to the Board, may propose their dismissal and determines the remuneration of the members)? **It is the Steering Council which should approve the budget of ART and which should take the decisions now reserved for the Administrative Board in Article 113 (especially the purchase, sale, and mortgage of properties; receiving and paying off bank credits; and finalizing contracts about new investments, when the sum to be invested by ART is over 5 – 10 percent of the annual budget of the institution).**
3. Why can members of the Administrative Board have three 4-year terms in succession, when members of the Steering Council can only be re-elected three years after the expiry of their last term)?

To resolve the dilemma of the supposed independence of the Administrative Board when in reality it could be easily controlled by the Director General, it could be defined as a consultative body of the Steering Council and report to the Council, rather than to the Director General. That would require a change in the law, depriving the Director General of any degree of control over the Administrative Board.

Articles 121-127

These articles concern "Cable Radio-Television Programs" which, on the face of it, may mean both rediffusion systems and cable television systems. Once again, lack of precise definition of terms (in this case "transmission" and "retransmission"[8]) deprives these provisions of legal clarity.

Article 122 lists the following types of "cable radio-television programs":

1. Rebroadcast of programs aired by terrestrial and satellite transmitters, always including programs of public operators;
2. Rebroadcast of programs intended for closed television networks like hotels, elder residents, tourist residencies, tourist villages, ships, ferry boats, hospitals, cinemas, theatres and discotheques;
3. Rebroadcast of audio-visual productions recorded from various equipment;
4. Broadcasting of various self-produced programs.

It is not clear why item 2 refers to "rebroadcasting" of programmes intended for closed television networks (which would mean their reception and retransmission somewhere else), whereas in fact this should probably refer to the "broadcasting" of such services for the purpose, and in the places for which they are intended.

Article 122

This article introduces a must-carry provision, requiring cable operators always to retransmit the programme services of "public operators" – which probably means ART. It is not clear whether this refers both to national and regional programme services. **It may be difficult for a cable system in one region to retransmit an ART regional programme service from another region, if its coverage area does not cover the region where the cable system operates.**

With time, it will be necessary to assess this provision for compatibility with provisions on this subject in Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

[8] The European Convention on Transfrontier Television defines them as follows: "Transmission" means the initial emission by terrestrial transmitter, by cable, or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public. It does not include communication services operating on individual demand"; "Retransmission" signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public;

Article 123, 126, 135

It is assumed here that Article 123 refers only to the licensing of new and original programme services introduced by cable operators into their systems (item 4 of Art. 122). If so, this is of course unobjectionable. **It would be a different matter if the cable operator needed a licence to both broadcast and retransmit programme services. That would mean that a programme service already licensed in another country would in effect be "licensed" once again in Albania, solely for retransmission purposes. That would be a violation of international law.**

If, however, the assumption is correct, then it would mean that retransmission by cable operators of any other terrestrial or satellite programme services (domestic or foreign) is unregulated, except for the must-carry rule in Article 122. However, two other provisions need to be noted in this respect.

Article 126 provides that "in order to achieve quality transmission of sound and image for subscribers through telecommunication cable networks, the National Council of Radio-Television, in cooperation with the Regulatory Telecommunication Agency, shall determine the rules and modalities for the distribution of radio-television programs". The way and procedure by means of which NCRT "determines the rules and modalities" are not defined, nor is it clear whether "distribution" means "transmission/broadcasting", or "retransmission". **This may be indicative of a lack of legal certainty for cable operators and of discretionary powers being given to NCRT in this regard.**

Secondly, it has to be noted that Article 135 bans "cable re-broadcasting of satellite programs for profit by individuals who possess such receiver equipment".

It is assumed here that this refers to individuals who are not cable operators operating under a "cable network permission" (see Article 127). If so, such "individuals" would be in violation of the telecommunications law. In terms of freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights, and freedom of reception and retransmission of transfrontier programme services enshrined in the European Convention on Transfrontier Television and the TWF directive, the matter is less clear. In the case of Autronic AG, the European Court of Human Rights has ruled out restriction of retransmission as a form of censorship or interference in the contents of a broadcast.

Articles 128-134

These provisions concern radio-television repeater stations, rebroadcasting domestic or foreign programme services in various areas of the country, and the licensing of broadcasters engaging in such activity.

The rules governing this form of broadcasting are cause for serious concern because:

1. They seek to impose content restrictions ("The stations broadcast by the responder do not affect the public and constitutional order of the Republic of Albania" – Article 130, item 2) which could be interpreted as extending Albanian jurisdiction to foreign programme services;

2. They seem to signal a preference for licensed domestic programme services over foreign ones (see Articles 129, 133);
3. Grounds for revoking such licences appear much more arbitrary than in the case of licences to broadcast domestic programme services, virtually giving NCRT a free hand (see Articles 131, 133).

While a preference for new programme services originated by domestic broadcasters may be understandable, these provisions confirm what has been described above as a bias against foreign programme services reaching Albania.