MEMORANDUM

on the

draft Albanian "Act of Freedom of Press"

by

ARTICLE 19
Global Campaign for Free Expression

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

I. Introduction

This Memorandum analyses the draft Albanian "Act of Freedom of Press" (the draft Act), received by ARTICLE 19 through the Office of the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe.[1] We understand that the draft Act will be discussed by the Albanian parliament in October 2004, and this

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation, which we believe is an unofficial version of the draft Act.

Memorandum is intended to help inform that debate, as well as related discussions by civil society.

The draft Act builds on an earlier proposal, released early in 2001. In March of that year, we commented on that proposal,[2] criticising the extent to which it attempted to regulate the press, particularly through the proposed establishment of a Journalists' Order with which all media practitioners would have to be registered. In addition to our primary concern with the Journalists' Order, we also criticised the attempt to legislate journalistic ethics – a matter which we believe is best dealt with through self-regulation – and the provisions outlawing the publication of 'false news', prescribing certain linguistic standards and outlawing vaguely defined forms of expression deemed to be inciting in nature. At the same time, we welcomed new provisions which would have protected, among other things, journalists' sources and pluralism in the media.

Compared with the 2001 proposal, we are pleased to note that the current draft Act no longer envisages the establishment of a Journalists' Order. We have some remaining concerns in relation to the registration scheme currently envisaged, however, as well as with the proposed content restrictions, price controls and the right of reply scheme, among other things. We are particularly concerned that the proposals to improve pluralism and diversity in the media aim to do so through setting minimum prices and limiting newsstands' profits. We do not believe that this is appropriate; media pluralism is best promoted by introducing detailed and specifically tailored support measures, either in the form of direct media subsidies, or through fiscal measures (for example, by abolishing tax on newsprint).

We detail our concerns in Section III of this Memorandum. Section II outlines international standards on the right to freedom of expression as contained in the international human rights treaties that Albania is a party to.

II. International and Constitutional Obligations

II.1 The Guarantee of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR),[3] 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 regardless of frontiers.

[2] The ARTICLE 19 Statement on the earlier draft can be found on the ARTICLE 19 website, at http://www.article19.org.
[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),[4] ratified by Albania on 4 October 1991, elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR. Freedom of expression is also protected in the three regional human rights systems, including Article 10 of the *European Convention on Human Rights* (European Convention),[5] ratified by Albania on 2 October 1996, Article 13 of the *American Convention on Human Rights*[6] and Article 9 of the *African Charter on Human and Peoples' Rights*.[7]

Article 10 of the European Convention states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Through the Albanian Constitution, the rights guaranteed in international treaties to which it is party take precedence over any Albanian laws or practices that are incompatible with them.[8] The Albanian Constitution also guarantees the right to freedom of expression separately, in Article 10 (freedom of expression in public life), Article 20 (freedom of expression of minorities) and Article 22 (freedom of expression and freedom of the press, radio and television).

II.2 The Importance of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. The European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[9]

The Court has also made it clear that the right to freedom of expression protects offensive and insulting speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[10]

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[4] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[5] Adopted 4 November 1950, in force 3 September 1953.
[6] Adopted 22 November 1969, in force 18 July 1978.
[7] Adopted 26 June 1981, in force 21 October 1986.
[8] Articles 5 and 122 of the Albanian Constitution, adopted 21 October 1998, as translated by K. Imholz, K. Loloci (Member of the Technical Staff of the Constitutional Commission and ACCAPP: <http://pbosnia.kentlaw.edu/resources/legal/albania/constitution/>.
[9] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[10] *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

It has similarly emphasised: "Journalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation."[11] This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.[12] The choice as to the form of expression is up to the media. For example, the Court will not criticise a newspaper for choosing to voice its criticism in the form of a satirical cartoon and – it has urged – neither should national courts.[13] The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician, while in the *Lingens* case, the Court stressed that the circumstances in which the impugned statements had been made "must not be overlooked."[14]

The Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary: "There is little scope … for restrictions on political speech or debates on questions of public interest."[15] The Court has rejected any distinction between political debate and other matters of public interest, stating that there is "no warrant" for such distinction.[16] The Court has also clarified that this enhanced protection applies even where the person who is attacked is not a 'public figure'; it is sufficient if the statement is made on a matter of public interest.[17] The flow of information on such matters is so important that, in a case involving newspaper articles making allegations against seal hunters, a matter of intense public debate at the time, the journalists' behaviour was deemed reasonable, and hence not liable, even though they did not seek the comments of the seal hunters to the allegations.[18]

The guarantee of freedom of expression applies with particular force to the media. The Court has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law"[19] and stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[20]

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[11] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.
[12] *See Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.
[13] See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.
[14] *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 34 and *Lingens v. Austria*, 24 June 1986, Application No. 9815/82, para. 43.
[15] See, for example, *Dichand and others v. Austria*, note 11, para. 38.
[16] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.
[17] See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 13.
[18] *Ibid*.
[19] *Thorgeirson v. Iceland*, note 16, para. 63.
[20] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

In nearly every case before it concerning the media, the Court has stressed the "essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all 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'."[21] In the context of defamation cases, the Court has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and to contribute to the discussion of matters of public importance.[22]

II.3 Restrictions on Freedom of Expression

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 10(2) of the European Convention, which states:

> 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 and impartiality of the judiciary.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee[23] and the European Court of Human Rights,[24] requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest, and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

The European Court has held that this three-part test represents a high standard which any interference must overcome:

> 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.[25]

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[21] See, for example, *Dichand and others v. Austria*, note 11, para. 40.
[22] *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.
[23] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[24] For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.
[25] See, for example, *Thorgeirson v. Iceland*, note 16, para. 63.

III. Analysis of the Draft Act

The latest draft of the Act of Freedom of Press states as an aim the implementation of the right to freedom of expression for the print media. It does this by providing for a registration scheme, by setting out several 'rights' of journalists, including a right to keep sources of information confidential, and by providing for a right of reply regime, among other things. There are also several options to improve media pluralism and to prevent print media being sold below the cost price in order to increase market share. The following paragraphs analyse these proposals in detail, providing suggestions and recommendations throughout.

III.1 General

We have a few overarching concerns in relation to the draft Act.

First, we note that the Act states as its specific aim, implementation of the right to freedom of the press.[26] Given this guiding statement of principle, we would have expected a stronger emphasis on this in the operative provisions of the draft Act. As currently drafted, the Act fails to make any mention of the constitutional right to freedom of expression or freedom of the media, apart from an oblique reference in Article 1 and a general prohibition on censorship in Article 25. The draft Act's first ten provisions are largely concerned with registration, price control, restrictions on who may be an editor-in-chief and content restrictions; journalists' rights are discussed only in Chapter 2. Together with the elaborate right of reply scheme and sanctions provisions, the draft Act appears to be more focused on regulating and controlling the media than on promoting media freedom.

Second, we are concerned that the scope of the draft Act is unclear. Some provisions apply only to 'press organs', while others apply to all 'journalists' or to 'public information media', apparently including those who work in the broadcast media. We would welcome consistency in this regard and recall that Article 19 of the ICCPR guarantees the right to freedom of expression "through any media". There is no reason, therefore, why the 'rights' elaborated in the draft Act (for example, to receive and disseminate information, in Article 13) should apply only to the print media. Obviously it is a different matter with respect to obligations, such as the obligation to register. This should apply only to mass media outlets strictly defined.

Similarly, we would advise that for the purposes of the rights provisions, the definition of 'journalist' be expanded to include all those who carry out journalistic activities, rather than just those who exercise 'the profession'. This latter definition might be interpreted restrictively as including only those who possess professional qualifications or a university degree, or only those persons who see journalism as a full-time profession. There should be no differential treatment between all persons who engage in journalistic activities, particularly as regards the enjoyment of rights such as not to disclose confidential sources.

[26] See Article 1.

Third, and also in relation to the scope of the draft Act, we note that ‘press organs’ are defined as “any publication originating from the activity of journalists, for purposes of public information and which is published periodically”.[27] Article 3, which contains this definition, goes on to state: “Publications which are not press organs under this definition shall be regulated by a specific law.” We are not aware of any such specific legislation currently in force or before parliament, unless this is meant as a reference to broadcast regulation. We would be concerned about the freedom of expression implications of any legislation governing non-periodical publications, such as books or pamphlets.

Finally, Article 4 lists a number of laws that are of ‘special’ importance to journalists. The list includes the Civil Procedure Code, the Criminal Code, State secrets legislation, copyright legislation and the Labour Code. The production of a list such as this is probably of little legal relevance and it is by no means inclusive, failing to mention tax laws or environmental laws, which are also important to the media. These laws are already in force and, to the extent that they are relevant to journalists, this is given effect through their own provisions. We do note, however, that this may be understood by some as purporting to give special force to these laws in relation to journalists, something which would be most unlikely to be legitimate.

Recommendations:
- The scope of the draft Act should be broadened to include all persons who engage in journalistic activities.
- Where the draft Act guarantees rights, it should make it clear that these are enjoyed by all media, be it print, broadcast or other media (including the Internet).
- The draft Act should make specific reference to the constitutional right to freedom of expression. To emphasise the protective nature of the Act, the provisions guaranteeing journalists’ rights should be strengthened and provided at the beginning of the law.
- Article 4 should be deleted.

III.2 The Registration Scheme

Articles 5-8 provide a basic registration scheme for all print media in Albania, together with some basic requirements which must be adhered to. Under Article 5, every publisher of a “press organ”[28] has to apply to an unspecified court in order to be registered. Applications must be made within 60 days of first publication. Details to be registered are specified in Article 5(3):

a) the title of periodical;
b) its periodicity; and
c) the nature of periodical.

Under Article 5(5), school and youth publications are exempt from registration, as are “publications for propagandistic purposes, periodicals included, (…) issued within the

[27] Article 3.
[28] Defined in Article 3 as “any publication originating from the activity of journalists, for purposes of public information and which is published periodically”.

duration of a declared election campaign." A press organ that fails to register may be fined; in case of continued non-registration, "the press organ may undergo confiscation from tax bodies at any moment" (Article 28).

Article 6 states that every periodical has to include the name of the publisher, details of the year in which it was issued, the volume number, and the addresses of its editorial offices and printers. Article 8 requires that complementary copies of every periodical must be sent to the National Library (5 copies) and the local district or zone library (3 copies). Failure to comply with these requirements may be punished with an unspecified fine or de-registration (Article 29).

Finally, Article 7 requires that all editors-in-chief should have Albanian nationality, be at least 18 years of age and have full capacity to act. The last requirement does not apply to youth publications.

Analysis

ARTICLE 19 questions whether it is necessary or appropriate to establish a registration scheme for the print media. We note that, in many countries, this is not required, without that having in any way undermined the rights of others or any other legitimate interest. We recommend, therefore, that consideration be given to removing the registration scheme altogether from the draft Act.

At the same time, we are pleased to note that the registration scheme now envisaged represents a considerable improvement over the highly restrictive licensing scheme we criticised in our 2001 Memorandum. However, some concerns remain. First, we are concerned that the obligation to register applies to every periodical publication produced, no matter how small. The only publications that are exempt from registering are school youth publications and political publications in election times. As such, it could be understood as extended to many publications that are published for a small interest group only – for example, the newsletter of a sports club, or a circular sent to students to inform them of university activities from time to time – or targeted small-scale publications – such as an NGO annual report. It is true that only periodicals produced by journalists are covered but we have already criticised the definition of a journalist and, were this term to be understood broadly, as it should be, this would hardly mitigate the problem noted above.

We recommend that instead, the requirement to register should extend only to publications that can truly be said to be 'mass media'.[29] Similarly, the requirements in Articles 6 and 8, to provide specific information such as the address of the editorial office, and to deposit copies with the National Library, could legitimately be extended only to the mass media.

Second, we are concerned that Article 5 fails to specify whether a court will have the discretion to deny registration and, if so, on what grounds. It is clear that, under

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[29] *See Laptsevich v. Belarus*, note 23, in which the Human Rights Committee criticised a registration requirement for pamphlets that had only a small print run.

international law, any registration scheme should be purely administrative in nature and there should be no discretion to refuse registration. Its sole legitimate aim would be to produce a register of publications so that individuals who feel aggrieved by published material are able to obtain redress. Registration should therefore be an automatic process; it should not pose any substantive restrictions on those subject to registration[30] and should never be refused once the requisite information has been provided.

Third, failure to register, instead of being punished with a fine, as presently envisaged, should be treated purely as an administrative matter. Fines are unnecessary as a court could simply order that a publication be registered, with the consequences that follow any failure to implement a court order. Similarly, any failure to publish the required details as set out in the draft Act should be treated as an administrative matter, subject only to minor fines for failure to comply. In no event should fines be so large that they exert a chilling effect on freedom of expression.

Third, the requirements in Article 7 are unnecessarily restrictive and should be removed. It is up to the media themselves to decide whom to appoint as editor-in-chief. In particular, it is illegitimate for the State to set strict age restrictions or residency requirements in this regard.

Recommendations:

- Consideration should be given to abolishing the requirement to register altogether.
- If registration is required, it, along with the requirement to deposit copies of each publication with national and regional libraries, should apply only to mass media publications.
- The court should have no discretion to deny registration.
- Failure to register should not be punished with a fine.
- Article 7 should be deleted.

III.3 Measures to Promote Diversity

Article 10 of the draft Act sets out four alternative proposals to improve transparency in the print media sector and to enhance plurality and diversity. Option 1, referred to as the Braçe & Lesi draft, states:

> 1. The state shall be the guarantor of free and pluralistic press.
> 2. In accordance with its capacities, the state shall intervene by taking alleviating measures to the benefit of the press.
> 3. The publishers, their relatives and co-owners, as well as the persons related to them shall not have the right to benefit from the public funds of the State, local government bodies, companies with state capital, as well as to benefit from the process of privatization, leasing, emphyteusis or giving on concession of the public and state property.
> 4. The minimal allowable selling price of a press organ on the free market is ALL 30 (approximately US$0.3). The newspapers that are sold with a price lower to

[30] See the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003.

the minimal allowable price shall not publish announcements or advertisements of state institutions and bodies, shall not be excluded from the obligation to pay the value added tax, shall not benefit reduced tariffs of electrical energy and fixed telephony.

5. The stands that sell print media outlets shall not profit more than ten percent of the price.
6. Natural and legal persons or joint-stock companies that publish dailies or periodicals shall be obliged to publish the balance-sheet that they have delivered to the tax bodies, no later than 30 days from the delivery day.

Under Article 30, non-publication of balance sheets will be fined with 1-2 million Albanian Lek; the General Tax Directory, the Public Procurement Agency, the Competition Authority and any other public institution are authorised to take "the necessary measures" to ensure observance of the requirements of paragraphs 4, 5 and 6.

Option 2, the Lesi option, proposes:

The selling of newspapers under the real publishing cost shall not be allowed.

a) newspapers having up to eight pages shall not be allowed to be sold under ALL 10;
b) newspapers with 8-16 pages shall not be allowed to be sold under ALL 20;
c) newspapers with 16-24 pages shall not be allowed to be sold under ALL 30;
d) newspapers with 24-32 pages shall not be allowed to be sold under ALL 40;
e) newspapers with 32-40 pages shall not be allowed to be sold under ALL 50;
f) newspapers with 40-60 pages shall not be allowed to be sold under ALL 60;
g) newspapers with 60-100 pages shall not be allowed to be sold under ALL 100;

The newspapers that do not respect the above-mentioned criteria:

1. shall not benefit announcements and advertisements of state institutions and bodies;
2. shall not be excluded from the obligation to pay the value added tax;
3. shall not benefit reduced tariffs of electrical energy and fixed telephony.

As with option 1, the General Tax Directory, the Public Procurement Agency, the Competition Authority and any other public institution are authorised to take "the necessary measures" to ensure observance of these requirements.

Option 3, the Minarolli option, focuses on compliance with general laws on competition and the provision of financial information.

Option 4, referred to as the 'working group' proposal, states:

1. The state shall be the guarantor of free and pluralistic press.
2. In accordance to its capacities, the state shall intervene by taking alleviating measure to the benefit of the press.
3. Subsidies, state advertisements, and other alleviating measures may not be used as a means of offering privileges to or discriminating certain press organs.
4. The activity of the press organs shall comply with the Albanian legislation on competition.

5. Press organs that are sold under the real cost shall not publish announcements and advertisements of state institutions and bodies, shall not be excluded from the obligation to pay the value added tax; shall not benefit reduced tariffs of electrical energy and fixed telephony.

The working group proposes that only the Competition Authority shall be competent to "control the observance of" these requirements.

Analysis

We note that the main purpose of the different proposals for Article 10 is to guarantee pluralism and diversity in the media. Council of Europe Recommendation (99)1 recommends that States should take a number of measures to promote pluralism in the media sector.[31] Amongst other things, it specifically mentions setting thresholds for media concentration, to prevent big actors monopolising the sector, and it recommends the use of support schemes to aid regional and local media, as well as minority media. It also recommends the introduction of public service broadcasting to ensure that the information needs of different parts of society are adequately met.

We are concerned that, instead of implementing measures such as those recommended by the Council of Europe, three of the four alternatives propose some form of price regulation and other unsuitable measures as a means to promote diversity. Two options, Options 1 and 2, are particularly rigid, proposing fixed minimum prices for newspapers, but Option 3 also links the receipt of subsidies and other government benefits to the sale of newspapers below the cost price.

We are aware of the problem in Albania whereby many media outlets operate at a loss and are subsidised by various benefactors, undermining their independence and potentially diversity in the sector as a whole. At the same time, we consider price-fixing options to be unnecessarily restrictive and to fail to take into account market complexities. They are likely to hinder entrepreneurial innovation in the media and to inhibit the growth, and ultimately the pluralism, of the sector. They also raise the possibility of government interference in the media, through the means by which these measures are applied. In any case, there are many ways in which would-be benefactors could get around these rules. Furthermore, there is simply no guarantee that, even in the short term, these highly intrusive measures will do anything to promote pluralism in the media. Indeed, fixing minimum prices may simply deny access to newspapers to the majority of the population, who will be unable or unwilling to pay these prices. The same criticism applies to fixing the maximum profits newsstands may make from selling print media.

The best way to promote pluralism and diversity in the media is by ensuring a level playing field for all entrants and, if necessary, by introducing support measures for new entrants or for media that could not survive in an open market place (the latter might be important in relation to minority media). Support measures can take the shape of indirect

[31] Recommendation No. R (99) 1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

fiscal measures, such as the abolition of tax on newsprint, or of direct media subsidies. Whichever method is chosen, the Council of Europe Recommendation specifies that the criteria for providing support should be clear, transparent and objective in nature.[32] While Options 1 and 3 each envisage support measures, they fail to provide any detail on how this would be implemented, by which criteria and by what State agency.[33] These are crucial issues that need to be settled in order for a scheme to become operational and enjoy the trust of the public.

Recommendations:

- Measures to promote pluralism and diversity should focus on supportive measures rather than price control.
- The draft Act should specify different forms of support that may be provided.
- The draft Act should set specific criteria on the basis of which support will be provided.

III.4 Journalists' Rights

Articles 13, 14, 15 and 16 provide for a number of rights that are incidental to the core right to freedom of expression. Article 13 states: "Press organs shall be free to receive and disseminate information … the government authorities shall take adequate measures to facilitate granting of information to the public information media." Article 14 prohibits discrimination by public authorities in relation to the print media, outlawing preferential treatment granted to some newspapers. Article 15 provides for the protection of confidential sources and Article 16 protects the right to publish anonymously.

Analysis

While we welcome the intention in the draft Act to flesh out some of the rights enjoyed by the media, we believe that there is some room for improvement.

First, Article 13 provides that "the government authorities shall take adequate measures to facilitate granting of information to the public information media" in the implementation of the Law on the Right to Information on Official Documents. In a Memorandum released in September of this year, we criticise that Law, which has hitherto not been sufficiently implemented in practice. It fails to provide a satisfactory framework for the implementation of the right of access to information and its existence is virtually unknown amongst public officials. In order for the right of access to information to become a reality in Albania, we therefore recommend a thorough overhaul of the Law on the Right to Information, together with a concerted campaign to both train public officials and raise awareness among citizens. In the absence of this, Article 13 of the draft Act is likely to remain a dead letter whereas, if this is done, Article 13 would be unnecessary.

Second, Article 15 provides an absolute right to keep sources of information confidential. While we welcome the protection, we question whether affording an absolute privilege is

[32] *Ibid.*, under VI.

[33] Additionally, paragraphs 2 and 3 of Option 1 appear to contradict each other.

either justified or workable. In line with European Court of Human Rights case law on the matter,[34] a Council of Europe Recommendation advises that while a strong privilege should be established, disclosure may still be ordered if necessary for the investigation of a serious crime and if the information cannot be obtained from other sources.[35] It is important that this is provided for; without it, the privilege would not enjoy public confidence and would ultimately be unworkable.

Third, and in contrast to the above concern, the right to remain anonymous is subject to a low-threshold override. Under Article 16(3), anonymity may be lifted "as a result of a court decision for the needs of a criminal process." This would allow for anonymity to be lifted in relatively minor proceedings. It would be preferable if the draft Act built in a stronger form of protection, for example by allowing anonymity to be lifted only if necessary for the investigation of a serious criminal offence and where alternative methods of gathering evidence with the same probative value had failed.

Finally, Article 15(3) prohibits public authorities from intercepting journalists' post or phone calls, confiscating their materials or conducting surveillance of journalists or their employers, if the purpose of these operations would be to undermine the privilege of confidentiality. While we again welcome these provisions, they should be freestanding privileges rather than linked to the protection of sources. In *Roemen and Schmit v. Luxembourg*, the European Court of Human Rights considered that, because of their broad scope, search and seizure operations have a greater potential impact on the right to freedom of expression than an order to disclose confidential sources:

> The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist.[36]

Therefore, the privilege protecting media premises from search and seizure and other intrusive operations should be freestanding, rather than linked to the privilege protecting confidential sources of information. This would follow established practice in a number of Council of Europe countries.[37]

Recommendations:

- The Government of Albania should review the existing Law on Access to Information in order to bring it into line with international standards in this area and also take effective measures to ensure proper implementation of, and full public awareness about, the law.

[34] *Goodwin v. United Kingdom*, note 24; *De Haes and Gijsels v. Belgium*, 24 February 1997, Application No. 19983/92.
[35] Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the Right of Journalists not to Disclose their Sources of Information, adopted 8 March 2000.
[36] *Roemens Schmit v. Luxembourg*, 25 February 2003, Application No. 51772/99, para. 57.
[37] For example France (Article 56-2, Criminal Procedure Code) and the United Kingdom (Article 13, Police and Criminal Evidence Act 1984.

- The right to remain anonymous and the right to keep sources confidential should both be subject to an override, but only where necessary for the investigation of a serious criminal offence and where other methods of gathering evidence have failed or would be likely to fail.
- The privilege protecting media offices from search and seizure and other intrusive operations should be freestanding and should include an override along the lines suggested above.

III.5 Content Restrictions

The draft Act provides for a number of content restrictions, although they have been drafted as 'duties' rather than restrictions. Article 9, for example, places a duty on the editor-in-chief "to protect a press publication from punishable content." 'Punishable content' is defined as:

- incitement of violence, national, religious and racial hatred, anti-constitutional actions, territorial division, or discrimination on grounds of political or religious belief;
- the publication of information that constitutes a state secret, as defined by law;
- the publication of information that 'harms' privacy.

Article 12 places a duty on print media, prior to the publication of any material, to verify its accuracy, "ethical content" and the reliability of the source of the information. Article 12 provides that journalists shall not be liable for the veracity of information received through "official channels".

Article 26 limits the liability of press organs "in all cases where the source of information is clearly identified"; Article 26(2) limits liability of the media where they transmit the views of others provided that "they have identified clearly the author of the ideas, views, comments or opinions and have visibly ruled out any connection with the content of above-specified ideas, views, comments and opinions."

Analysis

A primary concern with all of the content restrictions in the draft Act is that there is simply no reason why a press-specific law should contain *any content restrictions at all*.[38] Some restrictions on what may be expressed are permissible under the international law of freedom of expression, provided they comply with the three-part test described in Section II above. However, nothing in the legitimate aims recognised in the three-part test, or in the necessity analysis required under that test, has any exclusive application to the press. In particular, the restrictions contained in Article 9 have no *particular* application to the press; as a result, they should, to the extent that they are legitimate (see below), be contained in laws of general application to all citizens. Imposing specific content restrictions on the press may give the false impression that the free expression rights of the press are somehow different, and perhaps somewhat less fundamental, than

[38] Rules relating to retraction and reply are rather different in nature; if consistent with international standards, these provide for a special remedy against the media, as opposed to establishing different standards of liability.

those of others. To the extent that these restrictions duplicate laws of general application, they create a regime of double standards, which may well give rise to confusion, with the authorities seeking to apply the more stringent standard to the press.

In any case, the restrictions provided for in Article 9 are too vague, too broadly defined or stated in unjustifiably absolute terms to be legitimate. The prohibition on violating privacy would bar any journalist from investigating corruption in public office, as this often will involve a degree of intrusion into the subject's private life. Similarly, the absolute prohibition on the publication of State secrets, combined with the broad definition of what constitutes a 'state secret' under Albanian law, would bar a journalist from publishing investigative reports on the state of the country's defences or corruption in the armed forces. Finally, the prohibition in Article 9(2)(a) on inciting 'territorial division' would apply to the promotion of territorial division by peaceful means, something that cannot legitimately be prohibited.

Article 12 suffers from a similar defect, by requiring that journalists check all their content before publication. While journalists commonly do this as a matter of good professional practice, it is not always possible to establish the veracity of some information beyond all reasonable doubt – either because there is no time, or because verification is exceedingly difficult. In such cases, journalists have to make a professional decision whether, taking into account the importance of the information, it should nevertheless be published. It has been widely recognised that laws prohibiting the publication of false statements *per se* are illegitimate.[39] Even in the context of a defamation case, the European Court of Human Rights has held that, so long as journalists act in good faith in order to provide accurate and reliable information, they should not be liable for publishing inaccurate information.[40]

Additionally, while we welcome the limitation of liability for information received 'through official sources', in Article 12, we are concerned at the loose and open-ended definition of "official sources" in Article 3. This may lead to confusion in relation to which reports may be relied upon and which may not. As in all matters relating to freedom of expression, clarity of terms is important.

Finally, Article 26, limits liability for the statements of others only where journalists both clearly identify the statement as that of another person <u>and</u> distance themselves from it. This is too restrictive. In *Thoma v. Luxembourg*, the European Court of Human Rights held: "A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas."[41]

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[39] See, for example, *R v. Zundel*, [1992] 2 SCR 731 (Supreme Court of Canada), *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (Privy Council) and *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000 (Supreme Court of Zimbabwe)

[40] E.g. *Bladet Tromso and Stensaas v. Norway*, note 17.

[41] Judgment of 29 March 2001, Application No. 38432/97, para. 64.

Recommendations:

- Article 9 should be removed.
- The question of verifying the accuracy and reliability of published statements should be left to professional ethics and not regulated by law.
- A clear and unambiguous definition of "official sources" should be provided.
- There should be no requirement for journalists formally to distance themselves from quotations and statements by others.

III.6 Rights of Reply and Correction

Articles 18-24 provide for an elaborate right of reply/correction scheme. Under Article 18, any person whose honour and privacy has been impaired by the publication of erroneous information may request the publication of a reply (the draft Act uses the term 'response'). The reply must not exceed in length the original publication and must be restricted to the information commented on, and the press organ concerned is prohibited from commenting on the reply. If "new pieces of information" are published, the affected person shall have a "right to consecutive response". Under Article 19, if the same information has led to judicial proceedings, the "affected person" has a right to demand publication of the judicial decision or a summary thereof. Article 20 grants a right to demand a correction for any information found to have been inaccurate. Again, the press organ concerned is prohibited from commenting on the correction.

Under Article 21, an individual requesting the publication of a reply/judgment/correction has to write within thirty days of the original publication, enclosing a copy of the original publication, and has to provide reasons why a reply/correction/publication of judgment is requested. A request for a correction has to provide "well-grounded facts which prove that the publicized data or information are inaccurate." Article 22 provides that press organs must publish a reply/judgment on the same page and in the same font as the impugned article, stating the name of the person that requested it. A correction must be published "in a conspicuous manner and on the same page where the writing subject of correction was previously published". The reply/correction/publication of judgment must be published within 8 days or in the publication's next issue.

Article 24 provides that a press organ may refuse the request if the text of the reply or correction would incite hatred, harm privacy, disclose a State secret or if it vilifies third persons, thereby "diverting from a correct clarification of facts and events"; if it can prove that the person requesting the reply/correction/publication of judgment consented to the impugned publication; or if it can present "evidence or reliable documents in support of the published information."

Under Article 32, any disputes may be taken to court, which has the power to order publication of a reply/correction/judgment and to impose a fine for refusal to comply.

<u>Analysis</u>

The right of reply is a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose rights

have been harmed by the publication of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence.

The right of reply should be clearly distinguished from a right of correction or refutation. A right of correction is limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material. A right of reply, on the other hand, requires the publication to grant space to an individual whose rights have been harmed by a publication based on erroneous facts, to 'set the record straight'. As such, it is a more intrusive interference with editorial freedom than the right to correction.

Because of its intrusive nature, in the United States a mandatory right to reply with regard to the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment right to free speech. In *Miami Herald Publishing Co. v Tornillo*, the Supreme Court held:

> [A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[42]

On the other hand, the *American Convention on Human Rights*, covering the entire continent, requires States to introduce a right of reply[43] and in Europe, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe,[44] while many countries guarantee some form of a right of reply in law.[45] However, a legally enforceable right of reply constitutes a restriction on freedom of expression as it interferes with editorial decision-making.[46] As such, it must meet the strict three-part test set out above and a number of minimum requirements should apply.

ARTICLE 19, together with other advocates of media freedom, suggests that a right of reply should be voluntary rather than prescribed by law. In either case, certain conditions should apply, namely:[47]

(a) A reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be

[42] 418 U.S. 241 (1974), p. 258.
[43] Note 6, Article 14. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).
[44] Resolution (74) 26 on the right of reply– position of the individual in relation to the press, adopted on 2 July 1974.
[45] This is the case, for example, in France, Germany, Norway, Spain and Austria.
[46] See *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).
[47] See also the conditions elaborated in Resolution (74)26, note 44.

used to comment on opinions that the reader/viewer doesn't like or that simply present the reader/viewer in a negative light.

(b) A reply should not be available where a correction or refutation suffices.
(c) The reply should receive similar, but not necessarily identical prominence to the original article.
(d) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
(e) The media should not be required to carry a reply which is abusive or illegal.
(f) A reply should not be used to introduce new issues or to comment on correct facts.

Set against these standards, we have some concerns about the proposed right to reply/correction scheme in the draft Act.

First, while the draft Act provides for both a right to reply and a right of correction, it does not prioritise the right to correction over the right to reply. For example, where a person's reputation has been harmed by the publication of incorrect information, a simple correction may suffice to repair the harm done. In such cases, a full-length reply, which is a highly intrusive interference with editorial independence, should not be available.

Second, the prohibition on the media commenting on a reply or correction is unnecessary and may actually lead to situations where the readers are confused. If interpreted strictly, it might even bar the media from apologising for having published the erroneous information in the first place or from explaining that they received it from an otherwise reliable source. This certainly goes beyond what may be considered "necessary in a democratic society". It is also unclear what the 'consecutive response' is referred to in Article 18(3), but we note this may risk turning a reply into a series of debates, which is beyond the scope of the right of reply. If the claimant has a continuing disagreement with a publication, that is probably most appropriately addressed within a self-regulatory context or, where self-regulation is unproductive, in a court of law.

Third, an aggrieved party in a defamation or related dispute has an absolute right, under Article 19, to have the final judgment or a decision thereof published in the offending publication. While we note that such a procedure is available in countries such as France, it is implemented there not as an absolute right afforded the claimant, but as a discretionary measure that can be ordered by the court if it is deemed to be in the interests of justice. This is significantly different from the procedure envisaged in Article 19 of the draft Act.

Finally, Article 22 is highly prescriptive in relation to the manner in which the reply/correction is to be published: a correction must be published on the same page where the offending article was published and have a 'clearly correction content', while a reply must even be published in the same character size. While we recognise that replies/corrections should not be hidden away in a corner of a newspaper, publication on the same page will not always be appropriate. For example, a lengthy newspaper report on environmental damage caused by a pharmaceutical plant may be inaccurate in one or

two small aspects. As currently drafted, Article 22 may be interpreted to grant the pharmaceutical plant a right to have a feature-length reply, which would be clearly disproportionate. Furthermore, newspapers have to undertake complex formatting procedures and it may not realistically be possible to carry the reply/correction on the very same page as the original article.

Recommendations:

- Where a correction suffices to redress the harm done, no right of reply should be available.
- The media should not be prohibited from commenting on a response/refutation. A 'consecutive' right to response should be available only if the media's comments constitute a new interference with the rights of the claimant.
- The requirement to publish a judgment or summary thereof should be within the court's discretion, not granted as an absolute right to a claimant.
- The draft Act should require a reply or correction to receive similar, but not necessarily identical prominence to the original article.

III.7 Role of the Press During Emergencies

Article 17(1) states that even during an emergency, "no law or any other act … may restrict the granting of information and right to information, nor legitimise establishment of other control or censorship structures out of the editorial offices." However, under the second paragraph, public bodies will have a right to have decrees and other orders "which they judge reasonable" published without any payment in the daily press and "other public information media".

We do not consider that such a provision is necessary. In a declared public emergency, the media themselves will report on anything that is of public interest, including official decrees. The Council of Europe has recognised that even in relation to public service broadcasters, the only media on which such an obligation might conceivably be imposed legitimately, a requirement to publish should be imposed only when absolute necessary – and even then, the power to do so should be clearly and precisely laid down in laws or regulations.[48] Article 17(2), by contrasts, leaves public bodies a discretion to require publication in any press organ if they deem that to be "reasonable".

Furthermore, positive obligations of this sort are open to abuse. Private media may be harassed for allegedly failing to fulfil these vague requirements. In addition, public bodies may abuse their right to have messages carried in the broadcast media.

Recommendations:

- Article 17(2) should be deleted.

[48] Recommendation R(96)10 of the Committee of Ministers on the Guarantee of the Independence of Public Service Broadcasting, adopted 11 September 1996.