



**MEMORANDUM**  
on

**Russian Federal Draft Law  
“On Mass Media”**

by

**ARTICLE 19  
Global Campaign for Free Expression**

**London  
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## **1. Introduction**

The Memorandum analyses a draft copy of the Russian federal government’s Law “On Mass Media” (draft Media Law) for compliance with international standards. ARTICLE 19 is concerned that if this draft law is adopted in its current form, it will undermine Russia’s commitments under international law to protect and promote freedom of expression and will be a retrograde step in the development of democracy and media freedom in Russia.

The draft Media Law has some positive features, including a clear prohibition against State censorship, the protection of confidential sources and a system for allocating licenses to private broadcasters. Unfortunately, many of the law’s provisions are in breach of international standards regarding freedom of expression and media freedom, while others, if not necessarily formally in breach of international law, are unnecessary or could be improved. ARTICLE 19 has specific concerns in the following areas:

- the lack of independence of the regulatory bodies;
- the registration system created for the mass media;
- the regulation of journalists’ rights and duties;
- the regulatory regime for broadcasting;

- statutorily imposed content requirements; and
- the insufficiency of the freedom of information regime.

This first part of this Memorandum outlines Russia's obligations to promote and protect freedom of expression under international law. It describes the guarantee of freedom of expression, particularly in relation to the media, and the limited scope of restrictions on freedom of expression which international law permits, along with the test against which any restriction must be judged. It then goes on to assess the Constitution of the Russian Federation, highlighting some key concerns and making recommendations on how to address them. The second part of this Memorandum contains a provision-by-provision analysis of the draft Media Law.

## 2. International Standards

### 2.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>1</sup> guarantees the right to freedom of expression in the following terms:

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),<sup>2</sup> a treaty with 148 States Parties, which Russia acceded to in 1973, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

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

Freedom of expression is also protected in Article 10 of the *European Convention on Human Rights* (ECHR),<sup>3</sup> ratified by Russia on 5 May 1998, which states:

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<sup>1</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

<sup>2</sup> UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

<sup>3</sup> Adopted 4 November 1950, in force 3 September 1953.

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.

Guarantees of freedom of expression are also found in the two other regional human rights systems, at Article 13 of the *American Convention on Human Rights*<sup>4</sup> and Article 9 of the *African Charter on Human and Peoples' Rights*.<sup>5</sup>

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

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>6</sup>

## 2.2 Freedom of Expression and the Media

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

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

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."<sup>9</sup> The media as a whole merit special protection under freedom of expression in part because of their role in making public,

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<sup>4</sup> Adopted 22 November 1969, in force 18 July 1978.

<sup>5</sup> Adopted 26 June 1981, in force 21 October 1986.

<sup>6</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No.5493/72, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

<sup>7</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, 14 EHRR 843, para. 63.

<sup>8</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43 ("Castells").

<sup>9</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

...information and ideas on matters of public interest. Not only does [the press] 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'.<sup>10</sup>

The European Court has furthermore stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas 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".<sup>11</sup>

The Court has also held that Article 10 applies not only to the content of expression, but also the means of transmission or reception.<sup>12</sup>

### 2.3 Pluralism

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

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights has stated: "[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism."<sup>13</sup> The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."<sup>14</sup>

One of the rationales behind public service broadcasting is that it makes an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

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<sup>10</sup> *Castells*, note 8, para. 63.

<sup>11</sup> *Ibid.*, para. 43. See also *The Observer and Guardian v. UK*, 26 November 1991, Application No. \*\*, 14 EHRR 153, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. \*\*, 14 EHRR 229, para. 65.

<sup>12</sup> *Autronic AG v. Switzerland*, 22 May 1990, Application No. \*\*, 12 EHRR 485, para. 47.

<sup>13</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application No. \*\*, 17 EHRR 93, para. 38.

<sup>14</sup> Note 9, para. 34.

## 2.4 Independence of Media Bodies

In order to protect the right to freedom of expression, it is imperative that the media is permitted to operate independently from government control, so as to protect the free flow of ideas. This ensures the media's role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

Under international law, it is well established that bodies with regulatory or administrative powers over both public service and private broadcasters should be independent and free from political interference. For example, in a preambular paragraph, the European Convention on Transfrontier Television states that Member States "[reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters".<sup>15</sup> The Council of Europe's Committee of Ministers also considers the independence of regulatory authorities as fundamentally important. Its Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector,<sup>16</sup> states in a preambular paragraph:

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector...specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities, which clearly affirms and protects their independence.<sup>17</sup> The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.<sup>18</sup>

The Council of Europe Recommendation on the Guarantee of the Independence of Public Service Broadcasting<sup>19</sup> provides additional guidance on this issue. This Recommendation provides that members of the supervisory bodies of publicly-funded broadcasters should be appointed in an open and pluralistic manner<sup>20</sup> and that the rules governing the supervisory bodies should be defined so as to ensure they are not at risk of political or other interference.<sup>21</sup>

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<sup>15</sup> E.T.S. 132, in force 1 May 1993, as amended by the Protocol Amending the European Convention on Transfrontier Television, E.T.S. 171, in force 1 October 2000, Preamble.

<sup>16</sup> Recommendation R (2000) 23, adopted on 20 December 2000.

<sup>17</sup> *Ibid.*, Guideline I.

<sup>18</sup> *Ibid.*, Guideline II.

<sup>19</sup> Recommendation No. R (96) 10, adopted by the Committee of Ministers on 11 September 1996.

<sup>20</sup> *Ibid.*, Guideline III.

<sup>21</sup> *Ibid.*, Guideline II.

## 2.5 Freedom of Information

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

Freedom of information is a fundamental human right and... the touchstone of all the freedoms to which the UN is consecrated.<sup>22</sup>

Its importance has also been stressed in a number of reports by the UN Special Rapporteur on Freedom of Opinion and Expression, as the following excerpt from his 1999 Report illustrates:

[T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.<sup>23</sup>

The Committee of Ministers of the Council of Europe has also recently adopted a Recommendation on Access to Official Documents which states:

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*General principle on access to official documents*

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.<sup>24</sup>

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years a record number of countries from around the world – including Fiji, Japan, Mexico, Nigeria, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom and many East and Central European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

In his 2000 Annual Report, the UN Special Rapporteur elaborated in detail on the specific content of the right to information:

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<sup>22</sup> 14 December 1946.

<sup>23</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 12.

<sup>24</sup> Recommendation R (2002) 2, adopted on 21 February 2002.

44. [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.<sup>25</sup>

## 2.6 Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet. It states:

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<sup>25</sup> Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 10(2) of the ECHR also recognises that freedom of expression may, in certain prescribed circumstances, be limited:

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

Restrictions must meet a strict three-part test.<sup>26</sup> International jurisprudence makes it clear that this test presents a high standard which any interference must overcome in the strictest sense. The European Court of Human Rights has stated:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>27</sup>

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>28</sup> Second, the interference must pursue a legitimate aim. These are the aims listed in Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be “proportionate to the aim pursued.”<sup>29</sup>

### 3. The Constitution

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

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<sup>26</sup> See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.

<sup>27</sup> See, for example, *Thorgeirson*, note 7, para. 63.

<sup>28</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49.

<sup>29</sup> *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Freedom of expression and freedom of information are protected by Article 29 of the Constitution of the Russian Federation. It states:

1. Everyone shall have the right to freedom of thought and speech.
2. Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national, religious or language superiority is forbidden.
3. No one may be coerced into expressing one's views and convictions or into renouncing them.
4. Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means. The list of information constituting the state secret shall be established by the federal law.
5. The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.

Article 29(2) prohibits the incitement of “social, racial or religious hatred and strife”, consistent with Article 20(2) of the ICCPR, which states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” The Russian Constitutional provision goes further, however, and also prohibits propaganda that claims “social, racial, national, religious or language superiority.” While other international instruments and national laws restrict the dissemination of ideas based on racial superiority or hatred, there is no international consensus on whether this is legitimate. One reason for the lack of consensus is that while few would support the promotion of racial superiority, hate speech laws can be abused, including by States to repress minorities. Abuse is likely to increase with the scope of hate speech laws, particularly if they include vague notions such as the promotion of racial superiority.

Article 29(4) of the Constitution grants the right to “seek, get, transfer, produce and disseminate” information by any lawful means. The provision thus implies that there are unlawful means of communicating, a possibility not recognized under international law. The ICCPR states that law, the right to freedom of expression may be exercised “either orally, in writing or in print, in the form of art or through any other media of his choice”, without qualification. Additionally, international law protects the right “regardless of frontiers”, something the Russian Constitution fails to make explicit.

Finally, freedom of expression is subject to an additional limitation, provided by Article 56 of the Russian Constitution, which states, in part:

1. Individual restrictions of rights and liberties with identification of the extent and term of their duration may be instituted in conformity with the federal constitutional law under conditions of the state of emergency in order to ensure the safety of citizens and protection of the constitutional system.

2. A state of emergency throughout the territory of the Russian Federation and in individual areas thereof may be introduced in the circumstances and in conformity with the procedures defined by the federal constitutional law.

Article 4 of the ICCPR permits States to derogate from their obligations under the ICCPR in “time of public emergency which threatens the life of the nation”, the existence of which has been “officially proclaimed”. However, any derogation must be strictly limited to meet the demands of the situation. Article 56 of the Russian Constitution does not contain such qualified language; the life of the nation need not be at risk prior to suspending a guaranteed right and there is no requirement to limit the derogation as much as possible. Restrictions need only conform to federal constitutional law.

**Recommendations:**

- Article 29 of the Constitution should be amended to remove the prohibition against speech that promotes racial superiority. Alternatively, this concept should be clearly defined so that it is sufficiently limited and specific.
- Article 29(4) should be amended to remove the word “lawful”.
- Article 56 should be amended to require that the life of the nation be threatened before any derogation to the exercise of Constitutional rights may be adopted. In addition, if derogations are imposed, the Constitution should require that they be as limited and specific as possible.

## **4. Analysis of Media Laws**

The following section analyses the draft Media Law in relation to international standards on freedom of expression and media freedom, noting ARTICLE 19’s main concerns together with recommendations for addressing these concerns.

### **4.1 General Provisions**

Part I of the draft Law contains the many of the general principles upon which the legislation is based. Article 1 states that the subject matter of the law is the regulation of relations “connected with search, retrieval, receipt and processing of information, foundation of mass media and their dissemination via TV and radio broadcasting, publications and other ways of mass information dissemination.”

Article 2 provides that the draft Law will apply to mass media established in the Russian Federation. Article 3 states that the draft Law will be paramount to other federal media legislation. The same provision also states that where there is conflict between the draft Law and Russia’s international undertakings, then the international rules will apply. Article 4 contains definitions of the draft Law’s relevant terms.

Article 5 declares that the “retrieval, receipt, production and dissemination of mass information, foundation, production, composing and dissemination of mass media, production, purchase, storing and use of technical devices, equipment and materials, required for production and dissemination of the mass media,” will not be subject to any restrictions, except those provided by federal legislation. Article 6 prohibits any form of media censorship, and Article 7 lists the restrictions imposed by the draft Law on the freedom of mass communication established by Article 5.

### The “Mass Media”

“Mass media” for the purposes of the Act is defined to include “a periodically renewed and distributed printed or electronic publication, radio, TV channel, other form of periodical distribution of mass information, having its own name and aimed at [an] unlimited number of people.” “Electronic publications” presumably comprises the Internet, although this is not explicitly stated.

It is well established that different regulatory approaches are required for different media in accordance with the guarantee of freedom of expression. As the European Commission of Human Rights has stated:

Article 10 of the [European Convention on Human Rights] clearly distinguishes between the degree of control that the State may legitimately exert over broadcasting, television or cinema enterprises, precisely by regulating access to these commercial activities by licensing procedures in which a wider margin of discretion is left to the States, and control over forms of exercise of freedom of expression, including the press and other printed media, which are subject only to the limitations laid down in para.2 of Article 10.<sup>30</sup>

Mass media on the Internet, for example, cannot be regulated in the same way as print or broadcast media. The Internet did not exist when the major international human rights treaties were adopted, and it is clearly very different than either the print or broadcast media; any regulatory mechanism needs to take this into account. Nor can the print and broadcast media be regulated in an identical manner as important considerations that apply to one do not apply to the other. For instance, in most, if not all, established democracies, the impetus to regulate broadcasting stems from the finite nature of the spectrum, thus necessitating a competitive licensing process, whereas resource limitations of this do not apply to the print media.

#### **Recommendation:**

- The government should not attempt to regulate all media in the same manner.

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<sup>30</sup> *Gaweda v. Poland*, Commission Report of 4 December 1998, Application No.26229/95, para.49.

## Abuses of Freedom of Speech

Article 7 of the draft Media Law identifies certain types of information, the dissemination of which constitutes abuse of the freedom of mass communication. Article 7(1) states that the media cannot be used for the purpose of committing indictable acts, disclosing state secrets, or disseminating materials that “propagandise” pornography and/or the “cult of violence and cruelty.”

Article 7(2) of the same provision states that the dissemination of “extremist materials” and other information identified and prohibited by the law on terrorism also constitute an abuse of freedom of mass communication. “Extremist materials” is not defined anywhere in the Law. Article 7(3) prohibits the dissemination information on the “means, methods of development, production and use, [and] places of trade” of narcotics and psychotropic substances.

In order to be valid under international law, restrictions on freedom of expression must satisfy the three-part test, discussed above (Section 2.6). Restrictions must be prescribed by law; pursue a legitimate aim, and be necessary to a democratic society. The restrictions contained in Article 7 fall below the required standard.

The terms “propagandising”, “pornography”, “extremist materials” employed in Articles 7(1) and (2) respectively, are excessively vague and do not satisfy the “prescribed by law” part of the three-part test for restrictions. In order to satisfy the test, a person must be able to reasonably predict what behaviour will constitute a transgression of the law.

### **Pornography**

Instead of relying on vague terms, some legislators and courts in democratic countries have tried to provide more detailed definitions of precisely what is prohibited. For example, in *Miller v. California*, the United States Supreme Court set down what it deemed to be the appropriate standard in relation to “obscenity”:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>31</sup>

Courts in many jurisdictions have distinguished *offensive* material from material that is actually *harmful*, only allowing restrictions which have as their objective the prevention of harm. The European Court of Human Rights, for example, has stated that freedom of expression is applicable “to ‘information’

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<sup>31</sup> *Miller v. California*, 413 US 15, p. 24.

or 'ideas' that... offend, shock or disturb the State or any other sector of the population."<sup>32</sup>

To give effect to this distinction, the Canadian Criminal Code, for example, defines obscene material as follows:

For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.<sup>33</sup>

The Supreme Court of Canada has held that the meaning of "undue exploitation" in this section is a community standards one, but "it is a standard of tolerance, not taste... not what Canadians think is right for themselves to see [but] what the community would [not] tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."<sup>34</sup> The Court distinguished between three types of sexually explicit material, classifying each in terms of the test for "undue exploitation":

[T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.<sup>35</sup>

The Canadian Supreme Court has specifically held that the State could not restrict expression simply because it was distasteful or did not accord with dominant conceptions of what was appropriate. It upheld the legislation, however, on the basis that it was designed to prevent harm to society, by rooting out material which undermined basic human rights, such as equality between men and women:

[Earlier legislation on obscenity's] dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered inherently undesirable, independently of any harm to society.... [T]his particular objective is not longer defensible in view of the Charter.... [T]he overriding objective of S.163 is not moral disapprobation but the avoidance of harm to society.<sup>36</sup>

ARTICLE 19 believes that the law should only restrict sexually explicit materials which can be shown to be harmful and which lack serious literary, artistic, political, or scientific value.

### **Extremist Materials**

The prohibition contained in Article 7(2) is not formulated with the precision required under international law, sufficient to enable the citizen to regulate his or her conduct. The risk posed by insufficiently defined, and hence vague,

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<sup>32</sup> *Handyside*, note 6, para. 49.

<sup>33</sup> S.163(8) of the Criminal Code, RSC 1985, c. C-46.

<sup>34</sup> *R. v. Butler* [1992] 1 SCR 452, pp. 477, 485.

<sup>35</sup> *Ibid.*, p. 485.

<sup>36</sup> Note 34, paras. 492-3.

restrictions to freedom of expression lie in the chilling effect that these have on communication and public discussion. Without knowing what kind of information constitutes “extremist materials”, the media may hesitate before engaging controversial topics. This will result in a stifling of political debate and the exclusion of minority viewpoints, two outcomes which are inimical to the development of a healthy democracy.

### **Disseminating Information Regarding Psychotropic Substances**

The entirety of Article 7(3) fails to satisfy the “necessity” branch of the three-part legitimate restrictions test. In order for a restriction on freedom of information to be “necessary”, not only must it address a “pressing social need”, but it must also be proportionate to the legitimate aim pursued. In the present case, the provision creates an overbroad prohibition that effectively precludes any public discussion regarding psychotropic substances and narcotics. This result is in contrast to the international legal perspective that wide latitude must be given to freedom of expression when the information at issue is related to a matter of public importance.<sup>37</sup> Drug use and the criminal activity associated with drug trafficking are both issues of significant public interest, the discussion of which should not be silenced. The harm caused by Article 7(3) to freedom of expression far exceeds the limited gains – if any can be demonstrated – that the government is seeking to achieve.

#### **Recommendation:**

- Articles 7 draft Media Law should be amended as follows:
  - The prohibition on “pornography” should be deleted and replaced with a prohibition on “sexually explicit material which is harmful and lacks serious literary, artistic, political or scientific value.”
  - “Extremist materials” should be defined, or failing a sufficiently narrow definition, the term should be removed from the draft Law altogether.
  - Paragraph (3) should be deleted.

## **4.2 Journalists**

### Rights and Duties

Articles 8 and 9 set out the rights and duties of a journalist, many of which are issues of professional ethics, such as the duty to verify the authenticity of information reported (Article 9(1)), to preserve the confidential nature of information unless otherwise provided for by law (Article 9(3)), and to receive consent prior to revealing personal information about a private citizen (Article 9(4)).

It is contrary to international standards and best practice to legislate the responsibilities of journalists. In most democratic countries, the professional ethics of journalists are matters for self-regulation. Experience has shown that legal regulation of the behaviour of journalists by the State often leads to harassment of journalists who are critical of the government.

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<sup>37</sup> *Castells*, note 8, para. 42.

### **Abuse of Journalist Rights**

Article 12 prohibits the “abuse” of the rights granted to journalists by the Article 8 of the draft Law. Specifically, journalists may not conceal or falsify important public information, spread false rumours, collect information “in favour of an outside person or organization”, or disseminate information with the goal of “discrediting” private individuals on account of “sex, age, race, nationality, language, religion, profession, place of residences and work, and also political convictions.”

Regarding the first two “abuses” of journalistic rights identified in Article 12 – fraud and espionage – these are criminal offences already regulated by Russian laws. Therefore, reiteration in a media-specific law is redundant, since the obligation already clearly exists. It is illegitimate to give journalists a “double warning” of this sort as it suggests that journalists will be watched more closely than others in society, which is bound to have a chilling effect on media freedom.

Regarding the false news provision, it must be noted that most democratic countries either do not have or do not apply false news provisions, including Australia, France, the Netherlands, the United Kingdom and the United States. In the *Zundel* case, the Canadian Supreme Court noted that it could point to no other free and democratic country which finds it necessary to criminalize false news.<sup>38</sup> As noted above, such provisions have been held to be unconstitutional by the Supreme Court of Canada, the Privy Council (in respect of Antigua and Barbuda), and the Supreme Court of Zimbabwe.

False news provisions have a chilling effect well beyond statements which are actually false. Citizens will be deterred from publishing anything they could not prove to be true in a court of law, taking into account the strict rules governing admissibility of evidence. Thus, this kind of prohibition also undermines the right granted by the draft Media Law to protect confidential sources (Article 16), since a situation may arise wherein a confidential source is the only person capable of verifying the truth of a statement.

Prohibiting false statements also fails to take into account the fact that language takes many different forms and that it is impossible to draw a clear dividing line between statements of fact and statements of opinion. Examples abound of statements which appear on their face to be false but are actually substantially correct, or really express opinions. Exaggeration, ridicule and sarcasm are some examples.

For these reasons, independent courts around the world have consistently held that false statements are protected by guarantees of freedom of expression.

Article 12 also prohibits journalists from concealing information deemed to be of public importance. This implies that the media may have an obligation to

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<sup>38</sup> *R. v. Zundel* [1992], 2 S.C.R. 731, p. 766 (“*Zundel*”).

publish certain stories which is contrary to the principle of editorial independence (see the discussion in Section 5.2 regarding Must Carry Requirements).

Finally, the prohibition against “discrediting” private individuals on the bases listed in the provision suffers from the problem of vagueness, discussed above in relation to Article 7, and thus does not constitute a legitimate restriction on freedom of expression. As already noted, restrictions to freedom of expression must be narrowly drawn and their necessity must be convincingly established.<sup>39</sup> Freedom of expression does not only protect unprovocative expression, but is equally applicable to information and ideas that “offend, shock, or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”<sup>40</sup> The interests that the last sentence of Article 12 seeks to protect are better addressed by generally applicable defamation laws or by provisions regarding hate speech, wherein the offence consists of uttering statements that are meant to incite discrimination, hostility or violence against a group or person.

**Recommendations:**

- Article 9 should be deleted.
- Article 12 should be deleted.

**Accreditation**

Articles 10 and 59(3) of the draft Media Law address the accreditation of national and foreign journalists. Article 10 provides that the owner, publisher, broadcaster or editorial office may apply to various government, political and religious bodies to accredit their journalists with these organisations. The refusal to grant accreditation may be appealed to a court of law. State bodies that have accredited journalists are required to supply these journalists with reports “and to notify these journalists of any meetings or conferences, unless the decision has been made to hold meetings *in camera*.”

Article 10(3) states that a journalist may be deprived of his or her accreditation if he or she, or the editorial office, violates an organisation’s accreditation rules or disseminates information that is untrue or which denigrates “the honour and dignity of the organisation.”

Article 59 of the draft Law states that the accreditation of foreign journalists will be conducted by the Minister of Foreign Affairs according to the provisions of Article 10.

As discussed above (Section 2.4), it is well established that bodies with regulatory or administrative powers over the media should be independent of

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<sup>39</sup> *Ahmed and Others v. United Kingdom*, 2 September 1998, Application No. 22954/93 (ECHR), para.55.

<sup>40</sup> *Castells*, note 8, para.42.

government. This applies equally to accreditation as to other matters.<sup>41</sup> State organs and local administrative bodies are not independent and therefore should not exercise direct control over accreditation.

Additionally, the fact that accreditation may be lost if the “honour and dignity of the organisation” has been denigrated is a clear violation of freedom of expression for a number of reasons. First, it allows the accrediting body full discretion to decide whether its “honour” and “dignity” have been adversely affected. Such wide discretion may be abused. Injury to reputation is an issue that should be addressed by generally applicable defamation laws. Second, laws aimed at the protection of reputation cannot be justified if their purpose or effect is either to protect the reputation of the State, or to prevent legitimate criticism of officials or the exposure of official wrongdoing.<sup>42</sup> Third, while in some cases it may be appropriate to take measures when a journalist violates the law, international human rights law requires that such measures be proportionate to the harm done and the goal pursued. Cancellation of accreditation constitutes an extreme measure, which seriously restricts a journalist’s right to freedom of expression, and should be used only as a last resort.

**Recommendations:**

- Articles 10 and 59(3) of the draft Media Law should be deleted. If the government decides to retain a system for accrediting journalists, these provisions should be amended to provide for an independent body to accredit journalists.
- Article 10(3) should be deleted.

### 4.3 Registration

Articles 25-33 of the draft Media Law set out the registration system for the mass media. Article 25 states that the mass media may only begin operations following registration. Article 25(2) further provides that registration will be conducted by the “federal executive body”. Article 26 lists the information that must be submitted with a registration applicant and imposes certain rules regarding the name used by a mass media outlet. Article 26(7) states that an applicant becomes the “owner” of the mass media outlet from the moment of its registration. Article 27 exempts one-off publications of less than 1,000 copies from the obligation to register. Article 28 lists the only grounds upon which registration may be refused: if there has been an abuse of mass media freedom, as defined by Article 7 of the draft Law; if the application is incomplete; if there is a problem with the media outlet’s chosen name; and for any other grounds provided for in the draft Law. A refusal from the federal body may be appealed to a court of law. Article 29 states the circumstances in which the re-registration of the media outlet will be necessary, such as when a

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<sup>41</sup> See, for example, the UN Human Rights Committee case holding that Canadian accreditation procedures to parliament breached the guarantee of freedom of expression. *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995.

<sup>42</sup> See: *Defining Defamation*, (London: ARTICLE 19, 2000), p.5.

founder has been replaced or there has been a change in the agreement between the owners of the media outlet and the editorial office.

Article 30 imposes a registration fee on the mass media, the amount of which will be set by the federal government. A higher registration fee will be charged to mass media specializing in communications and advertising of an “erotic” nature, while a reduced registration fee will be charged to mass media specializing in the “communications and materials intended for children, adolescents and disabled persons and used for educational, cultural and enlightening purposes.”

Article 31 stipulates that the government body charged with administration of the registration system is also responsible for enforcing the provisions of the Media Law. Orders issued by the registration body to owners of media outlets regarding violations of the Law must be complied with. If an owner does not comply with an order, the registration body may issue a second order. If this order is not complied with, then the registration body may apply to a court of law for the termination of the media outlet’s registration. The second warning must provide a date by which the media outlet must comply with the order; a court may only cancel the media outlet’s registration six months after this stipulated date for compliance has passed.

Article 32 states the grounds upon which a registration certificate may be cancelled by the registration body, including upon the request of the mass media outlet owner; the liquidation of the mass media outlet; or in response to a court order. A court order for annulment may be made if the registration certificate was obtained by fraud, if the media outlet has not produced anything for more than two years, or if the owner has not acted in accordance with a second warning issued by the registration body following a violation. If the registration body has not applied to the court for the annulment of a registration certificate within one year from the date of issue of the second warning to a mass media outlet owner, the second order may not form the grounds of a request for annulment. At the same time that the registration body applies to the court for an annulment of the registration certificate, it may also request that the court order the temporary suspension of the mass media’s activities. If a media outlet is accused of violating Article 7(2) of the present draft Law (dissemination of extremist materials or information prohibited by the laws on terrorism), the registration body itself may suspend the operations of the mass media outlet. Finally, Article 33 provides for a State register that will contain the registration details of all mass media outlets.

### **Analysis**

Under international law, *license* requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information, and they do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing (see discussion above in Section 4.1).

On the other hand, *technical registration* requirements do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries.<sup>43</sup> ARTICLE 19 therefore recommends that the print and electronic media not be required to register. As the UN Human Rights Committee has noted: “Effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.”<sup>44</sup>

In any case, the registration system established under the Russian draft Media Law fails to meet the minimum conditions noted above and, as a result, breaches the right to freedom of expression.

First, the system imposes substantive conditions upon mass media outlets by requiring that the title of the mass media, their program goals and objectives not constitute abuse of freedom of mass communication (Article 28(2)). Restrictions of this sort, to the extent that they are legitimate, should be imposed through laws of general application, not the registration process. The illegitimacy of this provision is compounded by the fact that some of the “abuses” of freedom of mass communication listed in Article 7 are themselves illegitimate restrictions on the right to freedom of expression (discussed above).

Second, the imposition of registration fees that vary according to the proposed subject matter (Article 30) is illegitimate as fee levels should not exceed the costs associated with administering the registration system. In other words, they should not act as a tax on programmers. While different fees may be foreseeable on the basis of administrative expenses, the legislation must clearly define the categories of content that will attract higher costs. The terms “erotic” and “commercial” as currently employed in Article 30 are vague and provide little guidance to media programmers.

Third, the registration system is not administered entirely by a body that is independent of government.<sup>45</sup> Independence is particularly necessary where the body has substantive powers; the draft Law empowers the registration

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<sup>43</sup> For example, in Australia, Canada, Germany, the Netherlands, Norway and the United States.

<sup>44</sup> General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

<sup>45</sup> See Section 4.4, below, for comments regarding independent regulatory bodies, in the broadcast context. The observations apply equally to the registration system.

body to suspend the operations of mass media outlets (Article 7(2)), without providing for an appeal.<sup>46</sup>

Finally, the registration requirement under the draft Media Law applies to broadcasters, as well as the print and electronic media. Given that broadcasters are also required to obtain a license pursuant to the provisions of the draft Law (see below), there is no reason to impose this additional administrative requirement on them.

**Recommendations:**

- The registration system should be abolished.
- If the system is retained, it should meet the following conditions:
  - The system should be administered by an independent body.
  - Article 28(2) should be deleted.
  - Article 30 should be amended to ensure that the registration fees do not act as a tax on programmers by exceeding the cost of administering the registration system.
  - The requirement to register should be limited to print media which are legally incorporated, publish regularly and have large print runs.
  - Broadcasters should not be required to register in addition to obtaining a licence.

#### **4.4 Broadcast Licensing**

The licensing of broadcasters is governed by Articles 44 – 50 of the draft Media Law. Of particular relevance to the analysis of these provisions are the principles adopted by ARTICLE 19 on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,<sup>47</sup> which set out standards in this area based on international and comparative law. In addition, the Committee of Ministers of the Council of Europe has adopted a Recommendation on the Guarantee of the Independence of Public Service Broadcasting<sup>48</sup> and a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.<sup>49</sup> The following analysis is drawn from those sets of principles, as well as other authoritative standards in this area.

##### Independence of Regulatory Body

Article 44(1) provides that the Federal Executive body “specializing in the area of mass communication” is responsible for issuing broadcast licenses, without which no broadcasting activity may take place. As such, a State body is responsible for regulating the broadcast sector. Article 45 states that the

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<sup>46</sup> See Section 4.4, below, for a discussion of penalties, which is also applicable to the registration system.

<sup>47</sup> ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: March 2002).

<sup>48</sup> Note 199.

<sup>49</sup> Note 166.

purpose of the Federal Contest Commission on Television and Radio Broadcasting is the “provision of rational use for the television and radio broadcasting on a limited number of frequencies and assistance for the development of competition in the sphere of television and radio broadcasting, as well as conformance of television and radio broadcasting to the social requirements.”

It is well established under international law that bodies with regulatory or administrative powers over the media should be *independent* of government. The Council of Europe Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector states that Member States should establish “independent regulatory authorities for the broadcasting sector” and “include provisions in their legislation... which enable them to fulfil their missions in an effective, independent and transparent manner.”<sup>50</sup> The ARTICLE 19 *Principles* state that the institutional autonomy and independence of such bodies should be guaranteed and protected by law in the following ways:

- explicitly in the legislation which establishes the body;
- by a clear statement of broadcast policy as well as of the powers of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.<sup>51</sup>

The draft Media Law, however, fails to guarantee explicitly the independence of the regulatory body. Furthermore, it fails to set out the appointments process for membership of the Federal Executive body. Members of the governing bodies of public bodies which exercise powers in the area of broadcast regulation should be appointed in a manner which minimises the risk of political or commercial interference.<sup>52</sup> The Council of Europe Recommendation stipulates that the rules governing such bodies should ensure that members “are appointed in a democratic and transparent manner.”<sup>53</sup> This means that the process for appointing members should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.<sup>54</sup> To ensure this, appointments should be made by a representative body, such as an all-party parliamentary committee, rather than the executive. A shortlist of candidates should be published, to ensure transparency and so that members of the public may comment upon them. Furthermore, only individuals who have relevant expertise and/or experience should be eligible for appointment and membership overall should be required to be reasonably representative of society as a whole.<sup>55</sup>

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Access to the Airwaves*, note 47, Principle 10.

<sup>52</sup> *Ibid.*, Principle 13.1.

<sup>53</sup> Note 166, Guideline II.

<sup>54</sup> *Access to the Airwaves*, note 47, Principle 13.2.

<sup>55</sup> *Ibid.*

Certain “rules of incompatibility” should also apply. The Council of Europe Recommendation states:

[S]pecific rules should be defined as regards incompatibilities in order to avoid that:

- regulatory authorities are under the influence of political power;
- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.<sup>56</sup>

The ARTICLE 19 *Principles* go further than this, stating that no one should be appointed who:

- is employed in the civil service or other branches of government;
- holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government;
- holds a position in, receives payment from or has, directly or indirectly, significant financial interests in telecommunications or broadcasting; or
- has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.<sup>57</sup>

Members should also be appointed for a fixed term and be protected against dismissal prior to the end of this term. Only the appointing body should have the power to dismiss members and this power should be subject to judicial review. A member should not be subject to dismissal unless he or she:

- no longer meets the rules of incompatibility, as set out above;
- commits a serious violation of his or her responsibilities, as set out in law, including through a failure to discharge those responsibilities; or
- is clearly unable to perform his or her duties effectively.<sup>58</sup>

Finally, the financial independence of the regulatory body should be protected. The Council of Europe Recommendation states:

Arrangements for the funding of regulatory authorities... should 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.

...

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.<sup>59</sup>

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<sup>56</sup> Note 166, Guideline 5.

<sup>57</sup> *Access to the Airwaves*, note 47, Principle 13.3.

<sup>58</sup> *Ibid.*, Principle 13.4.

<sup>59</sup> Note 166, Guidelines 9-11. See also *Access to the Airwaves*, note 47, Principle 17.

**Recommendation:**

- The draft Media Law should be amended to provide for an independent body to undertake all regulatory tasks, and to include provisions effectively guaranteeing the independence of this body.

### Licensing of Broadcasters

Article 44 states that broadcast licenses will be awarded on a competitive basis, unless otherwise provided for by federal legislation. The draft Law does not distinguish between private and public service broadcasters. Licenses will be issued to cover specified geographic areas. Licenses may be denied if the applicant does not have the necessary technical capacity. The amount charged for a broadcast license will be determined by the federal government. Article 44(9) states that television and radio broadcasters of “special social importance” will have certain privileges. The list of television and radio channels of special social importance, and the conditions for distribution will be determined by the federal government.<sup>60</sup>

Article 46 states that the term of a broadcasting license is ten years, subject to automatic renewal unless the broadcaster has been issued multiple warnings – the number is not specified – by the regulatory body, and these warnings remain unresolved.

The form and content of the license will be determined by the federal government. Article 47 stipulates that the license will contain several items of information, including the name of the licensing body, the legal name of the broadcaster, the territorial boundaries of the license, the license number and so on. Notably, the license will also state the “social standard” for the license, which is defined in Article 4 as: “a minimum level of broadcaster’s obligations on distribution of statements, materials and/or other information (including social advertising) required to achieve socially helpful purposes, established according to the requirements of the present federal law.” (This is requirement is discussed in more detail below, Section 5.2 Content Issues, under Must Carry Requirements.)

A broadcast license may be renewed without any changes to its terms and conditions when there has been a reorganization of the license holder, where there has been a change in the territorial boundaries of the license, and where the license holder has changed addresses (Article 48). The license may also be renewed if there has been a reduction in the level of “social importance”, but Article 48(2) stipulates that any reduction in the level of social standard must result from an agreement to that effect with the responsible federal commission.

The draft Law fails for the most part to set out the substantive criteria for deciding between competing applications. It is important that criteria for

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<sup>60</sup> Note that the translation of paragraph (9) is ambiguous regarding the exact nature of the privileges accorded to broadcasters of special social importance.

deciding between licence applications be set out to ensure fairness and to ensure that decisions are made in the public interest. The Council of Europe Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector states: “The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.”<sup>61</sup> The criteria should, as far as possible, be objective in nature, and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant.<sup>62</sup>

Granting certain privileges to broadcasters of “special social importance” is insufficiently clear, particularly as a basis for allocating benefits, an activity which is notoriously open to abuse. Rather, “special social importance” should explicitly require that broadcasters provide a service that promotes the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming that contributes to a plurality of opinions and an informed public.

The licensing process also lacks transparency. The Council of Europe Recommendation states: “The regulations governing the broadcasting licensing procedure... should be applied in an open, transparent and impartial manner.”<sup>63</sup> Secretive and unfair licensing mechanisms may result in long delays in the awarding of licences, refusal of licences on insubstantial grounds or the granting of licenses only to supporters of the government. Licence application hearings should therefore be public, so that the merit of the application and the reasons for the authority's decisions are matters of public knowledge and debate. Finally, the draft Law does not provide for the appeal or judicial review of the licensing commission.

**Recommendations:**

- The draft Law should set out the substantive criteria for deciding between license applications, including promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership. Article 44(9), which accords privileges to broadcasters of “special social importance” should either be deleted or the term should be clearly defined, in accordance with international principles regarding content obligations.
- The draft Law should provide that license applications hearings are public.
- Licensing decisions should be subject to either judicial review or appeal.

Loss of Broadcast License and Penalties

Article 49 states that upon violation of any of the draft Media Law’s provisions, the licensing body may make an order for the elimination of such violations. If the broadcaster does not obey the order, the licensing body may, after a

<sup>61</sup> Note 166, Guideline I.

<sup>62</sup> *Access to the Airwaves*, note 47, Principle 21.2.

<sup>63</sup> Note 16, Guideline IV.

period of time determined by it, issue a second order for the elimination of said violations. If, after six months have passed from the end of the time period given by the licensing body to the broadcaster to remedy the violations, the violations persist, the licensing body may apply to a court for the termination of the broadcast license. A broadcaster may appeal an order or warning to a court of law.

Article 50 stipulates the circumstances in which a license may be cancelled by the licensing body: if the license holder applies for its cancellation, at the end of the term of validity of the license if renewal is not possible or if the license holder is liquidated and there is no one to whom the license may be transferred.

Under the terms of the same provision, a court of law may only cancel a license following an application by the licensing body in the following circumstances: if the license was obtained through fraud, if the broadcaster has not been in operation for more than six months, if the broadcaster has not obeyed a second order regarding violations of the draft Law, or lastly if there are “many acting warnings” – the exact number is not specified – issued by the body against the broadcaster. Confusingly, Article 49 refers to “order”, while Article 50 refers to “orders and warnings”. The difference between these terms is not obvious from the legislation, although the time limits for appealing to a court for the cancellation of a license are different. If the licensing body does not appeal to the court for the cancellation of a license within six months of the issue of a warning, the body loses its right to make this application. A warning that is more than 12 months old and which has not been acted upon by the licensing body is no longer valid. An order, by contrast, does not expire. If the licensing body has appealed to a court for the cancellation of a license, this appeal may form the basis of a decision to refuse the renewal of a broadcast license.

In terms similar to the provisions regarding the suspension of a mass media outlet’s registration (Article 32), Article 50 states that a court may suspend a broadcast license if “there are no other ways” to compel the broadcaster to act in accordance with the Media Law. The licensing body may suspend a broadcast license for violations of Article 7(2) regarding the dissemination of extremist materials or information prohibited by the laws on terrorism.

The federal licensing body, as created by the draft Law, has been granted significant discretionary power to suspend and/or cancel broadcast licenses. A body that exercises such power and which is not independent of government, poses a serious risk to freedom of expression.

Additionally, sanctions, like other restrictions on freedom of expression, must be proportionate. This implies that the authorities should have at their disposal a range of graduated sanctions for breach of the law, so that a sanction corresponding to the nature and level of the breach may be applied. For this reason, the Committee of Ministers of the Council of Europe has recommended that broadcasting regulatory bodies should have the following powers:

A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law.<sup>64</sup>

The penalties set out in the draft Law fails to meet these standards. In Articles 49 and 50, the only available sanctions are orders, warning and termination. Other possible sanctions, such as a requirement to publish a decision recognising the breach or fines, are not available. Furthermore, the period of suspension is not specified and thus an indefinite suspension could theoretically be applied, resulting in a *de facto* termination of the license.

The threshold for requesting the revocation of a broadcaster's license is too low. "Many active warnings" could be as few as two violations. Suspension and revocation are very harsh sanctions which should only be applied, if ever, in extreme cases of repeated and gross abuse of the law.

The problems noted above are compounded by the fact that a violation can be based on an "abuse" of freedom of mass communication, as listed in Article 7 of the draft Law. Many of these, as noted above, are either illegitimate grounds for restricting freedom of expression or are excessively broad or vague. As a result, it is probably relatively easy for the government to abuse its powers and suspend or revoke broadcast licenses.

**Recommendations:**

- A more graduated system of penalties should be established, including the mandatory publishing or broadcasting of decisions recognising the breach, fines, suspension of a fixed duration, and then revocation.
- Termination of a broadcast license should only be available in extreme cases of repeated and gross abuse of the law.

## 4.5 Content Issues

### Right of Refutation

Articles 19 of the draft Media Law states that a "private citizen will have the right to demand disproof of information that does not correspond to the reality and denigrates their honour and dignity or business reputation and that was spread by the given mass media outlet." Article 20 contains rules regarding the acceptable format of a refutation: it must indicate which information is allegedly false; it must be printed or broadcast in similar circumstances to the offending story; and the size of the refutation may be up to, but no longer than twice the length of the original story, either in terms of word count or time.

Article 21 allows a mass media outlet to refuse to publish a refutation under the following circumstances: the refutation contains an abuse of the freedom of mass communication, according to Article 7; the refutation contradicts a

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<sup>64</sup> *Ibid.*

court decision; it is anonymous; if someone “disproves the information that has been disproved in the media; and where the demand for refutation is received by the media outlet more than six months after the publication of the offending information.

A mandatory right of reply is a highly disputed area of media law. In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence.<sup>65</sup> In Europe, in contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe.<sup>66</sup> In many Western European democracies, the right of reply is provided for by law and these laws are effective to a varying extent. The purpose of a right of reply is to provide an individual with an opportunity to correct inaccurate facts which interfere with his or her right to privacy or reputation. Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply:

- the reply should only be in response to incorrect facts, not to comment on opinions that the reader or viewer doesn't like;
- it should receive similar prominence to the original article or broadcast;
- it should be proportionate in length to the original article or broadcast; and
- it should be restricted to addressing the incorrect or misleading facts in the original text. It should not be taken as an opportunity to introduce new issues or comment on other correct facts.

**Recommendation:**

- Article 20 of the draft Media Law should be amended to ensure that any refutation only addresses incorrect facts, not opinions, correct facts or unrelated issues, and is proportionate in length to the original article or broadcast.

“Must-Carry” Requirements

Article 35 of the draft Media Law imposes a legal obligation on mass media outlets to disseminate specific types of information. Article 35(1) states that the broadcaster and publisher must report certain court decisions within specified periods of time. The same paragraph requires that broadcasters must disseminate social advertising – which is part of the social standard – free of charge and in an order determined by the licensing body. The “social standard” refers to the broadcaster’s obligation to distribute statements, materials, and/or other information “required to achieve socially helpful purposes”.

Article 35(2) requires the State mass media to disseminate messages and materials from the federal government. The State media is also obliged,

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<sup>65</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>66</sup> Resolution (74) 26 on the right of reply, adopted on 2 July 1974. 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).

“without hesitation and free of charge,” to publish information about fire safety. Notably, Article 35 is the only provision in the draft Media that makes specific reference to the State media, instead of to the mass media in general.

While it is certainly important that the public broadcaster should carry news of important government policies, a provision such as this is both unnecessary and susceptible to abuse. It is unnecessary because any responsible media outlet will carry information of public importance without being required to do so by law. Experience in countries all over the world shows that both public and private media provide ample coverage of government policies in various areas of activity even when they are not bound by a legal duty. The provision is open to abuse because officials may use it in circumstances for which it was not intended. And finally, independent media may be harassed, and even closed, for allegedly failing to fulfil these vague requirements.

Even in relation to state and public service broadcasters, the Committee of Ministers of the Council of Europe has voiced concern over “must-carry” requirements, stating:

The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.<sup>67</sup>

**Recommendation:**

- The “must carry” requirements in Article 35 should be deleted.

Miscellaneous

Article 36(2) of the draft Media Law restricts the dissemination of so-called “erotic” communications. The draft Law states that programmes categorized as “erotic” may only be broadcast uncoded by radio and television between the hours of 11 o’clock at night and four o’clock in the morning. The retail sale of publications that specialize in erotica is only permitted in specially designated premises – the location of which is determined by local government – and the material must be sealed in transport packages. Finally, the provision states that legislation *may* provide “benefits” to mass media which is not of an advertising or erotic nature.

This provision restricts freedom of expression by limiting distribution and funding opportunities for media that is deemed to be “erotic”. According to the draft Law, media that specializes in erotica is that which “in general and systematically exploits public interest in sex.” This definition is too vague to provide sufficient guidance to the mass media.

Finally, the government should not be involved in awarding benefits to the media on a discretionary basis. If benefits are to be awarded, the process

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<sup>67</sup> Note 19.

should be managed by a body that totally independent of government – something lacking from the Russian legislation.

**Recommendation:**

- Article 36 should be amended to include a clear definition of what constitutes “erotic” programming.
- Any benefit scheme for the media must be overseen by a body that is independent of government.

## 4.6 Freedom of Information

The draft Media Law establishes the right of citizens to obtain information about government bodies, political parties, public and religious organisations and their officials, *through* the media (Article 13). These public bodies have the corollary obligation to provide information to the mass media in response to requests from owners, publishers and broadcasters, editorial offices, and journalists. The bodies must also provide information by holding press conferences and circulating reference and statistical materials (Article 13(2)).

Those members of the media identified by Article 13 may make either written or oral requests for information and a representative of the relevant body or organisation is required to provide the requested information within three days following the receipt of the request (Article 14).

Article 15 of the draft Law states that a request may be refused if it involves information that contains state, commercial, “or any other secret specially protected by the law.” A notification containing the refusal must contain the reason why the information cannot be disclosed or why non-secret information cannot be separated from the protected material, the name of the official who has refused the request, and the date the decision was made. Article 15(2) allows for an extension of the three-day response time for up to 20 days, as long as a notification of the delay is sent to the requester.

Article 16 identifies further categories of information that are secret and which may not be revealed by the media, including the identify of confidential sources – unless a court orders the disclosure – and the identity of a minor who is either the victim, or perpetrator, of a crime, without the consent of the minor or his or her legal guardian.

As discussed above (Section 2.5), freedom of information is an important component of freedom of expression, a fact recognized by the Russian Constitution, Article 29(4) of which states: “Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means.” The draft Media Law, however, creates only a partial right, granting it to private citizens through the intermediary of the media. International law requires that States guarantee the right of *everyone* to seek, receive and impart information. The Council of Europe Recommendation on Access to Official Documents also clearly states:

Member states should guarantee the right of *everyone* to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.<sup>68</sup> [Emphasis added]

Furthermore, this system leaves media freedom susceptible to abuse. Authorities may claim that the press is not disseminating enough information, or the right kind of information, and thus the media may be threatened with losing its registration, accreditation, or license.

In addition to this glaring deficiency, the “right to information” regime established by Article 13 – 16 of the draft Media Law is remarkable for its omissions. ARTICLE 19 has adopted a set of principles on the right to information, *The Public’s Right to Know: Principles on Freedom of Information Legislation*, which set out standards in this area based on international and comparative law.<sup>69</sup> The following analysis is drawn from those sets of principles, along with the Council of Europe Recommendation on Access to Official Documents and other authoritative standards in this area.

The draft Law provisions do not specify with sufficient clarity what kinds of information the media may request. Article 13 refers only to “authentic information” and “information about their [the identified bodies] activities”. “Information” should be defined to include all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production.<sup>70</sup> The Council of Europe Recommendation states:

‘[O]fficial documents’ shall mean all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation.<sup>71</sup>

The right in the draft Law fails to comply with international standards regarding the list of bodies to which the right applies. The legislation should clearly define which public bodies are covered. The definition of ‘public body’ should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).<sup>72</sup>

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<sup>68</sup> Recommendation No. R (2002) 2 on Access to Official Documents, adopted by the Committee of Ministers on 21 February 2002.

<sup>69</sup> ARTICLE 19, *The Public’s Right to Know: Principles on Freedom of Information Legislation* (London: June 1999).

<sup>70</sup> *Ibid.*, Principle 1.

<sup>71</sup> Note 68, Principle I.

<sup>72</sup> *The Public’s Right to Know*, note 69, Principle 1.

Furthermore, private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health,<sup>73</sup> or is required for the exercise or protection of a right. The South African Constitution and Promotion of Access to Information Act,<sup>74</sup> for example, include this sort of latter provision. Article 32(1) of the South African Constitution states:

- Everyone has the right of access to – ...
- c. any information held by the state; and
  - d. any information that is held by another person and is required for the exercise or protection of any rights.

Like freedom of expression, freedom of information may also be subject to certain restrictions. Under international standards, a refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test:

- (1) the information must relate to a legitimate aim listed in the law;
- (2) disclosure must threaten substantial harm to that aim; and
- (3) the harm to the aim must be greater than the public interest in having the information.

The Council of Europe Recommendation states:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
  - i. national security, defence and international relations;
  - ii. public safety;
  - iii. the prevention, investigation and prosecution of criminal activities;
  - iv. privacy and other legitimate private interests;
  - v. commercial and other economic interests, be they private or public;
  - vi. the equality of parties concerning court proceedings;
  - vii. nature;
  - viii. inspection, control and supervision by public authorities;
  - ix. the economic, monetary and exchange rate policies of the state;
  - x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to *harm* any of the interests mentioned in paragraph 1, unless there is an overriding *public interest* in disclosure.<sup>75</sup> [Emphasis added]

It is not sufficient that information simply falls within the scope of a legitimate aim listed in the law. The public body must also show that the information would cause *substantial harm* to that legitimate aim. In some cases, disclosure may both benefit and harm that aim. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim. In addition, even if it can be shown that disclosure of the information would cause substantial harm to a legitimate

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<sup>73</sup> *Ibid.*

<sup>74</sup> Act No. 2, 2000.

<sup>75</sup> Note 68, Principle IV.

aim, the information should still be disclosed if the public interest benefits of disclosure outweigh the harm. In such cases, the harm to the legitimate aim must be weighed against the *public interest* in having the information made public.

Without the “harm” and “public interest” components of the test, public authorities will have wide discretion to deny requests for information and the underlying objective of the law could be defeated.

The restrictions contained in Article 15 of the draft Law are overbroad and fail to fully incorporate a “harm” test, the second part of the test for exceptions. The draft Law also lacks a “public interest” override.

ARTICLE 19 also notes that the draft Law does not include a number of common and legitimate grounds for refusing to disclose information, such as national security, law enforcement or public safety. While we do not normally recommend extending the scope of exclusions in a freedom of information regime, we are concerned that the failure to include these grounds in the Ordinance reflects the fact that it is not really intended to be comprehensive and that information held by security, defence and law enforcement bodies will not in practice be subject to disclosure under the Ordinance.

The draft Media Law also fails to legislate several other elements which, if included, would strengthen the public’s right to information. First, there is no provision for appeals from a decision to refuse a request for information. Principle 5 of *The Public’s Right to Know* recommends that governments adopt a three-level process for deciding requests, involving the public body that received the request, an independent review commission, and the courts:

Wherever practical, provision should be made for an internal appeal to a designated higher authority within the public authority who can review the original decision.

In all cases, the law should provide for an individual right of appeal to an independent administrative body from a refusal by a public body to disclose information.

...Both the applicant and the public body should be able to appeal to the courts against the decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably.

Second, there is no provision regarding what party will bear the costs of an information request. Principle 6 of *The Public’s Right to Know* states that where the costs are born by the applicant, these should not be so high as to deter potential requests.

Third, the draft Law’s requirement that public bodies provide information to the media via press conferences and the release of reference and statistical materials (Article 13) falls far short of international standards regarding the

obligation of government bodies to publish key information. At a minimum, public bodies should be required to publish the following:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.<sup>76</sup>

Related to the obligation to publish certain categories of information is the obligation to maintain records and to sanction the wilful obstruction of access to, or destruction of public records.<sup>77</sup>

Fourth, the draft Law should provide protection for “whistleblowers” – individuals who release information on official misconduct. Civil servants and other individuals in the public sector sometimes have access to information which may expose official wrongdoing, but they are afraid to release it because they may face legal or employment-related sanctions “Wrongdoing” in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious mal-administration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment obligation.

Finally, the experience of countries which have introduced freedom of information legislation shows that a change in the culture of the civil service from one of secrecy to one of transparency is a slow process, which can take ten years or more. As such, the law should provide for promotional and educational activities, targeting both public bodies and society-at-large, including:

- the training of civil servants on the scope and importance of freedom of information, the procedures for disclosing information, and how to maintain and access records;
- incentives for public bodies which effectively apply the law;
- the submission of an annual report to Parliament on the progress (achievements and problems) implementing and applying the freedom of information law; and

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<sup>76</sup> *The Public's Right to Know*, note 69, Principle 2.

<sup>77</sup> *Ibid.*, Principle 1.

- a public education campaign on the right to access information, the scope of information available, and the manner in which a person's rights may be exercised under the new law.<sup>78</sup>

**Recommendations:**

- The media should not be obliged to satisfy the public's right to information.
- A full law guaranteeing everyone the right to freedom of information should be passed to replace the access provisions in the draft Media Law, in accordance with the following principles:
  - "information" should be defined to include all records held by a public body, regardless of the form in which the information is stored.
  - the list of bodies covered by right to information should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos, judicial bodies, and private bodies which carry out public functions.
  - the law should contain a comprehensive regime of exceptions, each of which should be subject to a harm test and a public interest override provision.
  - a three-level process for deciding requests should be provided for, including an internal appeal within the public body, an appeal to an independent review commission and an appeal to the courts;
  - a system of fees which do not deter requests for information;
  - public bodies should be required to publish key categories of information;
  - public bodies should be under an obligation to maintain their records in good condition and to prevent the destruction of information;
  - whistleblowers should be protected; and
  - the law should provide for a system of promotional and educational activities for the public and public sector employees regarding the right to information the access regime.

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<sup>78</sup> *Ibid.*, Principle 3.