MEMORANDUM

on the

Law on Public Broadcasting Services "Radio of Montenegro" and "Television of Montenegro"

and the

Broadcasting Law of Montenegro

by

ARTICLE 19
Global Campaign for Free Expression

London
May 2002

Introduction

This Memorandum is based on the latest drafts of the Broadcasting Law of Montenegro (Broadcasting Law) and the Law on Public Broadcasting Services "Radio of Montenegro" and "Television of Montenegro" (Law on Public Broadcasting Services), as published in March and April 2002 respectively by a ministerial Working Group. The draft Broadcasting Law aims to regulate independent broadcasting in Montenegro, while the draft Law on Public Broadcasting Services establishes a national public service broadcaster.

The two draft laws on broadcasting have to be read together with the draft Media Law, as the three are complementary and partly overlapping. In general, the draft Media Law addresses matters of content, in broadcast as well as print media, while

the other two deal with matters of broadcast regulation. Our April Memorandum welcomed the most recent draft of the Media Law which, like the other two draft Laws, had obviously been drafted with care and consideration. However, we made several recommendations to bring the draft Law in line with international standards on freedom of expression, in particular with regard to content restrictions and the 'must carry' requirement for government announcements. We reiterate those comments, which apply to both print and broadcast media.

ARTICLE 19 very much welcomes the two draft laws on broadcasting. Like the draft Media Law, they represent a significant step forward in terms of respect for freedom of expression and will establish Montenegro among the leaders in the region on these issues. However, we believe that they can still be further improved upon, particularly with regard to transparency around the election of members of the regulatory body and the council of the public broadcaster, the enforcement machinery of the draft Broadcasting Law, and a number of other, miscellaneous, provisions. We offer the following comments and suggestions as an aid to discussion.

This Memorandum will first discuss the draft Broadcasting Law, offering recommendations and suggestions for improvement throughout, and then focus on the draft Law on Public Broadcasting Services. As a follow-up from previous memoranda on earlier drafts, this Memorandum will contain only a brief introductory discussion of the most pertinent international standards on freedom of expression and broadcast regulation.

International and Constitutional Standards

Freedom of expression is guaranteed under Article 10 of the European Convention as well as under Article 19 of both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. The Constitution of the Republic of Montenegro also contains detailed provisions guaranteeing freedom of expression and freedom of the press (Articles 34, 35 and 37).

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 that "[it] is the mass media that make the exercise of freedom of expression a reality."[1] 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."[2] 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'."[3]

Under international law, it is well-established that the right to freedom of expression applies not only to the content of expression but also to the means of transmission. In broadcasting, this means that both the technical regime as well as the regulatory

[1] *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.
[2] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[3] *Thorgeirson*, note 2, para. 63.

mechanisms should be implemented in a manner that respects the guarantee of freedom of expression.

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. With regard to broadcast regulation, one of the most important obligations on the State is to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.[4] This implies that the State should ensure that there is a diverse broadcasting sector, including through the establishment of a strong public service broadcaster.[5] Within the Council of Europe region, public service broadcasting is particularly promoted.[6]

However, the State's obligation to promote pluralism and the free flow of information and ideas to the public does not permit it to interfere with broadcasters' freedom of expression, including publicly-funded broadcasters. For example, any restriction on freedom of expression through licensing is subject to the strict test established under Article 10(2) of the ECHR.[7] Furthermore, all bodies that 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, most importantly in the Council of Europe Recommendation on the *Guarantee of the Independence of Public Service Broadcasting*.[8] This 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.[9]

ARTICLE 19 has recently published a set of principles on broadcast regulation and freedom of expression, drawn from international law and best practice relating to broadcasting, entitled *Access to the Airwaves*.[10] These set standards in a range of fields, including on the position of regulatory bodies but also on issues of licensing, sanctions, election coverage and public service broadcasting.

---

[4] *Informationsverein Lentia and Others v. Austria*, European Court of Human Rights, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90.

[5] See, for example, the German Constitutional Court's judgment in *Fourth Television* case, 87 BverfGE 181 (1992), quoted in E. Barendt, *Broadcasting Law: A Comparative Survey* (Clarendon Press: Oxford 1995), p. 58.

[6] See *Resolution No. 1: Future of Public Service Broadcasting* of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994. See also Protocol No. 32 to the Treaty establishing the European Community, OJ C 340, 10 November 1997, pp. 173-308, and EU Council Resolution of 21 January 2002 on the development of the audiovisual sector, OJ C32, 5 February 2002, p. 4.

[7] *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, European Court of Human Rights, Application No. 10890/84, para. 61.

[8] CoE Recommendation R(96)10, 11 September 1996. .

[9] Articles 9-13.

[10] *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, ARTICLE 19: London 2002.

The draft Broadcasting Law

The draft Broadcasting Law aims to regulate all broadcasting activity in the Republic of Montenegro. It establishes a Broadcasting Agency, made up of five members, whose task will be to propose a national broadcast policy, adopt a frequency plan, issue licences and hear complaints from the public, among other things. The draft Law also outlines the licensing system, with licences to be issued via public tender, and an enforcement mechanism through the imposition of warnings, fines, and, eventually, licence suspension and revocation. Furthermore, the draft Law establishes the technical regime for cable, satellite and MMDS[11] distribution systems, including conditions of construction, use and maintenance, and it establishes a national company for the distribution of broadcasting signals. The draft Law also introduces a radio and television subscription fee, and it contains a rudimentary framework for public broadcasting services (addressed in further depth in the draft Law on Public Broadcasting Services, discussed below). Finally, the draft Law contains some important restrictions to prevent undue media concentration, and it requires advertisements and sponsorships to be clearly identified.

Interpretation

As a preliminary matter, we note that Article 1 of the draft Law states that it "shall regulate the conduct of broadcasting activities … on the level of … standards contained in the international documents on human rights and freedoms …" Not only is this an important statement of intent; it effectively incorporates the ECHR and the European Court's case law into the draft Broadcasting Law. Therefore, whenever there is ambiguity in the Law, or where its provisions come into conflict with international human rights requirements, this should be resolved in favour of international human rights standards.

The Broadcast Agency Council

The draft Law establishes the Broadcast Agency as the pivotal body in Montenegrin broadcast policy. It will draw up and propose the national broadcast policy, which is to be ratified by Parliament, as well as implement it. The functioning of the Agency will be crucial to the success of the Law.

The Agency is to be headed by an Agency Council, made up of five members. The members will be nominated by five different groups: the government, the University of Montenegro, broadcasters associations, human rights NGOs and journalism NGOs. These five nominators are required to draw up an 'act of appointment' nominating five Council members, which is then ratified by Parliament. If the nominators cannot agree on nominations and nominate more than one candidate member for a position, Parliament is to ratify the appointment of the member who has the most support among the NGOs and associations.[12]

Council members serve for five years and will carry out their functions independently of the nominating organisations. Their terms of office may not normally be reduced, except if the member resigns or dies; in exceptional circumstances, and only on the proposal of the Council or the nominator, Parliament may recall a Council Member.

---

[11] Microwave multi-channel distribution systems - a wireless technology commonly used for TV signal transmission.

[12] Articles 13, 14, and 15.

This procedure will apply if he or she gave untrue information during the appointments procedure, or if he or she does not perform their duties as a Council member during six consecutive months, or for six non-consecutive months in a year, without valid reason.[13]

Finally, Article 15 provides a number of rules of incompatibility, prohibiting a number of categories of persons from becoming Council members, including persons convicted of any offence that would render them 'unworthy of performing public duty'.

Comments

Independence of the Agency Council

ARTICLE 19 welcomes the requirement that Council Members should not sit as representatives of the nominating groups. This will enhance their independence. However, we are concerned that the government will nominate one of the members of the Agency Council. Regardless of the formal requirement of independence from the nominating body, this will leave the public with the perception that the Government has an important share of the vote in what should be an independent body. This will be the case particularly given that the Council will only have five Members.

Appointments procedure

We note that there is no formal requirement for the appointments process to take place in public. While the involvement of certain civil society organisations in the procedure will result in a degree of transparency, this should be formally enhanced by including as a formal requirement that the appointments process should be a public one.

Further, we note that the term of office is five years, with the possibility of re-election. There is no limit on the number of terms a member can serve. First, we recommend that the Law should limit the maximum number of terms to two. Second, as a matter of practicality, we would recommend that the first round of appointments should follow a staggered system – some members being appointed for two or three years, and others for the full five-year term. This will prevent having to re-elect an entirely new Council every five years.

Rules of incompatibility

While the rules of incompatibility provided under Article 15 are of the kind normally found in broadcasting laws, the exclusion for persons who have been convicted of an offence that would render them 'unworthy of performing the function' is problematical. The phrase 'unworthy of performing the function' is highly subjective and therefore open to abuse on political grounds.

Accountability

Under Article 29, the Broadcast Agency is required to publish an 'annual operating report' as well as its audited accounts. However, the Law does not require any specific information to be published. This is an important omission. In order for any broadcast regulator to be truly accountable to the public, it should be required to submit a detailed annual report on all its activities, particularly with regard to licence

[13] Articles 17-20.

decisions and decisions on complaints received. Such a report should be formally laid before Parliament. In addition, the law should include a safety valve, allowing Parliament to intervene if, without valid reason, the Council as a whole clearly does not function and has not carried out its functions for a prolonged period of time.

Recommendations:

- The Government should not be allowed to nominate a Council Member.
- Consideration should be given to increasing the membership of the Council.
- The draft Law should provide for a staggered system for the first round of appointments.
- The draft Law should formally require that the appointments procedure should be public.
- The exclusion relating to offences that would render a candidate Council member 'unworthy of performing the function' should be deleted from the draft Law.
- The Agency should be required to publish an Annual Report to be put before Parliament.
- The Agency should fall under overall supervision of Parliament, who should have a power, as a measure of last resort, to intervene if the Agency Council does not function.

Licences, licence enforcement and supervision

The general system for granting licences is provided under Articles 31-44 of the draft Law. Licences are to be issued after public tender and generally the procedure as envisaged is in line with international standards. However, there is one important oversight. While Article 32 of the draft Law mentions that licences may contain 'general conditions', which may be changed by the Agency during the validity of the licence, the Law does not give any guidance with regard to appropriate licence conditions. The Law should be more precise and restrict licence conditions to those that are relevant to broadcasting, and that serve the objectives of the national broadcast policy.[14]

Under Articles 8-11, the Agency will supervise all broadcasting activity, including observance by broadcasters of licence conditions. It may issue recommendations and instructions with regard to the implementation of the law in general, but also with regard to individual broadcast programmes. In addition, the Agency may receive complaints from the general public and it will have the power to impose a warning, reprimand or fine. Finally, it may suspend or revoke a broadcast licence. Article 11 requires that fines are issued only after warnings and reprimands have proved ineffective.

The draft Law does not specify the circumstances in which licences may be withdrawn. While Article 47 at first blush appears to state an exhaustive list of grounds for licence withdrawal, it provides an important loophole under the seventh bullet point by stating that licence withdrawal may take place "in compliance with this law and regulations based upon it.". Article 48 empowers the Broadcast Agency

[14] See *Access to the Airwaves*, Principle 22.

to draw up a 'special regulation' dealing with licence withdrawal, but again without stating grounds. This appears to leave the Agency with considerable discretion on this crucial matter.

Furthermore, while a broadcaster whose licence has been withdrawn may appeal to an administrative court, there is no procedure to appeal fines. Given that the law does not prescribe an upper limit for fines, which may therefore turn out to be substantial, this is also an oversight.

Finally, the complaints procedure outlined under Article 10 allows for the submission of complaints about 'the activities of broadcasters' without narrowing the scope of the complaint to the remit of the law or regulations adopted under it. This leaves a very broad and open-ended procedure. While the sanctions that may be issued are linked to observance of licence conditions and the law in general – with the notable exception of licence withdrawal – this still leaves the Agency a considerable margin of uncertainty in the consideration of complaints.

Recommendations:

- The draft Law should restrict appropriate licence conditions.
- The draft Law should provide an exhaustive list of circumstances under which a licence may be suspended or revoked.
- The draft Law should allow broadcasters to appeal a fine.
- Complaints should be admissible only if they fall within the remit of the Law or regulations adopted under it.

Privileged access to special events

Article 57 of the draft Law prohibits television stations whose programme coverage does not extend to at least 85% of the population from acquiring exclusive rights to certain important events, a list of which is to be drawn up by the Agency. This would presumably apply to sporting events, such as the Olympic Games, and other events of national importance.

This provision is designed to ensure that the majority of the population will be able to view these events, which is 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 57 does not prevent networks or other groupings of television stations which cover the whole country from acquiring exclusive rights to the listed sporting events.

Omissions: satellite and digital broadcasting, issues of convergence
Finally, the draft Law contains a chapter on cable, satellite and MMDS delivery systems. We note that Article 71, the sole provision dealing with satellite distribution of broadcast signals (ie ownership of the broadcast platform), is very summary, mandating the Broadcast Agency to draw up all conditions, procedures and fees. The Law does not provide any guidelines with regard to appropriate conditions. This leaves the Agency with an excessive amount of discretion in this important policy area.

On a related matter, we note that the draft Law does not address the issue of digital broadcasting or matters of convergence between broadcasting and electronic communications generally. Given the speed of developments in this area, it is important that consideration be given to drawing up appropriate policy guidelines.

Recommendations:

- The draft Law should provide guidance on appropriate licence conditions for satellite broadcasters.
- Consideration should be given to including issues of digital broadcasting and convergence in the draft Law.

The draft Law on Public Broadcasting Services

The draft "Law on Public Broadcasting Services 'Radio of Montenegro' and 'Television of Montenegro'" aims to transform the existing state broadcaster into a 'true' public service broadcaster "Radio and Television of Montenegro" (RTCG). It will run three national radio channels, three national terrestrial television channels and one satellite television channel. Its programming policy is prescribed under the Broadcast Law together with the draft Law on Public Broadcasting Services, and will be refined in the RTCG Statute; its organisation is provided for in the draft Law on Public Broadcasting Services.

The organisation of RTCG
RTCG will be founded by the Republic of Montenegro. However, all rights of the founder will be exercised by the Council of RTCG, on behalf of the Republic. There will be a four-layered governing structure, consisting of the RTCG Council, Managing Board, General Director and the Directors of Radio and Television.

From a constitutional point of view, the Council of RTCG will be the most important body. The Council will exercise all the rights of the founder on behalf of the Republic. Among other things, it will adopt the RTCG statute, appoint the managing board and approve the appointment and recall of the RTCG Director General as well as of the Directors of Radio and Television.

Articles 15-24 deal with the crucial issue of appointment and rules of membership of the RTCG Council. The number of members is as yet undecided.[15] Members are nominated by a range of different groups and nominations are ratified by Parliament.[16] The procedure for nominations is complicated and to a large extent relies on consent being achieved among the nominators. To some extent, it mirrors the procedure for appointments to the Council of the Broadcast Agency.

Eight nominators – the University of Montenegro, the Montenegro Academy of Science and Art, the Association of Municipalities of Montenegro, the Montenegrin National Theatre , "Museums of Montenegro" and "Montenegrin Film Theatre", the Montenegrin Chamber of Commerce and other employers' organisations, trade unions, the Montenegrin Olympic Committee and other NGOs from the field of sports –will each nominate one member. The Professional Association of Journalists will nominate two members, as will the Montenegrin Helsinki Committee together with other human rights NGOs, while four other groups of NGOs – groups active in the field of the protection of children, youth and family rights, groups active in the field of education, health care and social protection, groups active in the fields of tourism, agriculture and ecology and groups active in the promotion of rights of the members of national and ethnic groups –will each nominate another member.[17]

Article 17 requires the nominators as a group to adopt an 'Act of Appointment' naming all candidate Council members, which is ratified by Parliament. If a nominator nominates more than one candidate member and the nominators as a group cannot agree which one to nominate, Parliament will ratify the nomination of the candidate whose nomination is supported by the majority of the groups.

Article 20 provides that Council Members, although nominated by the different groups and organisations, shall serve independently; they do not represent the nominators. Article 20 furthermore provides that Council Members should be free from undue influence and that they should not take instructions with regard to their work as a Council Member. Their term of office is five years, with the possibility of re-election. Council Members cannot be recalled, except when one of the rules of incompatibility becomes applicable (see below), or when they for any reason do not fulfil their duties without a valid reason for a six month-period or a total of six months within a year, or when they resign or die. A decision to recall a Member has to be taken by a two-thirds majority of the other Council members and must be ratified by Parliament.

Finally, Article 24 provides for a number of rules of incompatibility, excluding from Council membership all members of national and local parliaments, RTCG employees, Government ministers and officials, officials of political parties, radio and TV producers or their employees or stakeholders or members of managing bodies as well as persons convicted of an offence against official duty corruption, fraud, theft, another offence that would render them 'unworthy of performing public duty' or another offence for which they received a sentence of six months or longer.

<u>Comments</u>

[15] This is left blank in Article 13.
[16] Article 15.
[17] Article 16.

Length of tenure of RTCG Council Members
ARTICLE 19 welcomes the requirement that Council Members should not sit as representatives of the nominating groups. This will enhance their independence. We note that the term of office is five years, with the possibility of re-election. As with the Broadcast Agency Council, we would however recommend that the first round of appointments should however follow a staggered system; some members being appointed for two or three years, and others for the full five-year term. This will prevent having to re-elect an entirely new Council every five years.

RTCG Council – Rules of Incompatibility
While the rules of incompatibility provided in Article 24 are of the kind normally found in broadcasting laws, the exclusion under bullet point six for all those who have been convicted for an offence against official duty corruption, fraud, theft, another offence that would render them 'unworthy of performing public duty' or another offence for which they received a sentence of six months or longer is unduly restrictive. First, as in the draft Law on Broadcasting Law, the phrase 'unworthy of performing public duty' is highly subjective and therefore open to abuse on political grounds. Second, while exclusion for membership for those who have been convicted of a violent crime or a crime of dishonesty is common, such an exclusion should not be perpetual. ARTICLE 19 recommends that once five years have passed since the sentence was discharged, an individual should again be eligible for Council membership.[18] We note that the draft Broadcasting Law does provide for this.[19]

RTCG Council – Appointment procedure
As with the Agency Council, we note that there is no formal requirement for the appointments process for the RTCG Council to take place in public. While a significant amount of transparency is achieved by involving some civil society organisations in the process, we believe that this can be further enhanced by including this as a formal requirement in the draft Law.

Recommendations:

- A staggered appointments system should be introduced for the first round of Council Members.
- The rules of incompatibility for Council membership should be redrafted along more objective lines.
- The disqualification for persons convicted of a criminal offence should be lifted after five years has passed since the sentence was discharged.
- The draft Law should require the appointments process to take place in public.

Funding
Under Article 9 of the draft Law, RTCG will obtain its funding from a variety of non-political sources, including a subscription fee, part of the tax for car stereos, production and sales, advertisements and sponsorship, and the organisation of concerts and other events.

[18] See "Access to the Airwaves", *op. cit.*, Principle 13.3.
[19] Draft Broadcasting Law, Article 15.

These are all usual sources of income for public broadcasters. However, Article 9 also lists the Republican Budget as one of the sources of income. Article 10 of the draft Law (and Article 99 of the Broadcasting Law) specify a number of categories that will be funded from the Republican budget, including information in Albanian and other minority languages. ARTICLE 19 is concerned that this may introduce a political element into programming policy on minority issues. This is clearly open to political manipulation, if not abuse, and ARTICLE 19 recommends that it be deleted from the draft Law. Minority programming should be a core activity for a public service broadcaster. Financial assistance from the Republican Budget should be limited to non-programming costs, for example technical expenditure.

Finally, Article 3, dealing with the mandate of RTCG, states that it may be involved in other activities, which contribute to "more complete use of the enterprise capabilities". To the extent that this will allow RTCG to engage in commercial (and potentially lucrative) activities such as pay-TV, the draft Law should make it clear that public funds should not be used to finance this.

Recommendations:

- All funding for minority programming should be acquired from non-political sources, such as subscription fees;
- Financial assistance from the Republican Budget should be limited to non-programming costs, for example technical expenditure;
- Public funds should not be used to finance the commercial activities of RTCG.

Accountability

The only provision in the draft Law dealing with the important issue of accountability is Article 6, which states that RTCG's accountability to the public "shall be realised through … the obligation of RTCG to inform the public about the results of its activities, at least once a year". RTCG is also subject to the overall supervision of the Parliament which may dissolve the Council and impose temporary measures if the Council fails to carry out its tasks for a period of six months.

In our view, this accountability mechanism is not sufficiently detailed. As a public service broadcaster, RTCG is under a number of strong obligation to provide programming that is relevant and of interest to all citizens of Montenegro.[20] To this end, it will receive a significant amount of public funding, and the public is entitled to be kept fully informed of how these funds are spent. The Law should therefore require the RTCG Council to submit to Parliament a far more detailed Annual Report, reporting both on financial and organisation aspects of the running of RTCG but also on how RTCG has fulfilled its programming obligations. In addition to this system of parliamentary accountability through annual reports, some countries ensure that the public broadcaster is directly accountable to the public through public reviews. In the UK, for example, the BBC is under a statutory obligation to hold periodic public meetings and to conduct surveys.

[20] See Articles 7 and 9 of the draft Law on Public Broadcasting Services, and Article 94 of the daft Broadcasting Law.

Recommendations:

- RTCG should be required to place a detailed Annual Report before Parliament;
- Consideration should be given to including in the draft Law a requirement that the public broadcasters keep themselves under constant public review.

Content restrictions: election broadcasting

Under Article 98 of the draft Broadcasting Law, RTCG is prohibited from publicising the results of public opinion polls from seven days before the voting is due to take place. While it is a common requirement for all broadcasters in many countries not to publish poll results the day before voting, the prohibition in Article 98 applies only to the public broadcaster. This is discriminatory; there is no similar restriction on private broadcasters, who will be allowed to publish results up until and even on the day of voting.

Recommendation:

- Any prohibition on the publication of poll results in the days leading up to an election should apply to both private and public broadcasters.