
# MEMORANDUM

**on**

# Law on the Public Broadcasting System of Bosnia and Herzegovina

**by**

**ARTICLE 19**
**Global Campaign for Free Expression**

**London**
**May 2002**

## Introduction

The authorities in Bosnia and Herzegovina published on 8 April 2002 a Working Version of the Law on the Public Broadcasting System of Bosnia and Herzegovina. This law sets out detailed rules governing the national public broadcaster, as well as its relationship to the public broadcasters of the entities, Radio-television of the Federation of Bosnia and Herzegovina and Radio-television of Republika Srpska. We understand that this draft is expected to be signed into law by the UN High Representative, Mr. Petritsch, very shortly.

The draft law seeks to ensure that the national broadcaster, Public Broadcasting System of Bosnia and Herzegovina (PBS of BiH), plays a dominant role within the public broadcasting system of Bosnia and Herzegovina. An effort has been made to ensure that the national broadcaster is both independent and yet accountable, a balance that is difficult to achieve in practice. The draft law also seeks to ensure that PBS of BiH provides programming that is relevant to Bosnia and Herzegovina and

that responds to the overall public interest. ARTICLE 19 therefore welcomes this draft.

ARTICLE 19 is, however, of the view that the draft law could be improved in key respects. The process for appointing members to the Board of Governors is both technically flawed and also allows for possible political interference. The law imposes unjustifiable restrictions on, or requirements relating to, content while, at the same time, it provides only very general direction as to the public service remit of the national broadcaster. Further restrictions on advertising should be included to ensure fair competition with the private sector. The scope of the right of reply is too wide and certain rights are guaranteed for the public broadcaster which should apply to all broadcasters. Finally, the law fails to provide for appropriate mechanisms of accountability.

This Memorandum describes the key international standards in this area. It also sets out ARTICLE 19's main concerns with the draft law, along with recommendations on how address these concerns.

## International Standards

### *The Guarantee of Freedom of Expression*

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. It 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.[1]

The *International Covenant on Civil and Political Rights* (ICCPR) is an international treaty to which Bosnia and Herzegovina became a party in 1993. The ICCPR imposes legally binding obligations on States Parties to respect a number of the human rights set out in the UDHR.[2] Article 19 of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found at Article 19 of the UDHR. Bosnia and Herzegovina signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[3] on 24 April 2002, paving the way for it to become a member of the Council of Europe. It is expected to ratify this instrument shortly. Article 10 of the ECHR guarantees freedom of expression. Guarantees of freedom of expression are also found in the other two major regional human rights systems, at Article 9 of the African Charter on Human and Peoples' Rights[4] and Article 13 of the American Convention on Human Rights.[5]

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[1] Article 19, UDHR, adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).
[2] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
[3] Adopted 4 November 1950, in force 3 September 1953.
[4] Adopted 26 June 1981, in force 21 October 1986.

Freedom of expression is among the most important of the rights guaranteed by the ICCPR and other international human rights treaties, in particular because of its fundamental role in underpinning democracy. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." The European Court of Human Rights has 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'.[6]

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The Inter-American Court of Human Rights, for example, has stated: "It is the mass media that make the exercise of freedom of expression a reality."[7] The European Court of Human Rights has referred to "the pre-eminent role of the press in a State governed by the rule of law."[8] The media as a whole merit special protection under freedom of expression in part because of their role in making public "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'."[9]

### *Pluralism*

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights, including freedom of expression, are respected. 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 stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished

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[5] Adopted 22 November 1969, in force 18 July 1978.
[6] *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.
[7] *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.
[8] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.
[9] *Thorgeirson*, note 8, para. 63.

unless it is grounded in the principle of pluralism."[10] 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."[11]

One of the key rationales behind public service broadcasting is that it makes an important contribution to pluralism. The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.[12] For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism. Although not all of these instruments are formally binding as a matter of law, they do provide valuable insight into the implications of freedom of expression and democracy for public service broadcasting.

A *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural needs, and the need to preserve media pluralism. As a result, funding by States to such broadcasters is exempted from the general provisions of the Treaty of Amsterdam.[13] For the same reasons, the 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.[14]

*Resolution No. 1: Future of Public Service Broadcasting* of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994, promotes very similar principles. This resolution notes the importance of public service broadcasting to human rights and democracy generally and the role of public service broadcasting in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the resolution recommends that member States guarantee at least one comprehensive public service broadcaster which is accessible to all.

### *Independence and Funding*

The State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression, including publicly-funded broadcasters. This follows from a case before the European Court of Human Rights which decided that any restriction on freedom of expression through licensing was subject to the strict

[10] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 17 EHRR 93, para. 38.
[11] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* note 7*, para. 34.*
[12] See *Fourth Television* case, 87 BverfGE 181 (1992). In Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 58.
[13] Official Journal C 030, 5 February 1999, clause 1.
[14] Clause 5.

test for such restrictions established under international law.[15] In particular, any restrictions must be shown to serve one of a small number of legitimate interests and, in addition, be necessary to protect that interest. Similarly, in the preamble to the European Convention on Transfrontier Television, States: "[Reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters."[16]

An important implication of these guarantees is that bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments.

Perhaps the most important of these is Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe.[17] The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasters. The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.[18]

Several Declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 *Declaration of Sana'a*[19] calls on the international community to provide assistance to publicly-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia* notes the need for state-owned broadcasters to be transformed into proper public service broadcasters with guaranteed editorial independence and independent supervisory bodies.[20]

*Resolution No. 1: Future of Public Service Broadcasting* of the 4th Council of Europe Ministerial Conference on Mass Media Policy, noted above, reiterates these principles, including the need for independent governing bodies, and for editorial independence and adequate funding. These recommendations, particularly the requirement of effective independence from government – including financial independence – are reiterated in a number of resolutions and recommendations of the Parliamentary Assembly and other Ministerial Conferences on mass media policy of the Council of Europe.[21]

ARTICLE 19 has adopted a set of principles drawn from international law and practice relating to broadcasting, entitled, *Access to the Airwaves: Principles on*

[15] *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, Application No. 10890/84, 12 EHRR 321, para. 61.
[16] 5 May 1989, European Treaty Series No. 132.
[17] 11 September 1996.
[18] Articles 9-13.
[19] 11 January 1996, endorsed by the General Conference at its 29th Session, 12 November 1997.
[20] Clause 7.
[21] For the former, see Res. 428(1970), Rec. 748(1975) and Rec. 1147(1991) and for the latter see Res. No. 2 (1st Conference, 1986) and Res. No. 2 (5th Conference, 1997).

*Freedom of Expression and Broadcast Regulation*.[22] Principle 34 notes the need to transform government or state broadcasters into public service broadcasters, while Principle 35 notes the need to protect the independence of these organisations. Article 35.1 specifies a number of ways of ensuring that public broadcasters are independent including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of goals, powers and responsibilities;
3. through the rules relating to appointment of members;
4. through formal accountability to the public through a multi-party body;
5. by respect for editorial independence; and
6. in funding arrangements.[23]

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[24]

Similarly, the Supreme Court of Ghana noted: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."[25]

Many of the standards set out above reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. This is reflected, for example, in Principle 35.3 of the ARTICLE 19 *Principles*, which states: "The independent governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose prior censorship." The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

This approach is reflected in Article 1 of Recommendation No. R(96)10 of the Council of Europe, which notes that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters. The Recommendation goes on to state that management should be solely responsible for day-to-day operations and should be protected against political interference, for

[22] London: ARTICLE 19, 2002.
[23] *Ibid.*, Principle 35.1.
[24] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.
[25] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

example by restricting its lines of accountability to the supervisory body and the courts.[26] In a related vein, Articles 20-22 of the same Recommendation note that news programmes should present the facts fairly and encourage the free formation of opinions. Public service broadcasters should be compelled to broadcast messages only in very exceptional circumstances.

Similarly, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In addition, public service broadcasters can only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of Recommendation No. R (96) 10 of the Council of Europe note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

ARTICLE 19's Principle 36 deals with funding, stating: "Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets". Similarly, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to ensure that sufficient resources are available to enable the public broadcaster to discharge its functions.[27]

## Specific Concerns

### *The Board of Governors*

Article 60 of the draft law provides that the Board of Governors of PBS of BiH shall consist of nine members, four appointed by the House of Representatives, three by the previous Board from among its members and two being respectively the chairs of the governing bodies of Radio-television, Federation of Bosnia and Herzegovina and Radio-television, Republika Srpska. Members may be appointed for a maximum of two three-year terms and must be citizens. Pursuant to Article 61, the four candidates appointed by the House of Representatives shall be nominated by civil society through a public tender system. The same Article sets out a number of rules of incompatibility – conditions which prohibit individuals from being appointing – including being an official, a member of a political party, an employee of a public broadcaster or having a conflict of interest due to business interests in broadcasting. Only the Board can dismiss its own members. The Board appoints the Director General by at least seven votes (Article 68) and has a variety of other important governing responsibilities (Article 66).

This appointments procedure has a number of strengths in terms of protecting independence, including the involvement of a diverse range of bodies in the appointments process, good rules of incompatibility and strong protection of tenure. There are, however, both technical and other problems with this mechanism.

[26] Articles 4-8.
[27] Decision 826/1998 [1998] Guir. cost. 3893.

It may be noted that under this mechanism, the three Governors who were returned by the Board at the last round of appointments must then retire, having served their two terms. This means that the next three to be returned by the Board must be chosen from among the four previously appointed by the House, since the Board presumably cannot return the two chairs of the other public broadcasters. This is problematical. It would be impossible if the House itself chose to return two or more of its previous appointments to the Board. In any case, it guarantees that three of the four members appointed by the House of Representatives will be returned for a second term. It thus seriously weakens, if not entirely negates, the independent role of the Board in selecting candidates. Consideration should instead be given to either allowing the Board to appoint freely from outside its ranks, or to allocating this power of appointment to the Communications Regulatory Authority or to civil society.

To promote transparency and participation, consideration should be given to requiring the appointing bodies to publish in advance a shortlist of candidates, giving the public an opportunity to make representations on these candidates. This approach, adopted in some other transitional democracies, can significantly enhance openness and promote public confidence in the Board.

The rule that only the Board can dismiss its own members is also of some concern. On the one hand, as it stands in the law this is an unfettered power to dismiss which could be abused, for example by political "ganging up" on the Board. In addition, it could be used for a variety of reasons which, although not necessarily abusive, were inappropriate. Conditions should be placed on this power – for example, restricting the ground for dismissal – to prevent abuse and to ensure that dismissal only takes place for legitimate reasons. On the other hand, it seems excessive to provide such protection to the Board. In other countries the legislature can dismiss board members and, although this does open up the possibility of political interference, it is also an important accountability mechanism. What would the impact of this rule be, for example, if the whole board were engaged in corrupt practices or were signally failing to represent the public interest?

**Recommendations:**

- The rule that the Board shall appoint three from among their number should be replaced by one that either allows wider scope to the retiring Board to appoint members or that allocates this power to the Communications Regulatory Authority or to civil society.
- The appointments process should be required to be open and consideration should be given to requiring appointing bodies to publish a shortlist of candidates and allow for public input.
- Either the appointing body or the House of Representatives, rather than the Board, should be given the power to dismiss Board members but, at the same time, conditions should be placed on the exercise of this power. In addition, the law could require a supermajority vote, for example two-thirds, by the House to dismiss.

### *Accountability Mechanisms*

The law does provide for some accountability mechanisms, including a requirement to conduct an independent annual audit of the subscription fee collection for all public broadcasters and of finances generally for PBS of BiH (Articles 17 and 56). However, overall the accountability mechanisms are weak.

A key accountability mechanism in most countries is the requirement for the Board to place an annual report before the legislature. This not only provides for an open reporting system, which should also be accessible to the public at large, but also ensures that the legislature has an opportunity to discuss the public broadcaster at least on an annual basis. The draft law fails to require PBS of BiH to produce an annual report or for any other oversight by the legislature.

Another accountability mechanism is to provide a detailed statement in the law of the purpose and programme remit of public broadcasters. The draft law does provide, at Article 3, that public broadcasters have a responsibility to provide high quality, diverse factual programming. Section C deals with Programming Principles and sets out a number of rules relating to programming. Most of these, however, are either very general in nature or are restrictions on content (see below) rather than positive requirements to provide certain types of programming.

ARTICLE 19's Principle 37 provides one example of a more detailed statement of programming policy, although this is also fairly general, since it is applicable to public broadcasters all over the world. This statement is as follows:

> Their remit should include, among other things, providing a service that:
> - provides quality, independent programming that contributes to a plurality of opinions and an informed public;
> - includes comprehensive news and current affairs programming, which is impartial, accurate and balanced;
> - provides a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
> - is universally accessible and serves all the people and regions of the country, including minority groups;
> - provides educational programmes and programmes directed towards children; and
> - promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

In some countries, public broadcasters are required to ensure that they remain under effective public review. Such obligations have been imposed, for example, on the BBC in Britain, which fulfils this requirement through public meetings, surveys and the like.

**Recommendations:**

- A requirement should be placed on the public broadcaster to submit an annual report to the House of Representatives and to ensure the publication and wide dissemination of this report.
- A more detailed statement of programme policy should be provided in the law.
- Consideration should be given to including in the law a requirement that the public broadcasters keep themselves under constant public review.

### *Content Restrictions*

The draft law imposes a number of strict content restrictions on public broadcasters. For example, Article 21 requires them to inform the public in a truthful manner and further that news shall be correct. Article 22 prohibits programming which causes a risk of inciting to national, religious or racial hatred, or which could incite crime.

Both of these restrictions are excessively strict. It is common to require public, and indeed all broadcasters to observe a rule of due accuracy, or to strive to ensure that news is accurate, but a strict requirement in this regard is unreasonable. Even the very best journalists make mistakes, as part of their duty to ensure the provision of timely information to satisfy the public's right to know, and no broadcaster can ensure that its news is always absolutely correct. These accuracy requirements should be modified.

It is perfectly legitimate to prohibit broadcasters from inciting hatred or crime, and even to require public broadcasters to make an effort to carry programming designed to promote tolerance and reduce crime. However, much legitimate and indeed important programming might *cause a risk* of inciting hatred or crime. For example, news coverage of a racially or ethnically motivated incident, about which the public has a right to know, might cause a risk of inciting further, responsive incidents. Or a programme about a growth in criminal activity, exploring the modalities by which the growth was taking place, could incite further crime. Narrower language should be applied to these restrictions.

Article 23 requires the public broadcasters to ensure that at least 40% of all programmes in all genres are domestically produced. While this is commendable in principle, this is too rigid a formulation of this rule. It may, in particular, be unrealistic to ensure this proportion in all genres. For example, TV broadcasters in many countries could not provide viewers with 40% locally produced feature films. It is not realistic to expect the public broadcaster to take sole responsibility for enhancing the output of the film industry. This rule should, therefore, be rendered more flexible. It could, for example, require 40% overall but not necessarily in every genre, or require 40% overall with efforts to increase domestic programming in those genres where it is currently below that level.

Article 23 also requires the public broadcasters to obtain at least 10% of their programming from independent producers, presumably originating in Bosnia and Herzegovina. This is a commendable provision, which should help ensure that public broadcasting is undertaken by a wide range of actors, not just the main public broadcasting organisations. Consideration should be given to requiring this proportion to increase over time as production capacity increases. For example, the BBC is required to obtain 25% of its programming from independent producers.

Article 32 requires public broadcasters to transmit, without delay and free of charge, urgent statements by State bodies relating to dangers to health, property, security and public order. While the rationale for this rule is understandable, it is both unnecessary and open to abuse. It is unnecessary because any responsible public broadcaster will carry information of public importance without a specific requirement to do so. Experience in countries all over the world shows that both public and private

broadcasters provide ample coverage of emergencies and natural disasters, even in the absence of formal obligations to do so. Should the public broadcasters fail in this regard, it is up to their governing boards to require them to address the problem.

Such provisions are open to abuse because officials may use them in circumstances for which they were not intended. This rule potentially applies to an extremely broad range of circumstances and bodies and could effectively be used by State bodies to get free access to broadcasting to present their views. What is important is that the public gets the information it needs regarding the emergency, not that it hears statements made by State bodies.

**Recommendations:**

- The content restrictions in Articles 21 and 22 should be applicable only where the material actually incites hatred or crime, not where it merely poses a risk of inciting these results.
- The requirement of 40% domestically produced programmes in all genres should be made more flexible in line with the analysis above.
- Consideration should be given to levering up over time the 10% of programming required to be purchased from independent producers.
- Article 32 should be removed from the draft law.

### *Funding*

The draft law allows the public broadcasters to carry advertisements but restricts the amount of advertising to six minutes per hour, or some 10% of programming time, allowing this to be somewhat concentrated in prime time, but never to exceed eight minutes per hour.

The overwhelmingly dominant model for public broadcasters all over the world is a mixed funding approach consisting of some public funding and some advertising revenue and so this approach is consistent with that of other countries. In our experience disputes abound about the level of access of public broadcasters to advertising revenues, often with both sides complaining, the public broadcaster about the level of restriction and the private sector about the level of access. In most cases, this is simply a matter of public policy, to be decided by local decision-makers.

There are, however, two key risks in allowing public broadcasters to have access to advertising revenues. The first is that the public broadcasters will use their public funding to engage in unfair advertising competition (for example by price dumping). This can be addressed by including in the law a direct prohibition on such practices, which could then be invoked by private broadcasters.

The second is that despite the overall time limitation, the public broadcaster will become excessively dependent on advertising revenue and, as a result, be diverted from its core public service programming mandate. This can be addressed by an overall limit on the proportion of total funds that may be raised through advertising, for example of 25%.

Pursuant to Article 54, the Board of PBS of BiH may request funding directly from the State budget to cover transmission needs, satellite rental costs, significant programming projects and the costs of maintaining the archive. Direct State funding is notoriously susceptible to political interference. Although the draft law does restrict the uses to which this funding may be put, and formally prohibits the use of this funding by State organs to influence programming, we are still concerned about the implications of this sort of funding. It would be preferable if other sources of funding could be sought but, if direct State subsidies are retained, they should at least prohibited from being used for programme production.

**Recommendations:**

- A prohibition on the public broadcasters engaging in unfair competition in relation to advertising should be added to the draft law.
- The public broadcasters should be subjected to an overall limit on the proportion of total funding that they may raise through advertising, for example of 25%.
- Alternatives should be sought to direct State funding for public broadcasting. If this sort of funding is allowed, it should not be able to be applied towards the costs of programme production.

### *Right of Reply*

The draft law provides a right of reply to anyone whose right is affected by a statement of fact contained in a broadcast (Article 33). This is far too broad an application of this right and could be claimed regarding truthful statements which it was in the public interest to broadcast and which only tangentially affected someone's right. As a result, this right of reply could easily be abused, including by political figures who sought to obtain free access to broadcasting.

The right of reply should apply only in circumstances where a broadcast infringes an individual's legal right, while the right of correction should apply to false statements of fact. Furthermore, the law should restrict the length of a right of reply. Replies should not be permitted to go beyond redressing the original wrong and should be required to achieve this objective as briefly as is reasonably possible.

**Recommendations:**

- The right of reply should be restricted to situations where someone's legal rights have been breached.
- Replies should be restricted in scope to redressing the original wrong and should be required to be as brief as possible.

### *Rules of General Application*

Some of the provisions in the draft law contain rules which should be applicable to all broadcasters or which, if applied, should also apply reciprocally to other broadcasters. For example, Article 36 sets out the established right to protect confidential sources of information. While this is an important right, all media, not just public broadcasters, should benefit from it. Including it in a public broadcasting law gives the unfortunate

impression that it applies only to these broadcasters and may undermine the right of all journalists to protect the confidentiality of their sources of information.

Article 37(2) gives the public broadcaster the right to quote in its news programmes up to 90 seconds from the transmissions of other broadcasters relating to public, cultural, sporting and other events. The legitimacy of this rule, including in relation to copyright, seems dubious but if it is to be retained, it should apply to all broadcasters and not just the public broadcasters.

**Recommendations:**

- Article 36, providing for protection of confidential sources, should be removed from the public broadcasting law and, if not already provided for, it should be included in a law of general application.
- Article 37(2) should either be removed from the draft law or amended to make it clear that it applies to all broadcasters.

### *Scope of Activities*

Article 43 defines the scope of activities of the PBS of BiH as being the production and transmission of radio and television programming. Article 43(3) allows PBS of BiH, with the approval of the Board, to provide additional programme services, regardless of the method of delivery and mode of funding. Article 43(6) provides that the statutes may identify other activities, provided that they are not inconsistent with the core activities of PBS of BiH.

This is an extremely broad mandate, subject to very loose conditions, which is inappropriate for a body receiving public funds for a specific task. At a minimum, certain conditions should be placed on the scope of public broadcast activity. For example, it should be clear that any additional programme services which require additional frequency must be subject to approval by the Communications Regulatory Authority, to prevent the public broadcasters from dominating frequency usage. In addition, there should be a prohibition on using public funding to subsidise commercial activities, such as pay-TV, explicitly referred to in Article 43(3). Finally, public broadcasters should be restricted in scope to activities related to their core activities; the wording of Article 43(6) should be changed to reflect this.

**Recommendations:**

- PBS of BiH should require the approval of the Communications Regulatory Authority for any service expansion which requires additional frequency usage.
- Any commercial activities undertaken by PBS of BiH should not be allowed to be subsidised by public funding.
- Article 43(6) should be reworded so that PBS of BiH is only allowed to undertake activities which are consistent with its core mandate, rather than being prohibited from undertaking activities which are inconsistent with that mandate.

### *Privileged Access to Sporting Events*

Article 45(2) of the draft law prohibits television stations whose programme coverage does not extend to the whole population of Bosnia and Herzegovina from acquiring exclusive rights to the most important sporting events, including the Olympic Games, various European championships and international sporting events taking place in the country.

This provision is designed to ensure that the whole populace will be able to view these events, a legitimate goal. It should be made clear, however, that this provision does not prevent television stations which have organised themselves into networks or made other arrangements so that together they cover the whole territory from acquiring exclusive rights to these events.

**Recommendation:**

- It should be made clear that Article 45(2) does not prevent networks or other groupings of television stations which cover the whole country from acquiring exclusive rights to the listed sporting events.