NOTE

on the

Draft Montenegrin Law on Electronic Media

ARTICLE 19
London

September 2009

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This Note provides an analysis of the draft Law on Electronic Media of Montenegro (draft Law). The draft analysed in this Note is under the title of the Ministry of Culture, Sports and Media and is dated 19 May 2009.[1] The draft is part of a series of legal and other reforms in the area of telecommunications and broadcasting regulation, some of which have been the subject of earlier ARTICLE 19 analyses.[2]

This Note assesses the draft Law against international standards on freedom of expression as relevant to the issue of broadcasting. The draft Law has a number of positive features but, at the same time, ARTICLE 19 has a number of concerns, as outlined below. This Note is not intended to set out all of ARTICLE 19's concerns with the draft Law; rather, it focuses only on the more important of these concerns.

1. Licensing of Broadcasters

There is a lack of clarity on roles regarding the licensing of broadcasters in Montenegrin law, and this is immediately apparently from the very first article of the draft Law, which provides

[1] We are not aware of whether or not this is an official translation and ARTICLE 19 takes no responsibility for errors based on misleading or erroneous translation.
[2] ARTICLE 19 prepared an analysis of draft amendments to the Law on Public Service Broadcasting in September 2008, available at: http://www.article19.org/pdfs/analysis/montenegro-comment-on-proposed-amendments-to-the-law-on-public-service-broad.pdf.

that its provisions shall not apply to the rules relating to the licensing of broadcasting frequencies (as opposed to the provision of broadcasting services). Article 9 provides, rather generally, that the Agency (the broadcast regulator established by the draft Law) and the body responsible for electronic communications (telecommunications regulator) shall cooperate, specifically in relation to "radio frequencies" for broadcasting services.

Pursuant to Article 44, those wishing to provide broadcasting services must either have the right to use a broadcasting frequency – whether via a broadcasting frequency licence or a right to disseminate via a multiplex system – or propose to disseminate without using broadcasting frequencies. Article 46 states that the Council, the supervisory body of the Agency, *shall* issue a licence to a candidate that provides "complete and high-quality documentation". Detailed criteria for the issuing of licences shall be adopted by the Council.

Potentially overlapping roles also apply to the cancellation of licences, with a broadcasting services or distribution licence being cancelled where the telecommunications regulator withdraws the broadcasting frequency licence (Articles 61(1)(7) and 86(4)). This is further confused by Article 56, which calls for the broadcast regulator to institute proceedings to withdraw the frequency licence in certain cases, but then to submit this to the telecommunications regulator.

Taken together these provisions are problematical and unclear. It is not clear, for example, whether or not the Council has real decision-making power in relation to the issuance of broadcasting service licences. Article 46 appears to make it mandatory to issue a licence once the requisite information has been provided (it may be noted that high-quality is not defined and therefore potentially allows for unnecessary discretion in the allocation of licences), although it also refers to the idea of criteria for such licences, which suggests it is not mandatory to issue them.

Regardless, it does not make sense to require those wishing to provide broadcasting services to go through two different licensing processes, potentially being successful in one only to be refused at the second stage. The general obligation of the Agency to cooperate with the telecommunications regulator is insufficient to overcome this problem. The same is true of licence cancellation, with broadcasters again and unreasonably being subject to two different licence cancellation regimes.

Furthermore, division of the process into two parts makes it very difficult to achieve important public interest goals through licensing, including to promote diversity in the airwaves, absent very close cooperation between the two agencies. Indeed, there is a need for the development of a frequency plan for broadcasting frequencies, as part of a wider frequency planning process, which builds in these public policy goals. This is absent from the draft Law (we are not aware of whether or not it is part of the telecommunications law).

Finally, we note that a matter as important as the criteria for issuing broadcasting licences should not be left to the discretion of the oversight body but should, instead, be provided for directly in the primary legislation.

The rules on licensing are in some cases unduly prescriptive. It is the function of the broadcast regulator to impose conditions on licensees that are appropriate, taking into account all of the circumstances. While some general conditions, for example in relation to minimum European quotas, should be in the legislation, others should not. Examples of this latter include Article 53, setting down very prescriptive rules on how much of the population in how many

administrative units different types of broadcasters must reach, Article 55, setting out very prescriptive rules on networking of broadcasters, Article 56, providing that all licences shall be for a period of 15 years (which, in addition to being unduly rigid, is also too long), Article 87, addressing distribution via cable systems, Article 88, imposing prohibitions on distributors disseminating their own programming, and Article 89, placing conditions on the distribution of channels. All of these are matters which should be left to be dealt with on a case-by-case basis in licences.

Recommendations:

- The rules on licensing should be revised to make it clear that applicants only need to go through one substantive procedure to obtain a licence. Ideally, this should be the broadcasting services licence procedure, with the frequency allocation built into it.
- The law should provide for the development of a frequency plan for the allocation of broadcasting licences in the public interest. This should either be the responsibility of the broadcast regulator (after a process of consultation has identified the frequencies to be allocated to broadcasting) or the joint responsibility of the broadcast and telecommunications regulators.
- The criteria for allocation of broadcasting licences, which should include promotion of diversity in the airwaves, should be provided for directly in the primary legislation.
- The overly prescriptive rules noted above should be revised to allow the regulator to consider all of the circumstances in setting rules in the licence.

2. Community Broadcasting

The draft Law fails to recognise community broadcasting, a broadcast sector that makes an important contribution to diversity and which is growing in importance in many countries. Article 2(3) refers to the balanced development of public and commercial broadcasters, Article 50(2) refers to licensing of public and commercial but not community broadcasters, and Article 95 calls for the diversity fund to promote commercial broadcast production. This last is a particularly serious omission since community broadcasters normally have the greatest need for financial support.

Recommendation:

- The law should recognise community broadcasting as an important third broadcasting sector and include specific provisions, for example in relation to licensing and licence fees, designed to foster the development of community broadcasting.

3. Content Rules

The draft Law makes sporadic references to the idea of a code of conduct, as well as complaints from the public, but it fails to establish a proper system to govern this. Article 10(1)(5), for example, refers to the role of the Agency in deciding upon complaints from the public, Article 12(12) refers to the Council's obligation to adopt rules on minimum programme standards, while Articles 12(19) and (20) refer to the processing of complaints.

It is not enough to include just these brief references and then leave it to the Agency or Council to develop the system. At least the general outline of how the standard-setting and

complaints system will work should be included in the law. The law should set out the process for adopting a code of conduct, including that it should be participatory and allow for all stakeholders to provide input. It is also advisable to include in the law some of the main types of issues – such as respect for privacy and protection of children – that the code needs to address. The law should also provide a framework for the processing of complaints, including the rights of complainants and broadcasters to be heard. And it should also set out the main approach to sanctions for breach of the code, among other things making it clear that the code is intended to set standards, not to punish (the criminal code serves that role in society) and that sanctions should be tailored accordingly.

Article 68 sets out a number of obligations for broadcasters, including that they should inform the public about matters of public interest in a "truthful, complete, impartial and timely manner", that they should contribute to the observance of "fundamental human rights and freedoms, democratic values and institutions, and pluralism of ideas", and that they should "enhance public dialogue culture" and "observe the linguistic standards". These are not only unduly vague, allowing for abuse in application, but they are also simply inappropriate standards to impose on broadcasters. It is not the role of a music radio station to promote human rights or promote public dialogue, it is not appropriate to expect all broadcasters to provide complete and timely information on matters of public interest, and there is simply no need for broadcasters to observe linguistic standards. These are wide social goals which we hope that the media might fulfil, but which they cannot be required to.

Recommendations:

- A far more developed system relating to the setting and application of content standards, including through complaints, in accordance with the above, should be added to the law.
- The wide social goals that Article 68 requires all broadcasters to promote should be removed from the law.

4. Independence

For the most part, the draft Law does a good job of promoting the independence of the Agency, in particular through the rules relating to membership of its governing Council. However, pursuant to Article 18(1)(1), the Ministry appoints one of the five members. This allows for political interference in the work of the Agency and is simply not necessary, as the experience of the many countries where there is no such appointment power clearly demonstrates.

Article 37 provides for the recall of the entire Council by the Parliament on various grounds, including that it has not meet for over six months, that it has failed to elect a president, and that it has failed to publish its financial report and the report of the auditor. The procedure for this is to be set out by the parliamentary body responsible for appointing the Council. ARTICLE 19 recognises that there may be exceptional cases of a breakdown of functionality of a body like this which would require it to be reappointed. However, clear safeguards need to be built into this process. The rules as set out could be abused, for example where a president resigns and the Council has taken some time to appoint a new president or where there has been a slight delay in the posting of the financial documents. The standards for recall should be extremely high, basically where the Council has clearly become completely unable to discharge its functions. For more minor failures, the Council might be subject to some sanction via a court decision for failing to respect the law. Furthermore, it should not be

up to a parliamentary committee to set the procedural rules for this. Instead, they should be set out in the law, and provide for clear safeguards against abuse (for example, a requirement of a two-thirds vote of the whole parliament).

The sources of funding for the Agency are also not sufficiently protected against political interference, and the rationale behind them is also not entirely clear. Pursuant to Article 41, the Agency shall be funded from broadcast frequency licence fees, subscriptions paid to distributors, the one-time fee for registering a broadcast service provider and other sources. The level of the first source shall be agreed between the Agency and the telecommunications regulator. The amount of the second source shall be determined by the Agency. Both the first and second sources shall be in accordance with the financial plan of the Agency.

It is not clear why the Agency is to be funded from the broadcasting frequency licence, instead of the broadcasting service licence fee. Indeed, this seems quite odd given that it is responsible for issuing and administering the latter while an entirely different body is responsible for the former. Furthermore, it is not difficult to imagine problems arising between the two bodies when trying to agree on their competing allocations from the broadcasting frequency licence fee. It is also not clear why distributors, uniquely from among the broadcasting service providers overseen by the Agency, are expected to contribute to its running costs. And the idea of giving the Agency the power to set the level of this fee, which by definition involves it in a conflict of interest, seems fraught with problems.

Recommendations:

- The Ministry should not have the power to nominate one of the members of the Council.
- The rules on recall of the Council should be completely revised, both as to the substantive grounds for recall and as to the procedural protections against abuse.
- The sources of funding for the Council should be reconsidered. In particular, consideration should be given to providing for the Council to be funded from the broadcasting service licence fees, which it oversees.

5. Public Service Broadcasting

The draft Law includes a number of general and some more specific rules on public broadcasting. It is assumed that these are intended to provide a framework for more specific laws, charters or agreements establishing specific public broadcasters. We note that the framework is very general on key issues such as how to ensure the independence of the Council of a public broadcaster. This could of course be done in the specific rules establishing specific broadcasters, but given the centrality of this issue to public service broadcasting, it might be useful to enhance the provisions on it in this law.

The draft Law includes rather more detailed rules on public broadcasters and elections. Pursuant to Article 105, public broadcasters' Councils shall set rules on "the presentation of political parties, coalitions, and candidates". It is not clear exactly what 'presentation' refers to. However, we note that it should not be up to the Council to set the main rules regarding political party coverage. Rather, this should be done either in the law, or by an oversight body (either the broadcast regulator or the electoral commission).

Article 106 provides that political parties shall be responsible for the veracity of their programmes, while public broadcasters are responsible for compliance with the law. This is

supplemented by Article 107, which provides that a public broadcaster may refuse to carry political content proposed by a party. These rules are rather confusing as to where responsibility for content is located. Furthermore, they grant too great a measure of discretion to public broadcasters to refuse to carry political statements, which may be abused for political purposes. Instead, we propose the approach recommended by the special mandates on freedom of expression at the UN, OSCE, OAS and African Commission, who called for broadcasters not to be responsible for the content of statements made by parties, "unless the statements have been ruled unlawful by a court or the statements constitute direct incitement to violence and the media outlet had an opportunity to prevent their dissemination" (Joint Statement of 15 May 2009).

Article 108 appears to place an obligation on public broadcasters to announce various elections in the daily press. We assume that this is a mistake. Article 109 prohibits the broadcasting of opinion polls by public broadcasters from seven days before an election. There are two problems with this. First, any such rule should be imposed on all broadcasters equally. There is no point, and it is not fair, to allow private broadcasters to carry such polls while prohibiting public broadcasters from doing so. Second, seven days is an excessively long period of silence. It is recognised that such polls may be misleading and have a disproportionate impact on the electorate close to an election. But it is not necessary to impose a blackout for seven days to avoid this. Two or three days is enough.

Article 110, on funding for public broadcasters, is problematical. It provides for part of the revenues to come from the general budget and for this to be allocated to specific sorts of programming. Furthermore, official bodies shall stipulate by contract the rights and obligations relating to this funding, as well as the rights and obligations relating to transmission costs. Funding directly from the public purse of this sort is relatively highly susceptible to political interference, so other sources of funding are preferable. Where it is deemed necessary to provide a direct public subsidy to public broadcasters, to supplement other sources of funding, careful measures should be put in place to limit the risk of political interference. Linking this funding directly to programme production and giving official bodies the power to dictate terms is clearly not the way to do this. Instead, the stipulations as to the use of these funds should, as far as possible, be set out in the rules governing the broadcaster and the funding should be allocated to more neutral activities such as technical capacity.

Recommendations:

- Consideration should be given to bolstering the provisions on independence of public broadcasters in the law.
- The main rules regarding coverage of elections by public broadcasters should be set out in law, and elaborated upon by oversight bodies, not adopted by the governing bodies of public broadcasters.
- Public broadcasters should not be responsible for statements made by parties or candidates except under the very narrow circumstances noted above.
- Public broadcasters should not be required to place advertisements in the newspapers regarding elections.
- The prohibition on broadcasting opinion polls should be limited to two to three days and should apply to all broadcasters, not just public broadcasters.
- The rules on funding for public broadcasters should be substantially revised so as to promote as far as possible the independence of these broadcasters.

6. Advertisements

The draft Law places quite onerous restrictions on advertising. For the most part, these are legitimate and conform to international standards, which allows for more intrusive limits on advertising than some other forms of expression. However, some restrictions are excessive. For example, Article 127(2)(1) prohibits advertisers from disparaging competitors, although this is common in advertising in many countries (as long as the statements are not inaccurate or misleading). Article 129 prohibits the inclusion of scenes of destruction, including of nature, in advertisements. Why should an advertisement for an environmental product not, for example, use a scene of a landslide to promote its products (other rules already provide for the protection of children (Article 130) and against advertisements which lead to harmful social or emotional reactions (Article 122)).

Recommendation:

- The rules on advertising should be reviewed to ensure that they do not unduly limit the freedom of expression of advertisers.

7. Sanctions

Article 61 of the draft Law lists ten grounds for revoking a broadcasting service licence, while Article 86 lists five grounds for revoking a broadcasting distribution licence. Article 62 empowers the Agency to issue warnings, as well as to suspend broadcasting service licences. Pursuant to Article 63, warnings shall be issued for violations of the law, on the assumption that this will be enough to right the problems, while Article 64 provides for suspension after warnings have failed to achieve the desired objective. Pursuant to Article 67, the decisions of the Agency are final.

There are serious problems with this system. A more democratic approach would be to establish a fully graduated system of sanctions for breach of the law, including warnings, requirements to broadcast statements, fines, suspensions and finally licence revocation, along with clear rules for the imposition of the more serious sanctions, to ensure that remedies are always proportionate to the wrong. This would allow the regulator to assess the seriousness of the problem and impose an appropriate sanction, albeit as constrained by law as regards the more intrusive sanctions.

A related problem is that the grounds for licence revocation are potentially far too broad. For example, one ground is where a broadcaster fails to address problems identified in a warning within the stipulated timeframe. There may be many reasons for such a failure; a more appropriate response to this would be to apply a more serious sanction than a warning, but a less serious one than licence revocation, such as a requirement to broadcast a statement or a fine. A distribution licence may be revoked where a "competent state body" determines that there has been a violation of some regulation; this is clearly open to abuse on political grounds.

It is also problematical that the draft Law seeks to establish the Agency's decision as to the application of sanctions as final. Broadcasters should be allowed to appeal at least more serious sanctions before the courts.

Recommendations:

- The system of sanctions should be fundamentally revised to provide for a graduated

set of sanctions, along with constraints on the application of more serious sanctions, with the application of the sanction to be determined by the broadcast regulator, taking into account all of the circumstances.
- At a minimum, the list of grounds for revoking licences should be revised so that only very serious breaches of the law may lead to this result.
- It should be possible to appeal at least more serious sanctions before the courts.

8. Diversity Fund

Article 96 of the draft Law sets out ten public interests which the diversity fund should promote. These are mostly specific social interests such as preventing discrimination, promoting human rights, encouraging culture, and protecting the environment. While these are all no doubt worthy causes, diversity is not limited to such sectoral interests but includes giving voice to the interests of disadvantaged groups and promoting dialogue about matters of public interest that are neglected in the mainstream media.

Article 98 describes the funding for the diversity fund as being composed of part of the subscription fund paid to programme distributors, the national budget, broadcast frequency licence fees, where the fee is part of the criteria for allocation of the licence, and other sources. Once again we see a similar set of funding sources as are granted for the Agency, and our concerns above are therefore also applicable here. While funding from the national budget may be an important way to supplement the funds available to the diversity fund, it also brings with it a risk of political ties.

Recommendations:
- The list of interests which the diversity fund should promote should be expanded beyond specific sectoral interests to include a wider notion of diversity as promoting social dialogue which is not catered for by other media.
- Consideration should be given to how to provide for a more robust and independent set of funding sources for the diversity fund.

9. Other Issues

The Strategy for Development of AVM Services Sector which the government is required to develop pursuant to Article 6 of the draft Law is clearly a very important document. It is important that the views of all stakeholders are taken into account in the development of this Strategy.

Article 38 provides for meetings of the Council to be called upon the request of at least three members. The President of the Council should also be empowered to call such meetings.

Article 94(4) requires all programme distributors to provide the Agency with Internet access to their subscriber database. It is not clear what the rationale for this is. The law already provides for the Agency to request such information from licensees as it may need to undertake its oversight functions. Furthermore, although this provision refers to data protection rules, it would appear to violate prevailing data protection standards by giving unnecessary access to private data.

Recommendations:

- The law should require the government to consult widely with all stakeholders in the development of the AVM Services Strategy.
- The President of the Council should be given a mandate to call meetings.
- The requirement of programme distributors to give the Agency Internet access to their subscriber database should be removed from the law.

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

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