



Ministry of Education,  
Science and Sports

**INTERNATIONAL WORKSHOP**

**LEGISLATION IN THE FIELD OF  
BROADCASTING –  
PUBLIC SERVICE AND COMMERCIAL  
BROADCASTERS**

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# PART I

## FOREWORD

*Majority of societies in transition require the entire broadcasting system to be created anew and an active policy to be designed if broadcasting is to enjoy the benefits of suitable legal framework and to serve the needs and interests of the country in question. Establishment, maintenance and fostering of independent, pluralistic and free broadcasting – where free broadcasting implies freedom from censorship in particular – are essential for development and preservation of democracy.*

Although the basic principles of broadcasting regulation are universal, they (will) probably still vary from one country to another, depending on cultural diversity, political and historical conditions and, ultimately, on how developed broadcasting is. Not only the advancement democracy but even the size of the country, economic situation, linguistic problems etc. must be taken into consideration in drafting new broadcasting legislation since all these factors have a bearing on legal framework. Ideal audio-visual landscape should be diverse so that it includes public service, commercial broadcasters and both local and regional broadcasters.

Most transition countries are yet to complete the transformation of state broadcasters under political control into public service. One of the most important objectives of this process is greater independence from the state, particularly from the government. As long as broadcasters are being subsidised by the state, the state will try to exercise its political power over the broadcaster and not only in terms of programming but also the structure of management and editorial board.

Despite certain progress in some Southeast European countries, media in most of them are however still subjected to the control by government and other political forces and freedom of press has not yet been achieved. This is why this particular workshop on legislation as a shield of free and independent broadcasting was designed .

The Workshop, held 11-12 May 2001 at Bled in Slovenia was organised by the Office of Slovenian National UNESCO Commission (within the UNESCO Participation Program 2000-2001), Broadcasting Council of the Republic of Slovenia, Institute of Media Law Ljubljana and Media Plan Institute Sarajevo, and in close cooperation with the Stability Pact for Southeast Europe through Slovenian Ministry of Foreign Affairs.

The Workshop was attended by media experts and representatives of independent media and agencies from the countries recipients under the Stability Pact, and experts from some donor states within the Stability Pact.

The Workshop aimed at presenting respective legal arrangements implemented by some EU countries as well as European standards, laid down by European conventions and Directives. In addition, participants sketched out the current state of affairs regarding media legislation in their respective countries. This helped outline a basic model, containing the most important elements of democratic legislation in the field of (public) broadcasting, which could be used in the countries of the region. All issues regarding the status, funding and the purpose of public service broadcasting were particularly attended to as well as protection of media competition, the role played by independent regulatory bodies in the broadcasting field and regulation of satellite TV.

Most importantly, the participants adopted Recommendations to serve as guidelines to the lawmakers in the states concerned, thus helping them to join European family of democratic societies.

Now that experts have worded their views and suggestions, the ball is in the court of politicians. Parliaments must have the ultimate responsibility not only in the sense of establishing the appropriate legal ground for broadcasting but also in the sense of guaranteeing implementation of laws.

Editor

**INTERNATIONAL WORKSHOP: LEGISLATION IN THE FIELD OF  
BROADCASTING – PUBLIC SERVICE AND COMMERCIAL BROADCASTERS**

**Zofija Klemen - Krek**

Director of the Office of Slovenian National UNESCO Commission and the Secretary-General of the National Commission

Media sphere in the countries of Southeast Europe is undergoing a major change: new media systems are emerging, previously state-owned media are being privatised, new independent media outlets have appeared, new legislation is being drafted. Despite all this however, governments and certain political forces still aspire to control media and full freedom of press has not yet been achieved.

Objectives of this Workshop have therefore been:

1. to present legislative arrangements devised in some European countries, EU members, to representatives of different independent research centres and media outlets from Southeast Europe,
2. to sketch out the current state of affairs concerning media regulations in the countries of Southeast Europe by participants of the Workshop representing these respective countries,
3. to devise jointly a basic model, with the most important elements of democratic media legislation, which could be applied in the countries of this region.

All three objectives are strongly stressed in the UNESCO Programme 2000-2001 and are closely related to the overall objectives of the Stability Pact. The organisers had therefore decided to link the objectives of both organisations through the Workshop. Independent research and consulting centres in the field of media, representatives of independent media and agencies, a number of independent experts and representatives of public broadcasting were invited to participate in the Workshop. They represented the following countries, all recipients within the Stability Pact: Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia, Moldova, Romania, Federal Republic of Yugoslavia. Participants representing donor countries within the Stability Pact came from Slovenia, Hungary, Slovakia, the Czech Republic, Poland, Austria, Germany and Italy.

We also had a special pleasure to welcome the President of the UNESCO's 30<sup>th</sup> General Conference Senator Jaroslava Moserova and Vladimir Gai, UNESCO's programme specialist in the field of broadcasting. Apart from general recommendations of the Workshop, special recommendations were made to the Director-General of UNESCO, inviting him to attend to this important field and to the countries in Southeast Europe.

## ***INTRODUCTORY ADDRESS***

**Jaroslava Moserova, M.D., Ph.D., D.Sc.**

Associate Professor at the Charles University in Prague

President of the General Conference of UNESCO

Dear President, dear friends,

I am speaking on behalf of UNESCO, and my presentation must necessarily include a global approach to the problem and not only European approach, though European aspects are of great importance to us, and I shall come down to them eventually. But from the global point of view in UNESCO, the media in the past have mainly been judged or evaluated from the viewpoint of freedom and independence. This has been because there are still many countries in the world where there is no independence of the media or where freedom and independence are very limited, though the countries concerned present themselves as democratic. However, notwithstanding the fact that they are democratic, the democracy doesn't reach so far as to ensure true independence of the media. I think that is particularly true of some countries, which emerged from totalitarianism. During the last general conference of UNESCO, in fact – during all the general conferences but mainly during the last general conference in 1999 when I was elected, I had a chance to listen to heads of all delegations. One hundred and eighty-six of them attended the general conference, all coming from countries of different cultural and historical background, with different standard of living, countries with very varied problems and difficulties. Yet there was one thing that all agreed upon.

Every single country represented at the conference found that the most powerful tool – for better or for worse – was education. And by education they mean both acquisition of knowledge or skills and acquisition of civic virtues. Both. There is no doubt that in most countries of the world the government, as well as UNESCO, can influence the concept of curricula and quality of education.

But what we cannot directly influence are the media, because they are or should be independent. They are certainly the most powerful instrument, which may exert influence over the public. It has been repeatedly stated that the greater the influence of the government, of politicians on the media, the greater is the danger of hate campaigns, of petrifying prejudices being passed on from one generation to another. I think that some of the countries, represented here today, know very well what I am talking about. Thus the legislation should ensure that hate campaigns are not part of TV or radio programming or press. From the global aspect though it is essential to bear in mind how important is the very access to the media, access to the possibility to communicate. In some Asian and African countries there is actually no such access in isolated communities that have no contact with their sophisticated capitals, that have no other means, no other possibility of contact than radio, for instance. So from the global aspect, as I said, it is important to devote UNESCO's energy and, if possible, also its resources, to make communications possible in those countries where the only way to reach isolated communities is through the radio and especially established community radios. I just wanted to make you aware of this.

Now I shall return to the problems on European scene of which we are a part and some of us aspire to join the European Union. It is necessary to stress that norms, which have been set up by the Council of Europe and EU, are good norms and they, when applied to our national legislation, should improve the situation. These norms, one of them being the European Convention on Transfrontier Television, ensure that all the broadcasters – not only the public broadcasters but also the private ones, follow certain essential and fundamental rules. I am sure that those of you who are experts (Mr. Gai, I am very glad to have you here from UNESCO) will fill in the gaps, which I might leave behind. Anyhow, I am again stressing the point that basic rules by European standards apply to all, not only to public broadcasters but to all broadcasters, and it is to our advantage to apply them. Let me point out one interesting detail, which has really nothing really to do with UNESCO. As, apart from my office in UNESCO, I am a senator in my country, I was a rapporteur in my Senate Committee yesterday, I was

required to report on the new law on TV and radio broadcasting. Next week we shall be discussing this law, which I will present, again as a rapporteur in the plenary session, so I welcome all suggestions which can originate from our debate because we'll be passing a decision on this bill next week.

At this point I should also like to say that we should never be Euro-centred. Euro-centrism is very dangerous. We must not ignore the rest of the world and its needs, and we must seek how we could help them. If I may again turn aside from the main topic: I recently went on an UNESCO mission to West Africa. I visited Senegal, Côte d'Ivoire, Ghana and Sierra Leone. It is obvious that what they need more than anything is education in the field of media, and they would welcome teachers from abroad or any kind of international support, but they mainly need the support for radio in order to start community radios as they happen to be the farthest reaching media (I am sure that Mr. Gai will comment on this).

I shall now move on to the Transfrontier Television. It deals with programme services, embodied in transmissions. The purpose is to facilitate transfrontier transmissions and retransmissions of TV programming. And here again I stress that this Convention shall apply to any programme service transmitted or retransmitted, any, which means also the private ones. The parties should ensure freedom of expression and information in accordance with Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

As to the duties of the transmitting parties, each transmitting party shall ensure by appropriate means and through its competent organs that all programme services transmitted by entities or by technical means within its jurisdiction, and in the spirit of Article 3 which I quoted before, complies with the terms of this Convention. What is also important is that the information about broadcaster shall be made available upon request by competent authorities of the transmitting party. The ownership of the media should be transparent because what happened in a number of our countries is that the owner of a newspaper or a radio station or a TV channel is sort of hazy. I don't know whether you have the same experience but it happens. Transparency of ownership is therefore also insisted upon by this document. All items of programme services concerned shall respect the dignity of human being and fundamental rights of others. It is very difficult to outline how far one can go. Particular programmes shall not be indecent, and they shall by no means contain pornography or give undue prominence to violence or be likely to incite racial hatred. All items of programme services, which are likely to impair physical, mental or moral development of children and adolescents should not be scheduled before late night. This is important, and here is the question that I would like to ask you – what do you consider the safe hour in the evening when such programmes can start? What in your opinion is the time when these programmes can be broadcast? I would very much welcome your opinion. We have so far 10 o'clock in the evening but things are changing, parents very often go out in the evening, so I wonder whether 10 o'clock is not too early. Then there is another thing about violence and undue violence in the media and promoting violence in particular. It is almost impossible to comply with this particular issue. That's one of the things we were talking about with the president of this country (to my great pleasure), because if you really think, if you were to be strict in this aspect, you would have to ban all Sylvester Stallone's or Schwarzenegger's movies. You can't do that, at least I doubt it very much. I've been concerned about this problem a lot, and it is now beyond any doubt that violence on the screen does exert negative influence on the very young and children. But what I think is more harmful than anything is not violence itself but the fact that violent acts and destruction of property, killing, are done by positive heroes, so-called good guys, that is - the characters which are presented as setting an example.

On the other hand, both the media and entertainment can exert positive influence. You may have noticed in American movies, and I am sure it is intentional, that very often the boss is an African American whilst employees are white Americans. If you keep repeating this, you get used to the idea, used to the fact, and why not? You may also notice that very often women are in top positions in American movies. I am sorry to say I smoke and many of you smoke too, but you may have noticed that in the movies done in the last 10 years, whenever a character lights a cigarette, you can be sure that this particular character is the villain, a bad guy. This also has some impact.

These are the facts, which have to be taken in consideration. The document, which I am quoting from, also includes the right to reply. The right to reply has to be possible and incorporated into legislation. If someone feels that s/he has been wronged against, if someone can prove that facts were distorted, s/he has to have the right of reply, and this has to be regulated but not in disproportion with the offensive statement. The broadcaster must also observe rules of the game. The broadcaster should broadcast the reply at the appropriate time, but whoever replies must not exceed the factual limits of the reply. The reply has to be to the point and not exceed the original offensive statement. There have to be some limitations, and this is easily forgotten. There has to be the right to reply, but it has to be regulated very carefully.

The document also deals with advertisements, that is – commercials, and the fact that persons who actually work at TV, reporters, commentators and others, must not be acting in advertisements and commercials. That is clear as well. The document also deals with all regulations on commercials, the percentage of advertising time, nature of advertising, etc. I don't know whether you have any problem with erotically suggestive commercials. There again is the question what time at the night they can be broadcast. Are they or are they not pornography? I mean, I have not seen in most of the well-anchored democracies as many erotic commercials as on our TV. So this is another important issue for discussion.

Sponsored programmes should not be influenced by sponsors under any circumstances. This is also provided for, and it is important that the contents and scheduling of sponsored programmes may not be influenced by the sponsor so as to affect the responsibility and editorial independence of the broadcaster in terms of programming.

Sponsored programmes must not encourage the sale, purchase and rental of products or services of the sponsor. This must not be overlooked. Sponsorship of news and current affairs programmes should not be allowed. This however does not apply to weather forecast.

These are some of the points, which may be of interest to you. European standard setting instruments establish rules of good conduct in many areas and many parts of our life, of our business and other. In countries that are emerging from totalitarianism, private enterprises and private broadcasters are something absolutely new, and our democracy is young. We need the rules.

In many countries democracy is perceived as a system in which everything is permitted, everything is allowed. I usually say that under the former regime we lived like animals in the ZOO. We were sure to have a roof over our heads, we were sure to have enough to drink, we were sure to have enough to eat, we were safe behind the bars, and we knew that our space within which we could move was limited so no one could get out. But this was still some kind of security. If you open up the ZOO, wild beasts and predators are the first to exercise the newly found freedom, and they are bound to be doing well on their own. Those more timid and defenceless animals have a tendency to hide in corners, in the shade, and some of them even think that perhaps it wasn't so bad behind the bars, because they forgot the lack of dignity and the stanch of the ZOO.

Well, I would like to leave enough time for some questions, but I would first call your attention to a committee of UNESCO, which is not so well known in some countries, and that is a committee which has a very innocent sounding name: Committee for Conventions and Recommendations. Committee for Conventions and Recommendations is in fact a human rights committee that deals with violations of human rights and basic freedoms in areas of UNESCO's competence. As I was a member of this Committee for 4 years, I know that it mostly deals with cases involving journalists and teachers, but mainly journalists, who have been either prosecuted or imprisoned. The advantage of this committee compared to other human rights agencies is that anyone can complain on any person's behalf. Thus, any one of us, any group, any individual can complain concerning any specific case. When a complaint arrives, the Committee can act immediately, it can write immediately to the government concerned, asking for explanation or at least a commentary. The Committee needn't wait till the so-

called "domestic remedies" have been exhausted because all of us know that there are countries where no such a thing as "domestic remedies" functions. The Committee is effective thanks to the fact that its findings are not being published, so that the country concerned doesn't lose face. This is important to know.

Well, I am looking forward to your comments because I have been selfishly talking so far, and I now hope to benefit from your views and experiences.

## *WELCOME ADDRESS*

Ambassador

**Jožica Puhar**

Stability Pact and SECI National Coordinator

Ljubljana

Thank you very much, Madame Chairperson,

First, I would like to greet you all here in Slovenia, to welcome you and to wish you all the best in your Seminar, held in these beautiful surroundings here, among green trees and white mountains. I hope that you will have some time off to take a walk around the lake. I would like to greet you also on behalf of the Ministry of Foreign Affairs of the Republic of Slovenia, where the coordination for the Stability Pact is located.

I would not like to bore you because I know that you are all well informed, and you know very well what the Stability Pact for Southeast Europe is all about. Still, I have to mention some Slovenian obligations and particularly *attitudes* concerning the Stability Pact. I would like to say that Slovenia sees the Stability Pact as a very comprehensive and appropriate mechanism to incite and to achieve necessary changes, which make the goals set by the Stability Pact as soon as the Pact came into being. We have now also seen the first concrete results of the Stability Pact, nearly 2 years later, although people in South Eastern Europe surely had much higher, while not necessarily realistic, expectations. But we must bear in mind that many projects and initiatives launched within the Stability Pact are bound by common administrative time-consuming procedures, particularly in terms of disbursement of collected funds and financial limitations. Due to these limitations, many a short-term project is running somewhat behind the schedule. But I hope we can now see that the Stability Pact is effective after all.

Another thing I would like to touch upon is the interest, or rather the mission, of Slovenia in the Stability Pact. Slovenia has a very fortunate position; it is geographically a part of Central and East Europe while sitting on the northern end of South Europe. At the same time, it is a country that sees itself as a European country, but also a country that has many historical ties with its southern neighbours. We are politically and geographically located here, and it is our strategic interest that the situation in Southeast European countries is stable and secure, that these countries are economically developed, acting as part of global international community. Most importantly, we want to see them prepared to join the European Union in the near future, which is our ultimate common goal. At the moment, Slovenia endeavours to be fully prepared to step into the EU. Slovenia, as you know, is an associate member of the EU. We are well prepared, and we hope that our full EU membership will happen in the near future.

Apart from these strategic interests and our concerns relating to Southeast European countries and their development, I would also like to acquaint you with what we are doing. We are active donors in the Stability Pact, and we have the lead in a lot of projects. We are also financing and co-financing these projects. But due to limited human and financial resources at our disposal, we are often looking for other participants in our projects and initiatives, we seek other interested parties to co-operate with us. In this sense, you will sometimes find Slovenian projects among projects submitted to the Stability Pact or presented at donor conferences. But this is more an exception than a rule. Normally, we are financing and co-financing the projects we are taking part in. We contribute to the Stability Pact also through our expertise. We transfer our experience with transition, our knowledge and know-how, but also the experiences with preparations for the EU membership. We have very rich experiences and in a way we feel that it is our duty to share it with countries of SEE, which are now at the stage of approaching the EU or in the process of numerous transition reforms. And thanks to our experiences

and our strong desire to share them with others, you can find among Slovenian programs a lot of bilateral, trilateral, quadrilateral etc. programmes, which are not directed to all SEE countries but to some particularly interested groups of countries or institutions. Some of them are not even implemented within the Stability Pact. A lot of projects, which are implemented by Slovenia, are therefore projects of bilateral, trilateral etc. nature.

And now, addressing you directly, as participants of this seminar, I have to highlight the following issues regarding your field of work: the media problems are placed within the competence of the Working Table on Democratisation and Human Rights. Right now, in the first six months of year 2001, Slovenia is co-chairing this Working Table, and the plenary meeting of this Working Table is due to take place in Portorož this coming Monday and Tuesday. And there is also a great meeting of NGOs at Brdo pri Kranju tomorrow, envisaged as a preliminary meeting, which will hopefully be a great contribution to the plenary meeting of the Working Table on Democratisation and Human Rights. This Working Table is very interesting but also very demanding. I do not want to say it is difficult. But it concerns the most delicate area of all areas covered by Stability Pact. Normally, tangible results can be seen, and expected, only after some time. But given the facts of reality, we have great difficulties in persuading donors and financial institutions that task forces within this Working Table and their initiatives or projects are no less important, or better said, are equally important as projects and initiatives within the Working Table for Security Issues or within the Working Table for Economic Reconstruction and Development. And at this meeting in Portorož we shall tackle a difficult task of persuading donors that we can move on using all our energy, our political will and our experiences and that we cannot let some Task Forces remain dependent on interests of some particular groups, people, or perhaps some particular countries. This is one of our duties; the other one is to achieve, if possible, a sort of consensus about our future priorities, on the basis of recently drafted criteria.

In this sense, the media are one of the strategic priorities within the Working Table on Democratisation and Human Rights. I personally believe, and this is a very strong conviction of mine, that the media significantly contribute to democratisation process and also to protection of human rights, refugee return, necessary education reforms, assurance of equal gender opportunities. I am very pleased that the Media Task Force is also on the list of priorities, second only to the refugee return initiative. In this respect, we need to be influential enough and to have enough strength to persuade all interested parties – the donor countries and financial institutions in particular – that refugee return cannot be a definite and long-term solution without a proper climate created *inter alia* by media. Additionally, it cannot be a long-term solution either if we lack favourable economic conditions for decent existence and work, good inter-ethnic relations and protection of minorities, etc. These are the main targets of our endeavours.

I do not want to bore you, as I said at the beginning, so I shall now just wish you a lot of success, and I hope your work on media legislation will prove very effective. I will just take this opportunity to inform you that we are now preparing a quadrilateral meeting – a follow-up of the meeting which was organized in September 2000, attended by Italy, Hungary, Slovenia and Croatia – to examine the status of media after political changes in the Federal Republic of Yugoslavia.

Thank you very much, and I wish you all the best.

# ***PART II***

## ***PUBLIC BROADCASTING LEGISLATION: BASIC REQUIREMENTS<sup>1</sup>***

### **Dr. Werner Rumphorst**

Director, Department of Legal Affairs  
European Broadcasting Union  
Geneve

Public service broadcasting is a unique concept. Although easy to understand, it is more often than not misunderstood, sometimes profoundly, sometimes even intentionally.

### **WHAT IT IS NOT**

Some languages do not even have a term fully corresponding to the English word “public”, and the closest translation appears to confer the notion of state/government/official. Where this is the case, in a country that has had a tradition of state broadcasting, this linguistic barrier constitutes the first obstacle to clear understanding of the real nature of public service broadcasting (which is anything but “state”, “government” or “official” broadcasting).

Especially in countries with a long tradition of commercial broadcasting, public broadcasting is often referred to as “state-funded” broadcasting, with the underlying implication that it must be close to, if not a mouthpiece of, the government.

In former Socialist countries, there is a widespread notion of public service broadcasting being a type of broadcasting which, while continuing to be a sort of official broadcasting, is not controlled by the government (or the Communist Party), but by the democratically elected majority in the parliament. In other words, those who hold the political power also control “public service” broadcasting, the difference being that those in power today have democratic legitimacy.

Others still consider naïvely (but sometimes not so innocently) that public service broadcasting is a minority service, meant to fill the gap which commercial broadcasting – for perfectly valid economic reasons – leaves open. Whether the motive is bad conscience or the desire to marginalize a potentially powerful competitor, the resulting concept of this type of “public service” broadcasting is the same: a minority service, with emphasis on culture and religion and whatever else may be desirable for society but will not be touched upon, at least in the same serious manner, by commercial broadcasters.

### **BROADCASTING FOR THE PUBLIC**

What, then, is public service broadcasting?

As the name itself intimates, public service broadcasting is broadcasting

- made for the public,
- financed by the public,
- controlled by the public.

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<sup>1</sup> INTRODUCTORY NOTE from the *Handbook: Model Public Service Broadcasting Law*, dr. Werner Rumphorst. Full text of the Handbook is available on [www.mediaonline.ba](http://www.mediaonline.ba)

The “public” here is the entire population of the country (or region) which the public broadcaster is responsible for serving.

“Entire population” has a twin meaning:

- Firstly, in terms of *technical* coverage, it means that ideally every household in the service area should be in a position to receive the programme service. This is akin to the *universal service* concept, which is familiar in other – result-oriented – public services such as water, gas, electricity, telephony and public transport.
- Secondly, it means that all groups and sections of society: rich and poor, old and young (and in-between), educated and less well-educated, people with special interests (be they cultural, religious, scientific, sporting, social, economic or anything else), but also society as a whole, i.e. the entire population in this sense, must be served by public service programming (even though it is impossible to please everybody all the time).

If, speaking in positive terms, public service broadcasting is made for the public, for the entire population, it follows, in negative terms, that it is not made for the government, parliament, or president, for a political party or a church or for any other (private) interest group or shareholders. It must be *independent* of all these, serving “only” the interests of the population, that is – people as citizens rather than as consumers.

## **PUBLIC FUNDING OF PUBLIC SERVICE BROADCASTING**

Except where the public broadcaster is in a monopoly or quasi-monopoly position, and where furthermore the size of the national population is fairly significant, public service broadcasting cannot be funded from commercial revenue alone. An example of such an exceptional situation was Spain, where prior to the introduction of regional broadcasting and, subsequently, national commercial television in the 1980s, the national public broadcaster RTVE held a television monopoly.

In some cases, public service broadcasting draws no revenue from advertising/sponsorship. Apart from relatively negligible “other income” (e.g. from programme sales and publications), the sole source of revenue is the licence fee. Under this system, a receiving licence fee must be paid for every set, which is technically in a position to receive broadcast programmes. The BBC (United Kingdom) is probably the best known example of a public service broadcasting organization funded purely by the licence fee.

In most cases, there is mixed funding, i.e. both licence fee income and revenue from advertising/sponsorship, where the former is generally predominant. This is the situation in the vast majority of (West) European countries.

Instead of the licence fee, there may also be public funding through an annual allocation from the state budget. However, a closer look will reveal that more often than not the broadcaster is in reality a state broadcaster, rather than a truly independent public service broadcaster.

## **LICENCE FEE FUNDING**

Licence fee funding, as opposed to funding from the state budget, has several decisive advantages:

Firstly, it means that the broadcaster is independent of the political good will of those who decide on the amount allocated from the state budget. Programming, and particularly coverage of political affairs, does not have to please those in power as a (tacit) pre-condition for actually being granted the requested sum. However, since the amount of the licence fee, and in particular its periodic adjustment (increase), also needs to be decided upon by some official body (normally the Parliament or the Government), great care must be taken to ensure through

appropriate legal means that as far as humanly possible the decision is taken in an impartial manner, solely on the basis of objective needs of the public broadcasting organization to fulfil its public remit.

Secondly, licence fee funding, and the income to be expected therefrom over a given number of years, is considerably more predictable than an annual allocation from the state budget. This is vital for medium- and, even, long-term planning and strategic investment.

Thirdly, as long as there is funding from the state budget, the broadcasting organisation is likely to be a state company, with all the implicit constraints. In particular, the broadcasting organisation is probably bound by a state salary structure, which is a critical handicap in a system where there is direct competition with commercial broadcasters. Where there is licence fee funding, it may be assumed that the broadcasting organisation also has the right of self-administration (whilst naturally being subject to public control).

Another major advantage of licence fee funding is that an important psychological link is established between the licence fee payer, the citizen, and the public service broadcaster as the recipient of the payment. The citizen knows what he or she is paying for and appreciates its value. The broadcaster is continually aware of whom the programming is made for and who ultimately has to be satisfied and pleased.

## **PUBLIC CONTROL OF PUBLIC SERVICE BROADCASTING**

The public is not only the beneficiary of public service broadcasting, and its paymaster, but also its controller. This is only consistent, and it could not really be any other way.

What, then, does control by the public mean?

It means that representatives of the public ensure that the public broadcasting organization actually fulfils its public service mission in the best possible manner.

## **BROADCASTING COUNCIL**

These representatives of the public, grouped together in what is normally called a Broadcasting Council (which may either be a body of the broadcasting organisation itself or a separate independent body), play a role comparable to that of shareholders in a company. They may be appointed in different ways, with two distinct models prevailing:

- The first model authorises identified institutions and groups of the civil society to delegate a representative of their own choice to the Broadcasting Council, for a definite time period (e.g. four years). Some of those institutions and groups are churches, universities, theatres, authors, journalists, musicians, farmers, women, young people, sports federations, environmentalists, employers, trade unions, etc.
- The second model proscribes a fixed number of members (e.g. nine or twelve) appointed by the parliament or by several public institutions (e.g. one-third by the parliament, one-third by the government, one-third by the president). Since the members of the Broadcasting Council are to represent interests of the civil society, great pains must be taken to ensure that they do not in reality represent political views and interests of those who appointed them.

Broadcasting Council has three major functions:

- Appointment of the Director General, who is the chief executive officer of the organization and bears ultimate responsibility for all programming;

- Appointment of a Board of Administration, with control- and decision-making powers in the fields of administration and finance;
- Monitoring of programming, with the possibility of recommending, and even insisting on, modifications.

If, to summarize, public service broadcasting means broadcasting for the public, and is financed by the public and controlled by the public, what, then, is the specific programming remit of a public service broadcaster?

### **THE PUBLIC SERVICE PROGRAMMING REMIT**

Details of the remit vary from country to country, perhaps due to different legislative techniques and habits, but also, in particular, owing to economic, social, cultural, historical and other realities prevailing in every individual country. Even so, there is a core of common features, which are universally valid.

Both the Council of Europe (the Prague Ministerial Conference of December 1994) and European Parliament (of the European Union) have identified this core of common features in important resolutions, quotations whereof speak for themselves.

### **THE PRAGUE RESOLUTION:**

- ❑ “Public service broadcasting, both radio and television, supports the values underlying the political, legal and social structures of democratic societies, and in particular respect for human rights, culture and political pluralism”
- ❑ “Importance of public service broadcasting for democratic societies.”
- ❑ “Vital function of public service broadcasting as an essential factor of pluralistic communication accessible to everyone”
- ❑ “Reference point for all members of the public and a factor for social cohesion and integration of all individuals, groups and communities”
- ❑ “Reject any cultural, sexual, religious or social discrimination and any form of social segregation”
- ❑ “Forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed”
- ❑ “Impartial and independent news, information and comment”
- ❑ “Pluralistic, innovatory and varied programming which meets high ethical and quality standards”
- ❑ “Not to sacrifice the pursuit of quality to market forces”
- ❑ “Programme schedules and services of interest to a wide public while being attentive to the needs of minority groups”
- ❑ “Reflect different philosophical ideas and religious beliefs in society, with the aim of strengthening mutual understanding and tolerance and promoting community relations in multiethnic and multicultural societies”

## **EUROPEAN PARLIAMENT RESOLUTION**

Much similar language was used in the 1996 European Parliament Resolution. To give only a few examples:

- ❑ “Public sector broadcasting is an aid to informed citizenship, an agency of representative pluralism bringing together different groups in society in a common conversation that shapes public opinion.”
- ❑ “Offer a wide range of quality production in all genres to the whole population”
- ❑ “Set quality standards in popular programmes followed by mass audiences”
- ❑ “Serve minority interests and cater for all different sections of the population”
- ❑ “Provide unbiased and fully independent information, both in mass coverage and in-depth factual programming, capable of earning the audience’s trust and of representing a reference point in the rapidly expanding information market”
- ❑ “Play a major role in encouraging the public debate that is vital for the proper functioning of democracy and provide a forum for debate for all groups and organizations in society”
- ❑ “Ensure that the general population has access to events of general public interest, including sports events”.

As regards *funding* of public service broadcasting, the states that participated in the Prague Ministerial Conference *undertook* “to maintain and, where necessary, establish an appropriate and secure funding framework, which guarantees public service broadcasters the means necessary to accomplish their missions”. Again, similar language is used in the European Parliament Resolution.

## **THE FUTURE ROLE OF PUBLIC SERVICE BROADCASTING**

Finally, the *future* of public service broadcasting follows on from its mission, from its role within and for civil society. The more diversification and individualization of information sources there is, the more audiences become fragmented, the more important it will be to maintain at least one strong service which performs the function of a national point of reference and of national identification, and the role of the market place for public opinion. At the same time, as technology develops (digitalisation, compression, etc.), as additional forms of programme delivery develop (satellite, cable, the Internet), as programme offers (channels) multiply, especially through the addition of thematic channels, and as new methods of funding develop (pay-TV, pay-per-view), public service broadcasters too must be in a position to embrace all these developments so as to continue to serve the public in the most appropriate way, as demanded by the times.

## **CHANCES FOR ITS INTRODUCTION**

In conclusion, is it realistic to assume that even if the nature of public service broadcasting has been fully understood, it will actually have a chance of being introduced where so far it does not exist? Rather than speculating on this, it may ultimately prove more promising to offer at least one major policy argument for each of the two typical situations where the introduction of public service broadcasting would come into question: countries with state broadcasting and countries that have so far had only commercial broadcasting.

## COUNTRIES WITH STATE BROADCASTING

In countries that still have a state broadcasting system, it may not be easy to convince those in power to give up their control over it and to transform it into truly independent public service broadcasting.

However, in such countries democratic ideas and principles may have evolved and matured over recent years, thus putting the *citizen* increasingly at the centre of attention. Democracy starts with citizens, but without broadly- and objectively-informed citizens there can be no real democracy.

Certain countries in Central and Eastern Europe find themselves in this category today, together with numerous other countries in the rest of the world.

The real difficulty here may not so much be demonstrating the virtues of public broadcasting but showing that in the current circumstances state broadcasting cannot possibly make sense any more.

Compared with the time when state broadcasting was introduced, and when it flourished, many countries have a fundamentally different environment today:

- there is global deregulation in the telecommunications field;
- commercial broadcasting has been introduced, or at least tolerated, virtually everywhere, often with little (if any) regulation;
- satellite broadcasting, which knows no national borders, is omnipresent today and is rapidly developing further and spreading (with no restrictions on acquiring the necessary receiving dishes);
- cable distribution of foreign programmes (often including programmes in the country's own language, or at least reasonably understood by a sizeable portion of the population) exists everywhere and is rapidly spreading;
- technical developments, especially digitalisation and compression, offer possibilities for many additional programme channels;
- the Internet, which again knows no national borders, appears to have the potential to carry unlimited numbers of audio and audio-visual programmes.

In this situation, it would be entirely utopian to assume that the state, through state broadcasting, could still influence and control information flow, and thereby people's thinking. Only a relatively small share of the population will make up the audience of state broadcasting (with the majority of people receiving their information elsewhere). But even those who still receive their information from state broadcasting may well be expected to be rather critical and sceptical, not only as a result of experience, but also because of possible comparisons with other sources of information.

Therefore, if it is clear that state broadcasting is no longer viable, the prospects for public service broadcasting as the democratic replacement of state broadcasting should not be too bad.

It certainly takes courage for those in power to install and to live with truly independent public service broadcasting. However, those elected by citizens should remember that they were elected for the sole purpose of serving the best interests of those citizens.

## COUNTRIES WITH COMMERCIAL BROADCASTING

In countries which so far have only commercial broadcasting, it will also be difficult to obtain the necessary support for introducing public service broadcasting, and, in particular, for establishing a system of obligatory licence fee funding, one of the pillars of truly independent public service broadcasting.

However, in cases where broadcasting has functioned in conformity with only the laws of the market for many years, people may increasingly feel the need for something else, for something more. Assuming that to be so (as it was, for instance, in the United States when Public Broadcasting was introduced in the 1970s), the major obstacle may then be the receiving licence fee, since people are accustomed only to “free” radio and television.

Here, the reminder is necessary that *all* forms of broadcasting are ultimately financed by the consumer/citizen, whether it be as a tax payer (state funding), as a consumer of products and services (advertising and sponsorship), as subscriber to a given programme channel (pay-TV) or as holder of a receiving set (receiving licence fee). In each case, the consumer/citizen has no choice; he is obliged to pay.

- When he pays as a taxpayer, he finances the type of programming, which the state has decided to be in the best interests of the state.
- When he pays via advertising and sponsorship (by buying products or services which are advertised on radio or television), he finances the type of programming which the commercial broadcaster has chosen to maximize its audience, so as to maximize its profits.
- When he pays as a subscriber to a given programme channel, he pays for a service which he has chosen as a *consumer*.
- When he pays for broadcasting via the receiving licence fee, he finances a public service provided to him as a *citizen*.

Once it is understood that in the end *all* forms of broadcasting are paid for by the consumer/citizen, why should the citizen be opposed to financing the type of broadcasting which is particularly conceived and made for *him*, rather than to serve the state (i.e. those in power) or private economic interests?

## ***ON THE STATUS AND ROLE OF INDEPENDENT REGULATORY AUTHORITIES***

### **Greger Lindberg**

Chairman of European Platform of Regulatory Authorities

Director of Swedish Broadcasting Commission

Thank you for inviting me here, and also for giving me the opportunity to advertise the EPRA. I will speak about independence of regulatory authorities but I will not try to impose Swedish model on you. I will perhaps seem to be advising you as if I thought that you did not have any regulatory structures at all. That is not my intention, on the contrary. I will just try to give a few hints as to how I think things should be, anywhere. Of course it will be my opinion, not the EPRA's opinion, and not Swedish Broadcasting Commission's view.

I said that I had come here to try and advertise the EPRA, because that is the organisation that I chair. I'll do that very briefly by explaining just what it is. The EPRA stands for European Platform of Regulatory Authorities. I always maintain that there should be a B there somewhere, a B for broadcasting, because this is a co-operation scheme for broadcasting regulators. We have 39 members from 32 countries,<sup>2</sup> and the numbers may indicate to you that we do not all do the same thing, because there are more members than there are countries – we have a couple of countries with double membership and even triple – the United Kingdom, for example.

This is indeed a very heterogeneous group. It is heterogeneous in size – certain regulators, Turkish regulator for example, have several hundred people employed, the ITC in London has got a couple of hundred, the CSA in Paris has got a little more, and Polish regulator just slightly fewer while, if you look at Slovenia or Scandinavian countries, you have a handful of staff at best. But they don't vary only in size; they vary of course in their remit, in what they do. Some organisations are licensing bodies, they award licences for broadcasting purposes, some do not; some, but not all, deal with the monitoring of various advertising regulations, both European and national ones. Protection of minors is very often, but not always, a part of the remit for the broadcasting regulator. Matters concerning intrusion of privacy are also a matter for broadcasting regulators, but not always. Consumer protection is sometimes done by specialist organisations, sometimes by the regulatory authority – ITC for instance.

And then there is public service: regulation of public service is sometimes, but far from always, a part of the broadcasting regulator's remit. Broadcasting regulators make policy sometimes, and sometimes they do not. In some countries, like mine, they are complaint commissions, i.e. they act primarily on complaints from viewers and listeners, while other organisations might have among their responsibilities to support the growth and development of private TV, or even the introduction of new techniques. The regulator might deal with radio or TV or both. In some cases there may even be converged regulators. I think that there are two such regulators in Europe: the newly created CRA in Bosnia and Italian Agcom. It is sometimes held that Finns have a converged regulator, but the broadcasting regulation is a very small part of what they do. And there are of course one or two countries thinking of creating a convergent regulator. Slovenia, I think, is in the process of doing so and the British have said that they will be creating a convergent regulator in two years time.

But why do we have regulatory authorities? The answer is that we are interested in freedom of expression, and we have realised that broadcasting is far too important for the regulation of it to be left entirely to political institutions. That broadcasting is important to the political society I don't need to convince you of, you just need to look across the Adriatic.

But if you have a regulatory authority, what should it do? Well, consider for example licensing. In broad terms, the licensing body can be any one of three. It could be the government (or a ministry

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<sup>2</sup> The EPRA now has 42 members from 34 countries.

within the government), it could be the parliament or it could be a national authority (or a regional one, for that matter). In my country, Sweden, decisions on licensing are taken by the Government. In Norway, the most important licences are decided upon by Norwegian Parliament, while in most countries, these decisions are taken by the regulatory authority.

But to determine who should do the licensing, let us first consider what a licence is. A licence is a permission to speak; it is a permission to exercise freedom of expression. This of course means that we have to be very careful and have very good cause to demand such a permission to speak, a permission before the freedom of expression is actually exercised.

And we do demand this far too often in Europe. If of course there is a shortage of opportunities – if we have more players than we have broadcasting opportunities – it is acceptable for the state to ‘order’ the queue. I am still not sure whether we need to demand individualised licence, but let’s leave that aside for the time being. But there is actually no real shortage most of the time: anybody can dig cables into the ground, and you’ll find there will be room for many more players now that the digital era is at our doorstep, and that the need for licensing will be diminishing fast. But as I said, I accept the idea of licensing when there are more players than opportunities.

One of the most important jobs that the media do is reporting on, scrutinising, even criticising politicians. And if a minister starts playing around, they need to report it. Not because they like mock-raking, but because voters need to know what is going on: should they really vote for this minister again? But if the mission of media is to scrutinise politicians, how can we justify that politicians get to decide who can scrutinise them? The answer is, of course, that we can’t.

And what kind of credibility does a system where the government hands out the licences have? Everybody will believe that the Government will give licences to its friends, and in most cases they will probably be right too. And the same applies to the Parliament. Parliament is hopefully a more diverse assembly, but an individual MP may well be more blatantly biased than the Government ever dares to be. He will support a licence for his friends or the Government’s friends, or he may not even care at all. He might consider that it is worth supporting license applicants recommended by the Government in return for a new road in his constituency. But we cannot possibly exchange the freedom of expression for roads, can we?

As to ministries of the government, they are set up to do different things than regulatory authorities are meant for. If you have two identical twins doing exactly the same thing, licensing, one sitting in a ministry, and the other one in a regulatory authority, the governmental twin will commit more mistakes, not because the other one is cleverer, but because the government does politics, it produces sometimes just political symbols, but those are its products, while the end product for the broadcasting regulator is the licence. The latter twin will just be given more time and better opportunity to do his job right than he would have sitting in the ministry. I know. I have tried both!

The government should not be the licensing body for its own sake either. The government needs somebody to blame, and why should they take the blame themselves? I’ll give you an example from my own country: the Government gave a licence to a UK broadcaster, a digital licence. So when there was a complaint over the contents to Swedish Broadcasting Commission, the Commission found that the Government’s decision was null and void because the Government cannot possibly give licences to UK-based broadcasters – that contradicts European law. But while that is clear, why should the Government subject itself to the embarrassment of having its own decisions examined by its own authorities? It is more appropriate then to leave decisions to the respective authorities in the first place.

I think we can safely say that licensing should be a job for regulatory authorities. Let’s now consider what else they should do.

One more possible task I would like you to consider is monitoring and regulation of public service. In some countries – take the UK., Norway or Germany for example, you’ll find that the public service

regulates itself, while in other countries, such as Sweden, France and Poland, this falls at least to some extent under the regulatory authority's competence. But which is better? Unsurprisingly you'll hear me say: the latter, for two reasons.

One is credibility. Suppose that you make a complaint to the responsible authority, the broadcaster, and the broadcaster says that, following careful consideration, they have come to the conclusion that you were wrong, and they were right. Is that satisfying? Of course it isn't. You will be equally upset when the independent regulatory authority says the same thing, but you will be less convinced that it is saying so for certain ulterior motives. The other argument is legal certainty, equality before the law. The public service companies will have to abide by minimal standard rules regarding advertising, protection of minors, privacy etc. – the very same minimal standards which commercial broadcasters must observe. But we cannot have the regulatory authorities saying that advertising methods applied by private broadcasters are contrary to European legislation while the public service will happily apply the very same methods and still be found innocent by the very same legislation.

It is of course not quite as easy because a public service broadcaster is not just any other broadcaster, there are specifics peculiar to the public service. Public service is like an elephant. It is very difficult to describe, but you know it when you see it. All the same, there has to be some definition of what public service is. Sometimes my public service colleagues claim that the only people who can describe the public service mission are people employed by public service institutions themselves. I don't agree. I think you need to define public service broadcasting, but I don't think public service broadcasters can or should do that themselves.

I think there is a role to play here for political institutions in setting up and defining public service. But there is also a need for enormous caution – politicians do not make good TV producers. This is what the old communist structures did for so many years for us, or to us; that is not what we are looking for.

We need a good filter between political institutions and public service broadcasters. One method of establishing such a filter is a long-term licence. If you have short-term licences, the public service people will be looking over their shoulders, thinking about the next revision. And of course, those licences cannot be too detailed for the reasons I just gave you – that politicians do not make good TV makers or radio makers.

You need secure financing and again, for the same reasons, a fairly visible flow of funding. If you believe that your money will be taken away unless you behave the way the political institutions expect you to behave, it will undermine your independence.

We need separate control institutions, not necessarily the ordinary regulatory authority; it can be a particular one for a particular public service broadcaster if you think that is better. But the same principles of independence will of course apply. In many cases you will find it more convenient to use the same institution for public service broadcasting and for private broadcasters. And in my opinion it is all right, even during the licence term, to have a control body running the rule over public service broadcasters. This body would then identify whether public service broadcasters are in compliance with their licences, the law or even with their promises of performance, provided that the control body is an independent institution. But you don't want governments, ministries or other political institutions to interfere during the term of the licence: their 'moment of glory' comes when the licence is to be renewed. You can't avoid them discussing whether the public service broadcaster has done a good job or a bad job relating to your various traditions, when it comes to the renewal of the licence. But you wouldn't want that to take place in mid-term.

But my presentation is not about public service; I will return to the regulatory authorities. Who should sit on them?

This is not so easy. I represent Swedish Broadcasting Commission, which in many ways is a complaints commission. This organisation resembles a court on few points. In fact, the law indeed

proscribes that the director has to have experiences as a judge and that the chairman and the vice-chairman have to be judges. In practice they will have been Supreme Court judges, the last one was the president of the Supreme Court at one point. For an institution working as it is, such a composition gives a certain status and credibility to its decisions, not least because the judges are used to applying the law and working with it. I am not saying that you must always have judges as the heads of regulatory authorities; it all depends on what the organisation does, but it has worked very nicely for us.

On the other hand, we have a system where there are no other rules concerning appointment of other members. The Government decides upon all the other positions and that is in itself a bit dangerous. There is a tradition not to politicise the Commission, but I believe that this tradition can be maintained partly because the Commission does not have very sharp teeth, i.e. that it doesn't have major power at its disposal.

One of the Commission's tasks is to decide on questions of impartiality. If those decisions were to be made on political grounds, the Commission would automatically lose its credibility. Fortunately, this is well understood at the political level, and there are no moves towards politicisation.

We have a sister organisation, which is called the Radio and TV Authority, and it should be a licensing body in theory, but at present it is not authorised to issue any licences. The Government insists on doing that itself. This institution has a Director General who initially got a six-month term, while on leave from the Ministry of Culture. Now you can imagine how much credibility as regards independence this will accord to this institution. The Ministry has now finally given him a proper term. The members and chief executives of regulatory authorities should naturally have secure positions that will not make them look constantly over the shoulder and worry too much about what the Government would think.

Like any other public service institutions, broadcasting regulators need, for the same reasons, long-term financing. Otherwise you run the risk of the Government beating the Authority with the power of finances, penalising any unpopular decisions. And decisions should be appealed to the courts of law, not to the Government, again – for obvious reasons. I was in Warsaw earlier this week, where they have created what I see as a rather strange solution: apparently, if the Council's annual report is dismissed by both houses of the Parliament, the Council is automatically dissolved. I think this is asking for trouble. The Council has, in theory at least, a fairly secure position, but you are taking a bit of that away by introducing a certain moment of insecurity. I am not saying that the Council is not independent, because I believe that it is, but this looks like a strange method of perpetuating that independence from my standpoint as an outsider.

Another country I'd like to you to consider is Malta. Maltese Broadcasting Authority always attributes great importance to the fact that the authority's existence and its functions are written into the Constitution. They also maintain this to be necessary. They would otherwise be swallowed up by political parties. I am not saying that you always need to write the functions of the regulatory authority into your Constitution, but it could help if there were such legal certainty and legal stability.

Who should make the appointments to regulatory authorities? It is difficult to go beyond the political institutions, but this again poses a problem.

The French have a system that has been exported to Poland, Catalonia and a few other places: they have nine commissioners, three of them appointed by the President of France, three appointed by the Senate and three by the House of Representatives. It is supposed to indicate some sort of political balance. More importantly, they try to look for people who have media background. I think the commissioners may very often have a political background as well. But there is a tradition to look for a strong media background, and I think this a good tradition if you can maintain it. It accords to members greater credibility both in the eyes of broadcasters and in the eyes of the public. I would also like you to consider another peculiarity of French system. The Commissioners have fairly long terms,

I think seven years, and they work full time, doing nothing else. In fact, they are forbidden to do quite a lot of things, and for one year after that period ends they are kept “in quarantine”. In other words they get paid for a full year for doing nothing, or for writing a book as the last president did, but there are quite a lot of restrictions on what they can do. This shows that the French have put some thought into the mode of protecting independence, not just from political institutions, but broadcasters as well. And quite obviously the institution would lose credibility if a member partakes in making decisions in favour of a particular broadcaster and then starts working for it the next week!

The Dutch have tried a little more scaled-down model – instead of having nine commissioners, they have three, doing the job part-time, and these three are usually appointed or nominated by each one of the major parties. They are of course looking for trouble because there is a very great danger that politicians will see themselves as the representatives of their parties rather than institutions. I don't think it works that way in the Netherlands, but if it doesn't it is of course thanks to their political tradition, rather than provisions of the law. It is difficult to avoid this problem of political balance, of the parties wanting to control each other. And if you cannot establish a tradition or manage to agree on being non-political in your nominations, you will soon have created some sort of spoil-system if you are not careful.

In my opinion, credibility is the key to the appointment procedure, and too much dependence on any political institution can harm it considerably.

What can be done? Well, there is always an institution in every society that has a higher degree of credibility. And it is always possible to leave the nominations, or decisions on who should preside over the respective regulatory institution to e.g. the chairman of the Bar Association, or a college of that kind of people.

But what it all comes down to, of course, is will. If there is no will on the part of the political institutions to avoid these negative effects of political influence, then there is no way. But there is something to help us with this. I am talking about a very useful document by the Council of Europe, adopted last December, Recommendation No. 23, on the independence of regulatory authorities. Quite a lot of good things are written into this document. In my opinion, it is based on sound principles of independence. Now, don't misunderstand me, I am not saying that political institutions do not have a role to play in media politics. Of course they have - that's why it is called media politics. But politics should be about making the law, not about applying it. And similarly, once the politicians have set up the framework for the media, they have to take a back seat when it comes to the day-to-day application of the legal framework. And they have to do so for the sake of freedom of expression.

Thank you for your attention.

***MEDIA LEGISLATION IN TRANSITION COUNTRIES –  
INTRODUCING DEMOCRACY AND OBSERVING EUROPEAN STANDARDS***

**Mehmed Halilovic**

Assistant to Ombudsman for Media  
Bosnia and Herzegovina

Social position of and the role played by media in the countries of Southeast Europe today is, almost without exception, a reliable indicator of democratic processes unfolding over the past decade. Although the rule that free media cannot, in principle, develop in societies that are not free has proven true in this region, independent media, although few in number, have however initiated and supported democratic changes in countries where dictatorships were in power until very recently.

Still, media legislation and application of European standards in media reform fully reflect social, political and economic transition that all countries of the region have been undergoing.

The ambition of these countries to find their place in the big European family as soon as possible, but also the unstoppable internal democratic processes, as uneven as they are, have motivated their efforts to reject old legislation characterized by formal recognition but actual restriction of freedom of the press. There is not a single country that has not undertaken this effort in the past decade, with the exception of Serbia for many years, although the results of such efforts vary, as it might have been expected.

All countries in the region have at the same time undergone a transformation of media ownership – from state owned to privately owned – and in the case of leading broadcasters, creation of so-called public services and establishment of new relationships between the authorities and the media. Still, the biggest social change has been taking place within the media themselves. This is not only a matter of change of ownership; it is a process of true media transformation from state propaganda tools, the role which most of them played during the communist period, to a growing information industry operating along market-driven principles.

Although progress can and should be assessed for every country individually, there are certain characteristics shared by the region as a whole or certain groups of countries within the region.

Results in the application of modern standards to media legislation and progress made in media transformation, divide countries in transition, or more narrowly, countries in the region, into three groups – a group of countries that has undergone transition peacefully, a group of countries that was engulfed by war, and finally, the last group of countries that had, until recently, been led by undemocratic regimes.

Understandably, the most favorable position and the best results were accomplished by the first group of countries. But there are clearly certain differences among them as well, depending on how far their democratic processes have advanced. Those that have come closest to integration into European Union (Slovenia and Hungary, for example) have enjoyed a considerable advantage over other countries in this group. Among countries in which these processes have been unfolding more slowly are Bulgaria and Romania and especially Macedonia and Albania.

Media transition has not completely bypassed the two latter groups of countries either – those that experienced catastrophic wartime destruction (Bosnia-Herzegovina above all), as well as those that were until recently headed by undemocratic regimes (Federal Republic of Yugoslavia and Croatia) and that, in addition, were also inevitably heavily affected by wars in and around them (Croatia, Kosovo, Serbia).

*These two groups of countries that appeared on the ruins of former Yugoslavia have an extremely complex media scene. It is characterised by a high degree of political and economic dependence on political parties, ruling regimes or foreign donors, ethnic division and exclusion, exposure to immense pressure, failure to develop a real media market, relatively low professional qualifications of the majority of journalists, etc. Media in these three countries have been undergoing turbulent changes that have affected their work, but they have also initiated social change.*

Several parallel processes are unfolding in Bosnia-Herzegovina today: transformation of earlier semi-state and state owned radio and television stations into public services at local level and at the level of Bosnia and Herzegovina, development of commercial broadcasters, creation and affirmation of a communications regulatory agency, privatisation process and adoption of new laws relating to the media.

None of these processes have been unfolding rapidly, nor easily, nor without assistance and even full participation of international bodies. Still, all in all, certain progress has been made, particularly in the legislative field, by which this country even excels in the region. Law on Freedom of Access to Information has already been passed at the state level, which – although it does not mention either media or journalists even in one word – constitutes a cornerstone of free media. Similar laws are soon to be passed at the level of the two entities that make up this country, as well as defamation law. Not only do these laws correspond with the highest international standards; in some elements they even leave behind the current media legislation in the countries of Western Europe.

The problem in this field, however, concerns the laws on public information at the level of one of the two entities and at the level of cantons in the other entity. These laws are a living remnant of communist media legislation, and they fail to observe both relevant international standards and other recently adopted national laws. These local laws still require that print media be registered with government bodies, which constitutes a concealed instrument of press control in the hands of politics. Some of these cantonal laws have been amended in the meantime, but not all.

Generally speaking, the media arena in Bosnia-Herzegovina in the post-war period still reflects the country's ethnic, religious and political division. The consequence of this is that the media have been under, stronger or weaker, but still pressure from the ruling structures and have been subject to blackmail and threats or have been completely dependent on their financiers.

The expansion in the number of the media (210 radio stations and 71 television stations in a country that today hardly has 3.5 million inhabitants) was not accompanied by enhanced program quality. On the contrary, the majority of media outlets were established during the war to serve as tools of political propaganda. Development of these media and constant training programs organised for journalists with the help of international organizations have contributed to reforming of these media and their professionalisation. But still, the majority of local radio stations have simple programming structure while their programming is of fairly poor technical quality. This is also true of the majority of television programmes, as TV broadcasters generally run music videos, movies and cheap soap operas.

Not even direct international financial support has yielded any considerable result in the field of broadcasters. Two major international media projects TV OBN and Radio Fern had for a long time provoked public controversy and ended in failure.

Fruits of recently created domestic local radio services at state and entity level have been noticeable only of lately, while this process in the case of television stations has been unfolding much more slowly.

The media arena in Croatia is characterised by a predominant position and influence of state-owned radio and television (HRT). As for numerous newspapers in kiosks, editions for children and entertainment dominate, while serious political papers do not have high circulations. This gloomy

picture is somewhat improved by local radio stations. According to survey findings, they boast 47 percent ratings and considerably jeopardise the monopoly of state-run radio programs. Out of the total number of 118 local radio stations, 65 percent are privately owned.

Ten years under an undemocratic regime have brought to Croatia, on one hand, a series of rigid restrictions of media freedom and, on the other, declarative freedom that the authorities claimed matched the highest international standards. This is a typical characteristic of undemocratic societies – the more pronounced the media restrictions, the more the authorities boast of declarative freedoms.

Media freedom in Croatia was not restricted by the Law on Public Information, which was the fundamental legal framework for the media, but by some other laws, such as the Penal Code, as well as by practice. The Penal Code, namely, restricted the work of journalists in a number of ways and constituted ground, upon which many lawsuits were filed against journalists, and this was a rather flagrant form of pressure on the media. State influence was also reflected in the fact that certain media outlets operated in debt for years without being shut down. Some media were operating in line with market-driven laws, but others did not. This of course was to the detriment of independent media, which were forced to adapt their editorial policies to the impoverished and at the same time politicised market. Serious and analytical journalism was meanwhile collapsing (several such newspapers disappeared), and the market was being conquered by tabloid journalism.

A consequence of this situation is that independent and serious journalism is finding it hard to develop even today because media with such ambitions are in an unfavourable economic position.

Another story is the non-transparent privatisation of some media. The most illustrative example is the case of two major Croatian dailies that were supposedly privatised, but actually fell under the direct influence of the political structure in power at the time.

Similar to Croatia, the media landscape of Serbia had been characterised for over a decade by a sharp division to regime and anti-regime camps of newspapers and broadcasters. Information released by these two opposed blocs practically depicted contradicting images of reality. In state-controlled media there was clearly no room for professionalism, only for political propaganda of the authorities and communication of inter-ethnic and inter-religious hatred for a long time.

Although it was unable to suffocate political pluralism altogether, Belgrade-based regime did all it could to diminish and restrict it. What it could not seize and directly control, it destroyed in other ways (by imposing high fines and taxes, introducing restrictions on newsprint sale, withdrawing broadcasting licenses, etc.). In the end, it resorted to physical liquidation of one of the most prominent Belgrade publishers and editors of the nineties.

Legal regulations in Serbia under the previous regime were in clear violation of the European Convention on Human Rights, one clear example of law denying freedom of the press. The Law on Public Information considerably contributed to Serbia being placed in a group of only a few countries of the world where media freedom was threatened the most. Namely, the law introduced a ban on rebroadcast of certain foreign news programs, summary court sentences, fines increased by 80 times, etc. Not only was the law applied on media that were publishing and broadcasting in Serbia; it was also applied on imported media. Newspapers from Montenegro and some parts of Bosnia-Herzegovina were confiscated and banned many times.

Although it is located in the same country, the Federal Republic of Yugoslavia, the media landscape in Montenegro shares only some of Serbian problems and features many differences. As in Serbia, the Law on Public Information in Montenegro allows the government to interfere with the media. In addition, the media have been involved in a very complex power struggle between the two republics, not only by reflecting political conflict, but also by inspiring it, which is why they have been exposed to constant political pressure and blackmail. Additional pressure on the Montenegrin public and journalists has been placed by the federal army, which would draft “politically incorrect” journalists

and editors from time to time, filed criminal reports, arrested foreign journalists and, on top of all that, established its own television station.

Politics dominates the media as well as the overall social scene. Montenegrin political parties believe that election results give them legitimacy to run all public affairs, including state-owned media.

However, democratisation processes in political life in countries of the Western Balkans have stimulated pluralism of the media arena, enabled professionalisation of the press, radio and television and speeded up implementation of European standards in media legislation. But these processes have at the same time left certain questions open and answers are still being sought.

Abolishment of state ownership and state control over broadcasters is beyond doubt one of the biggest achievements of the implemented media reforms, although their transformation into public services has been unfolding neither speedily, nor evenly. How long and painful this process is can be seen on the example of the successor countries to the former Yugoslavia. Croatian Radio and Television today has monopoly as a legacy of the previous regime, Radio and Television Bosnia-Herzegovina is even today not accepted in the whole country for political reasons, while Radio and Television Serbia was a media outlet of the ruling political structures until recently and the process of creating a public service has not even started there. All governments, even the first democratically elected governments in these countries, have been using the transition process to maintain some degree of control over the leading media in order to have control over public opinion.

The media commercialisation process in some of these countries has led to a real boom in the number of newly-established private broadcasters – in Bosnia-Herzegovina close to 300, in Serbia 350 (until last year the government recognised only 200), in Macedonia 250, in Croatia more than 120. Such a large number of stations only partly reflect the growing need for a plural media arena; it reflects much more the fragmentation of these societies as a consequence of devastating wars and national polarisation. The majority of these media have been unable to perform highly professionally, as reliable sources of information or feature programming of reasonable technical quality.

Slow transformation of formerly state-owned radio and television stations into public services on one hand, and rather erratic development of commercial media on the other, have created a series of new problems. State-owned media that are now becoming public services want to maintain their monopolistic position in the market, which *inter alia* means the possibility of offering commercial services in addition to having secure and constant sources of financing, usually in the form of fee or tax revenues. Commercial media however maintain that this jeopardises their survival, as the market is the only source of income they can count on. Since markets in these countries are underdeveloped and are often shaped by non-market motives, mostly political ones, conflict among these media outlets is inevitable.

The issue of commercial services is an issue of development and survival of private commercial media in the region. Can it be solved by recognising this right both to public and to commercial media, which is the current practice in the majority of countries in the region and which gives public services and state-owned broadcasters a big advantage, or the right to public services should be denied altogether, as in most Western countries? There is the third model, which has been applied in Macedonia: a small share of subscription fee (which is effectively tax on radio and TV receivers) revenues is given to local public radio stations (five percent), as well as radio and TV programs produced by private stations and independent producers (10 percent).

Efforts by regulatory agencies to introduce some order in this field, as the example of Bosnia-Herzegovina shows, have been met with some resistance. Denial of licenses to certain broadcasters who do not meet minimum programming, financial or technical requirements has often been interpreted as an attack on media freedom and the right to freedom of expression, and as denial of journalists' right to work. Public debate on this issue has not given a unified answer to the question of whether it is the obligation of regulatory agencies to guarantee these rights to everyone, or it is the

obligation and responsibility of these media, which do not provide even minimum working conditions. Another question arising is whether mass withdrawal of frequencies constitutes punishment for irresponsible media and their founders, or it is effectively a punishment executed over their listeners and viewers.

Regulatory agencies have had a fairly simple task in protecting the limited terrestrial radio and television frequency spectrum. But new technological breakthroughs question the need to limit the number of frequencies on this basis as cable and digital technologies – let alone satellite technology – give practically unlimited possibilities. Does this mean that the argument of “limited frequency spectrum” can no longer be observed and, more importantly, that the number of radio and TV stations will keep growing in the future?

Although development of modern media legislation in the region has had its ups and downs as societies transformed, it now provides a solid foundation for ongoing media reforms, as well as for the ones yet to follow.

## ***PROTECTING COMPETITION IN THE MEDIA ARENA***

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### **INTRODUCTION**

Competition reflects the state of economy; when national economy is developed, when it is open, when entry barriers are more of an exception than a rule, efficient competition is almost invariably in place.

We cannot consider that there shall be ideal competition. It has never existed, it is not likely to happen. What is much more important is the fact that we should aim to reach the higher level of competition, to reach the level of effective competition. Those are the conditions of a working market. *The* desirable level of competition is reached when regulators become less important and when market activities remain within the framework of rules without rigid external checks. The rules should however be relaxed and up-to-date, keeping up with the changing requirements of modern economies and different developments, technological progress in particular. While the rules must be devised in correspondence with current economic trends, political changes should not be overlooked either.

This presentation of mine will focus on recent developments in market competition and its protection, with special regard to media.

### **COMPETITION**

Statistics by the World Bank suggest that fewer than one hundred countries have adopted competition legislation. But, while a modern normative framework is essential, protection of competition by and large depends on corresponding implementation of this framework. This requires certain decision-making powers, as well as matching human and financial resources of the relevant institutions if a modern competition policy and its protection are to be implemented effectively.

Potential distortions of competition however vary a great deal. They often involve not only entrepreneurs as active players but also national and local authorities, which makes independence of authorities in charge of competition a must. Independence here assumes functional independence, i.e. the respective institutions should be independent and autonomous in exercising their duties, preferably accompanied by administrative and financial independence.

Government as a whole and its ministries individually are responsible for creation of a competition policy, which will reflect sound macroeconomic policy by both resulting thereof and providing additional incentive to the latter. These political institutions however cannot be involved in protection of competition. This must be left to expert agencies.

One of the fundamental rights enjoyed by each and every state is the power of its institutions to have the sole competence in the state territory, that is – to exercise state sovereignty. Certain supranational systems (i.e. the European Union) have limited some competencies of national authorities for special reasons (e.g. merger control must observe thresholds set by the EU etc.), taking into account other basic interests such as internal market principles etc.

Cooperation among different national authorities, usually subject to bilateral agreements, does not limit their competence and/or autonomy, but may lead to better insight into market activities and performance by main market actors, that is – companies and enterprises.

Effective competition protection has to be founded on a relevant normative framework, which is user-friendly and includes provisions that enable respective authorities to perform their duties. Competition law should therefore be clear and transparent and should contain the relevant provisions and them only. My personal experience has taught me that if the law includes provisions, which entail the potential of jeopardising competition but cannot be treated as competition (antitrust) problems, it may result in uncertainty and confusion about the very basic terms of competition.

Clear normative framework provides a good basis, yet the implementation remains the crucial element of an effective competition protection. As I have already mentioned, effective implementation is possible if functional independence of respective authorities, as well as adequate human and financial resources, is granted. If this is not the case, competition cannot be effectively protected.

Human resources are of extreme importance in this regard. Professionalism and expertise of officials tasked with protection of competition guarantee legal certainty of society, granting authorities good image and contributing significantly to competition advocacy.

Experts are respected, experts may be consulted, and they help raise the level of competition culture for competition is not a matter of institutions only. It is also a matter of enterprises, consumers, authorities, organisations – it is a matter of society as a whole. Competition culture is very important because it can effect long-term positive results: it is always better to prevent than to cure.

Protection of competition in practice is necessarily a product of all these factors: normative framework, competition culture, national consensus and overall economic development.

As already said, competition is *the* best regulator of the market. While ideal competition is not realistic, it is of utmost importance that competition leads to innovations, optimisation of business and overall economic growth. If competition is effective, competitiveness of national economy is high. If competition is however underdeveloped, if it is ineffective, national economy suffers: it is not competitive. This often leads to introduction or re-introduction of certain measures of protectionism, non-transparent state aid policy and entry barriers in particular.

As traditional entry barriers to market – such as custom taxes, variable levies, trade restrictions etc. – are being rooted out, and a new approach to public procurement is being adopted, national markets are opening wide. This results in new dynamics of competition, and the final outcome involves a price/quality ratio favourable to consumers. Tremendous benefits for the market structure are obvious.

Yet, we have to ask ourselves whether the result is as good as it can be. We have to ask ourselves whether the market is really the reflection of a proper level of competition, we have to ask ourselves whether the market players follow the rules of the market or perhaps the market is simply tailored to the behaviour of its players.

Perhaps we should also ask ourselves whether (1) enterprises are independent of the market demands or (2) the market makes them act upon its demands. Sometimes, and not only in transition economies, the answer is not that clear.

The most problematic distortions of competition are not the ones created by businesses, but the ones caused by national (local) authorities. While not underestimating distortions caused by the former, one cannot overlook a very simple rule: there is always a state to protect competition. In the event when the state itself distorts competition, we face another situation: how can the state that distorts competition in a certain case be expected to protect competition in the very same case? But, as described hereinabove, markets gain much more of their natural power, and states are much more aware of the need to protect competition.

Concerning the so-called classic competition distortions, I believe on the basis of my own experience that the competition authorities are mostly engaged in:

- (1) horizontal restraints, in the form of (i) fixing of purchasing and selling prices, (ii) sharing the markets of sources and supplies, (iii) limiting or controlling R&D, production and marketing,
- (2) vertical restraints, mostly in the form of long lasting exclusive contracts, and
- (3) abuse of the state dominance, where it has to be pointed out that the dominant position is sometimes a result of legal monopoly and the abuse is reflected in (i) cross-subsidy among monopolistic and market service, (ii) structural abuse etc., which represents specific obstacles for other potential competitors to enter or to compete on the market.

In majority of these cases, enterprises involved are based and operate in the national territory.

Some strategic sectors (i.e. oil etc.) are not limited to national markets at all. National markets thus cannot create their own policy in this field but have to follow worldwide policy, which is sometimes a result of agreements or concerted practices that are hardly in line with the contemporary competition policy.

Certain supranational associations, multinational corporations, companies or informal groups tend to create the local markets. But they follow their own interests, not the interests of local markets, competition and consumers.

Activities of international cartels and certain exclusive agreements often function as cross-border competition restraints as well.

Competition authorities are usually in charge of merger control as well. In order to provide competent merger control, competition authorities conduct comprehensive market surveys and act upon the findings of their analyses. These analyses are mostly confined to national markets. Yet, in certain cases, this should not be so, especially in small economies, which do not enjoy independence from influences of their neighbouring countries.

The effect of supranational mergers on national economies is very important. National markets are sometimes created from outside due to development plans of certain external companies. Sometimes mega-mergers do not cause any distortion to either international market or the national markets of the companies involved in the merger, yet such mergers might have extremely important effect on local markets where the merging companies are represented by their daughter companies, branch offices or even only business transactions.

On the other hand, certain national mergers, especially in retail sector, may have cross-border effect, changing habits of the consumers: we should not forget that economies in transition are at the same time consumer-oriented economies.

Introducing effective competition and its protection is not an easy task; it is a full-time job. This cannot be done overnight, it is a steady process and a top priority at the same time, inevitably encountering problems. I shall mention here only some of those which can particularly harm effective competition.

### ***Definition of National Interests***

National interests are sometimes not understood properly because they may arrest long-term positive effects. Something may have positive short-term effects and yet cause considerable damage in the long run. This refers to entry barriers in particular, that is – special safeguards. National interest is sometimes equated with the interest of certain economic entities, usually *national champions*. This is particular the case in small economies and may present a serious obstacle to competition.

Satisfaction of short-term interests of certain sectors or even companies, coupled with disregard for interests of the economy as a whole and interests of consumers (especially their right to choice and the

right to have the adequate price/quality ratio of products and/or services), may well be the outcome of mistaken assessment of national interest.

National interest should not be equated with protectionism of “national champions”, but protection of effective competition (where it already exists) and/or introduction of competition, especially in public services.

### ***Ex Ante Price Control***

In sectors where competition exists and where competitors on the market really compete, *ex ante* price control (or better: allowed maximum prices set by the state, especially when such prices are not economically interesting) may seriously obstruct competition and harm economic and social welfare of the state itself. In those cases competition is distorted, artificial price cartel is established by the state, and such price policy bars from entering other potential competitors, who would have entered the market otherwise.

### ***(Legal) Monopolies***

A dominant position reflects the market condition if there is competition. Dominant position as such is not prohibited yet any abuse is strictly prohibited. If a dominant position is a product of market competition, the authorities can respond to any potential abuse. Leaving aside the so-called natural monopolies, we are facing a totally different situation in case of legal monopolies. In such case, the situation on the market is directed by this legal monopoly, and the market effectively does not exist since competition is lacking. This applies to public services, specific sectors, especially transportation, telecommunications, energy, health care. Another problem arises in cases when an enterprise that is a legal and legitimate monopolist, i.e. it is granted special or exclusive right on a certain service, is active in other market segment where players compete freely. Cross-subsidies and strengthening of competitive advantages relating to market-exposed goods and services are then a likelihood. Transparent business transaction and unbundling are, among others, the best weapons against negative effects of such situation.

### ***Competition among Authorities***

There is always an open question how many regulators we need. Do we need a sector specific or general regulator? It is never easy to answer this question. What however is essential in taking the right approach is to understand that regulator(s) should be independent, professional, with clearly defined competencies and national interest. In practice, it may easily happen that sector specific regulators favour interests of specific companies over interests of competition in general. On the other hand, sector specific regulators sometimes try to obtain “exclusive powers” to control privatisation, restructuring and (de)regulation of legal monopolies, while failing to identify corresponding national interest.

### ***Non-Transparent State Aid Policy***

State aids are not *per se* prohibited category. State aid is one of the allowed incentives, and national economies as well the players on the market may benefit a lot from it. On the other hand, state aids can threaten competition. They can even destroy competition altogether when they are allocated in a non-transparent way and with wrong tools over a longer period of time. This is especially true of economies in transition, which face numerous challenges of new market economy. They tend to sustain certain non-viable businesses, which are not competitive due to high production costs, lack of resources, failure to observe energy and environmental standards. National authorities thus often resort to specific pressures to provide operational aids in order to avoid social turbulence and to maintain certain minimal welfare standards for less-qualified groups of citizens.

### ***Excessive Competition Protection (Over-Regulation)***

I have already pointed out that I consider human and financial resources, independence and decision-making powers essential for efficient protection of competition. Economies in transition particularly require certain regulation of the market in order to make the market work and to ensure conditions for effective competition. This applies in particular to sectors where competition is weak and to sectors that are being rid of monopolies.

On the other hand – as the problem is very sensitive and requires carefully tailored solution – we can encounter another problem: over-regulation. Over-regulation implies that state (through its authorities) intervenes with the market by means of regulations, which may not be necessary. In certain cases, over-regulation may have a negative impact on competition and even represent a sort of entry barrier.

Typical cases of over-regulation involve certain types of *ex ante* price control, introduction of redundant technological standards or formalities etc.

Restrictive control of concentrations may be considered a form of over-regulation too when decisions are not based on competition principles.

### **COMPETITION AND MEDIA**

Competition law applies to all legal and natural persons performing economic activities, irrespective of their legal status and ownership. Associations of enterprises that do not directly perform economic activities but have or may have an influence on behaviour of enterprises on the market shall also be considered enterprises. Competition law applies also to public companies and other public legal persons performing economic activities, unless specifically exempted. Thus enterprises performing in media sphere have to comply with the rules of competition.

In the past, broadcasting market was limited by the scarcity of frequencies and high barriers to entry; these two elements in fact created a legal monopoly.

#### ***State Aid***

Liberalisation of broadcasting introduced competition on this specific market, but it is questionable whether all competitors face the same situation on the market and whether competitors are equal. This question especially relevant where certain broadcasters are still being publicly funded, usually on the pretext that they have a public service mission. In such a case, which is of course completely legitimate, funding system can and should be allowed in order to provide public service, yet certain important points should not be overlooked if overall competition is not to suffer.

Public funding represents state aid if competitive advantage exists as a result of funding. Due to this reason, there is a duty, not only a right, to define the public service remit in order to avoid excessive and illegitimate state aid to a broadcaster that is otherwise entitled to funding.

There is a very simple rule: funding must be proportionate to the net extra costs of the public service and must not affect competition to an extent contrary to the common interest. The definition of common interest is another very important issue, because when common interest is not properly defined, competition distortions are likely to happen.

Proportionality is another element that should be especially attended to. State aid must not exceed to the costs incurred by the enterprise in the provision of public services. In absence of proportionality, certain competitive advantages may result from a non-transparent state aid policy, although we rarely take this kind of competition distortion into account.

### ***Cross-Subsidy***

Cross-subsidy is likely to appear when broadcasting company owns infrastructure facilities that are used by its competitors and the interconnection fee does not match the real commercial value. In such cases cross-subsidisation within the very company is not impossible, and that may cause severe competition distortion.

Cross-subsidy as an element of non-allowed competitive advantage may occur when a broadcaster enjoys different independent sources of capital (funding). Interconnection fees, advertisement pie, infrastructure indemnification and licence fees if entering an integral budget of a broadcaster may create ideal situation for cross-subsidising, especially in case of non-transparent book-keeping.

### ***Exclusivity***

Exclusive agreements can also restrict competition because certain companies are granted more rights than their competitors. In certain cases exclusive agreements even exclude other competitors from the market altogether. But not all-exclusive agreements are prohibited. Some of them might be subject to block exemption rules while others may be exempted on case by case basis.

Still, enterprises should be very cautious, because exclusive agreements are null and void if they do not conform to the rules of competition, and enterprises risk paying substantial fines.

Exclusive agreements in the field of media are generally not perceived as a competition concern if concluded on a period of up to one year. Any longer term agreements should be examined on case by case basis.

### ***Collective Selling***

Collective selling is not always bound to exclusivity, although in majority of cases this is the case. Collective selling can raise competition problems because it is very likely that availability of rights on broadcasting markets is reduced.

In cases of collective selling sellers do not compete independently to sell directly to broadcasters. Typical examples can be found in the field of sports, especially soccer, car racing, etc.

### ***Collective Purchase***

Similar effects can be observed in the case of collective purchase where the restrictive effect depends on the position of participants on the market. Foreclosure in these cases may occur, and that is one real competition concern. Such situation may well arise in connection with sports and television, where cable operators, sports clubs, terrestrial operators and others may be excluded from the market.

### ***Media ownership***

Control over media entails a certain kind of market dominance because it may result in a monopoly over information flow. That is why the ownership over media, especially over different kind of media, should be of special concern.

The same applies to interaction between media and information society where convergence criteria are of great importance.

Cross-ownership between media and sports represent special competition concern, and certain cases in connection with media and sports (esp. soccer) clubs particularly interesting in this respect.

## **CONCLUSION**

Media field is not exempted from competition rules. This is due to several factors out of which at least two should be pointed out: media business is an economic activity, and it is a very important field, sometimes ruling all other fields of the market.

As in all other fields, competition concerns are not out of place in media arena. In order to boost competition and increase its effectiveness, we need a clear legal framework, qualified experts and effective enforcement of general competition rules as well as sector specific rules. We also need mutual understanding and co-operation among authorities and strong common interest. All this shall help maintain effective, innovative competition and get a price/quality ratio more favourable to consumers.

## ***REGULATION OF SATELLITE BROADCASTERS***

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**History of electronic media is full of erroneous expectations and prophecies.**

**When invented, radio was predicted to bring about the doom of every classic form of reporting, journalism and culture. It was expected to be the end of newspapers and theatre. Nobody would attend boring lectures anymore and all in all – radio was predicted to outdo everything else.**

**When television came to life, prophets predicted not only the downfall of radio, but also the death of cinema. As we can see, nothing of the like has happened so far.**

When the first satellites appeared, prophecies claimed that it was most certainly the end of “picket fences” TV limited by national and administrative borders. Satellites will overnight do away with all hindrances and will, according to the idealist MacLuhan, unite the world into one single, inseparable and global information village, i.e. into one entirety. Unfortunately, MacLuhan missed to define the global village as a passive or active one. He did point out the phenomenon of interactivity or rather the flow in both directions in several discussions, yet the abstract perspective was never exceeded in his time.

Only the empirical findings of the last 15 years have shown that matters aren’t really what they have seemed to be at first, and that technological solutions fail to provide answers to matters of contents.

Yet, let us take one step at a time.

Only with the introduction of satellites, we managed to overcome the paradigm and supposition labelling the electronic media, i.e. radio and television, from their very beginning. Today, it may seem funny, but both radio and TV were initially designed as exclusively national, and they were by no means meant to cross borders of their paternal state.

The entire legislation regulating this field was exclusively national.

Since terrestrial frequencies were granted on a national basis and were licensed internationally only as to prevent interference with signals in other countries by spilling over borders, we may regard these systems as explicitly closed information systems.

This has been further enhanced by the emerging copyright regulations. They anchor in national legislation even today when there is no doubt regarding the transnational potential and mission of the electronic media, thus impeding and slowing down development. The so-called overspill has been initially regarded as a necessary evil, as something undesired and unforeseen, a consequence of unavoidable physical laws.

Before World War II and after, when the ideological gap opened up, politics contributed its fair share to confining media into state boundaries. However, broadband radio exceeded those boundaries almost the moment it was invented. Listening to foreign radio stations, especially in the evening, when there were fewer distortions, became a form of entertainment and information.

But, the ideological godfathers did not miss to escort this ingenious invention with a system distorting and preventing the reception of broadband radio. At the peak of the Cold War, broadcasting over borders was as intense as never before. However those, who the broadcasts were aimed at, managed to

set up an almost perfect legal and technical system distorting, impeding and preventing the signal reception. Nobody involved was innocent. Reception of radio broadcasts weren't impeded only in the East, but also in the West. The media was abused by both sides, as noble as the deeds or intentions behind the whole exercise may have been.

Until recently, international agreements on technologies, frequencies and defining contents aimed more at enhancing national rights and protecting national interests than at encouraging and promoting cross-border exchange and effects.

Two important milestones have brought about a turn:

The Conference on Security and Cooperation in Europe that went on for 3 years in the seventies was the first one. Here, the super powers and their allies supported by the bloc-related countries for the first time stepped down from their defensive position concerning media and put the famous third basket of the Helsinki Charter the free flow of people and information, which affected mostly the electronic media, onto the pedestal of new international norms.

Together with the growing utilisation of satellites for peaceful purposes and the development of related technology, this created a realistic chance of overcoming constraints of technology induced by the lack of terrestrial frequencies and opening up almost unlimited, cross-border access to radio and TV programmes through satellite communication. This prove to be a very special milestone along the way from analogue to digital expanding the possibilities almost beyond imagination and enhancing the quality of picture, sound and other carriers of various new electronic media.

The last 20 years have seen a tremendous increase of interest for radio and television frequencies partly caused by transition from the monopoly of public broadcasters into a dual system, i.e. deregulation opening up the market to commercial programme and technical operators. The existing system of analogue terrestrial frequencies would never have withstood the demand. Digital technology was a matter of need, an absolute must, just as were satellites and everything related to them.

Now we have reached the heart of the matter:

The eighties brought about the objective need to sanction all these phenomena internationally and to introduce some sort of international rules enhancing development as well as defining certain principles.

Post-Helsinki Europe was initially still ideologically divided, whereby the late eighties brought a visible division to European Union member and non-member countries; the bridge between both sides is the Council of Europe, a wider and more universal body. During this period, two legal documents were drafted regulating the field of cross-border broadcasting and in this framework also broadcasting via satellite. European Union passed the so-called Directive on Cross-Border Television, while the Council of Europe simultaneously introduced the Convention on Transfrontier Television.

The terms for border-exceeding television need some clarification at this point, since cross-border, as well as transfrontier have gained wider use, both conveying the same meaning. The only difference is that "transfrontier" is used more in political context.

Initial drafts of the documents passed in the mid-eighties were in discord. But amendments made within the European Union every four years and in the Council of Europe within the process of harmonisation and adoption of European norms, which brought about a revision of the Convention, effected that both documents now offer reconciled principles without any major differences.

The Council of Europe even established a standing committee monitoring the implementation and interpretation of the Convention; it is the so called T-TT meeting 3 to 4 times a year in order to study

all issues related to the implementation of the Convention. Personally, this is my eighth year as a member of this body, and it has so far been an interesting and useful experience indeed.

Many interesting questions, dilemmas, changes and contributions have piled up during the years. Most certainly, the legislation regulating this field cannot be static, since the ever-emerging new technological solutions and possibilities and the ever-changing range of needs and interests require constant review and adjustment.

The difference between the Directive on Cross-Border Television and the Convention of the Council of Europe is that the Directive is a binding legal norm for all EU member states. Once adopted, directives automatically become a part of the legal order of every member state, which does not apply to the Convention of the Council of Europe. To date, slightly fewer than a half of the Council of Europe members, although their number is constantly increasing, have adopted the Convention. It can therefore not yet be considered as a universal act and is legally binding only in those countries, which have signed or adopted it. This is certainly a factor of constraint. Yet it is undoubtedly one of the conventions, which will eventually be adopted by all Council of Europe members.

Let us take a look at the definitions of both documents regulating cross-border, i.e. above all satellite broadcasting:

The first and foremost principle is to foster explicitly the flow of radio and television programmes across borders, since both documents ban any kind of impediment and set very precise conditions upon which a state has the right to impede this flow. An important aspect is that any such impediment is not allowed to be of technical or physical nature, but can be implemented only through diplomatic channels.

This is an achievement of civilisation beyond comparison, but unfortunately it remains more or less theoretical.

If we are to encourage and sanction airing and even re-airing of programmes across borders, we need to settle and harmonise some general rules as to the contents and methods of airing.

It is foremost a matter of preventing deliberate political propaganda and war or ethnic instigation, a matter of harmonising advertising codes in order to prevent legislation of one country treading on the toes of another and to prevent advertisers from applying international procedures to circumvent national laws.

It furthermore involves important achievements as the right to reply. And here we're coming across the first reefs and problems.

The question of licenses ought to be settled as unified as possible. Unfortunately, this is not at all the case, since half of Europe, especially transition countries of Central and Eastern Europe, sometimes don't even have media or similar laws regulating the field, which leaves room for pretty unpleasant surprises to pop up.

One other question is whether the freedom spreading across borders may be used as to overpower the weaker ones, to flood small languages and cultures by the big ones and similar.

The commercial and private sector is always full of various ideas. Within the last 15 years, the cross-border and satellite television offer did not see only a growth of pan-European or even global channels, both generalist and specialised, like for instance Super Channel, CNN, Eurosport and the like, which certainly is one of the aims in using the new possibilities, but experienced also an irrepressible cross-border expansion of certain national and commercial channels. Initially, prestige was the driving force behind it, later, however, political and commercial interests prevailed. Wider audience generates more profit, although we have to bear in mind a unique European phenomenon,

namely Europe lacking anything like pan-European advertising. For the time being, pan-European channels do not generate a fortune, since advertising and marketing strategies focus onto certain national surroundings, they base on specific cultures and traditions and therefore vary from country to country.

A completely different case concerns the cross-border channels introducing different national slots, including advertising. Such goal-oriented channels are profitable as well.

They are also the main topic of arguments in the last years, inducing legal changes and amendments, the most important being that registration and licensing do not primarily base on the territorial principle anymore (somebody from country A airing into country B needing a license in country A and not B), but the so called operational and economic principle. This principle rules that if broadcasting is targeting at another country, the operator needs to have a license in the target country, and its rights and duties depend on where it has its headquarters and generates most profit.

An awful lot of new dilemmas have arisen in the last years: For instance, may a Kurdish TV station broadcast programmes from London to Turkey and under whose jurisdiction? New technologies, like virtual reality have opened up a whole range of new questions. The phenomenon of online-casting carried by satellite, as well as by cross-border broadcasting has an extension almost beyond imagination, etc., etc.

It appears as if in this complex and mixed woodland some important, even basic questions about the sense and aim of cross-border and satellite broadcasting were left aside, like the cross-border and interactivity principle seen from the angle of equal opportunities to everybody.

The Helsinki Charter and both documents that I have already mentioned aim at the free flow and reception of programmes. This hasn't been the case yet and will probably never be due to the ever-increasing commercialisation. The number of satellite channel operators offering pay services is increasing. They are trying to use the possibility of cross-border airing for narrowing the offer or limiting it to pay services, which are due to financial as well as technical factors (people living across the border may not have access to the same equipment).

Also those, who thought that at least the programmes of public and national services will be available to everybody (wouldn't it be marvellous, if a Greek immigrant could watch his programmes in Sweden or a Scandinavian tourist watching his programmes in Slovenia, etc.), reckoned wrong. The limiting factor is big and small copyrights being very strict as regards the flow of creativity across borders. It is understandable as regards intellectual services, but lacks reason from the angle of knowledge and information flow. What do we gain from 500 television programmes buzzing on satellites over Europe, if the majority of them are scrambled and only partly accessible due to copyright limitations?

The experience gained in the last 15 years has shown that also a bigger, border-exceeding offer of channels did not essentially increase options. Programme quality has not been really improved, but rather diminished and uniformed. Due to lack of money and somewhere even of creative potentials in national production, most programme operators (including the public services in fulfilment of their mission) are buying programmes abroad – mostly the affordable ones, which usually come from the same few addresses. So it happens that you can watch the same programmes on different European channels on one and the same day, the only difference being different scheduling.

To materialise the idea of cross-border and satellite television, it would take an arrangement for the free flow of public national or regional services regulated in some kind of European convention. This would settle the right to pan-European airing through a single, yet moderate acquisition/purchase of European rights or maybe on the basis of reciprocity.

European Broadcasting Union, EBU is drafting such models in its search for possibilities to offer packages of original productions, i.e. national programmes that haven't been acquired abroad.

The current system is instead of providing new opportunities and more equality *eo ipso* widening the gap between the big and the small, the rich and the less fortunate, the East and the West.

The big are as it is paying big for licenses and copyrights, and a supplement for pan-European airing does not represent a problem to them. The small ones have to reach deep in their pockets for every cross-border broadcast, which makes it non-profitable to them. The effect of interactivity and two-way media streaming went lost. This potentially creates new tensions, dissatisfaction, monopolies and dominance.

It is a problem hard to solve. After 15 years, there is still very little light at the end of the tunnel. We are faced with a clash of two principles: The principle of universality, the right to undisturbed reception and (re-) airing and, on the other hand, the right to protect intellectual property. These principles are in concord only at first sight and on the condition that the transmitting station, as well as the receiver, has enough money. For now, it is only an exception and by no means a rule.

# *PART III*

ALBANIA

## THE ACT ON BROADCASTING

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Law 8410 of September 1998 on Public and Commercial Broadcasting in the Republic of Albania lays down the foundation for real transformation of the formerly government-controlled broadcaster into a public one and the creation of a new market of commercial broadcasters. As indicated by the very title of the law, it extends its regulation both on public and commercial broadcasters.

Following the definition of broadcasting, the Law proceeds to outline the basic principles governing broadcasting in the Republic of Albania. Namely, it is envisaged in Articles 4 and 5 of Law 8410 that, whilst broadcasting in the Republic of Albania is free, it must be impartial and must respect political and religious views and beliefs of others as well as privacy. Editorial independence is guaranteed by the same Law.

In the segment referring to commercial broadcasting, the Law has provided for the National Council of Radio and Television (NCRT) to be set up. The NCRT is the licensing authority and supervisor of legality in private broadcasting. The NCRT is elected by the Parliament and is fully independent in all its actions. The Law provides for the competencies of NCRT, election of its members and actual membership, internal organisation, funding and incompatibilities pending on members of NCRT. A so-called Board for Complaints is attached to the NCRT.

In Chapter IV, the Law specifies licensing procedure to be applied to private broadcasters. It is stipulated that licenses for private broadcasting are awarded on bidding principle and that respective decisions of NCRT are made public.

The Law also outlines requirements in terms of territorial coverage for local and national broadcasters, internal organisation of national broadcasters, required license application form, time frame for award or denial of license, etc.

Regulations contained in Chapters V, VI, VII concerning programming, advertisement and sponsorship respectively, are applicable to both private and public broadcasters. Chapter V on programming bans broadcasting of certain categories of information such as state secrets, pornography and information that intrudes upon privacy of citizens. Additionally, information that inspires national, racial or religious hatred in one way or another as well as territorial partition of the country or anti-constitutional acts is also banned by the Law.

Broadcasters are required to air without compensation information concerning natural catastrophes, epidemics and public order. The NCRT is expected to come up with more detailed regulations of this issue.

As regards broadcast time, the law imposes minimum airing time for local broadcasters – 6 and 4 hours respectively per day. Minimum broadcasting hours for national broadcasters are 10 and 6 hours per day respectively.

National broadcasters are obliged to air news daily. The news programme is to observe strict requirements of impartiality. Broadcasters are required under the Law to record their news programmes and retain recordings for 2 months after the broadcasting time.

As regards advertising, same quotas apply to both commercial and public broadcasters. Namely, overall advertising time should not exceed 15% of the broadcasting time for television programmes and 10% for radio programmes. The Law proscribes how commercials are to be inserted into programming with the view of preventing ‘mutilation’ of programmes. It also bans advertising of certain products such as tobacco, weapons etc.

Chapter V of Law 8410 regulates also the right of reply and sets certain conditions for transmission of motion pictures.

The only real quotas related to programming apply to local broadcasters, which are supposed to dedicate at least 15 percent of the broadcasting time to local affairs. Although no such quotas are imposed by the law on national broadcasters, the NCRT’s licence application forms requires the bidders to specify the percentage of home production as well as the share of Albanian production and of foreign production in the overall programming which the broadcaster airs. Tacitly, the NCRT has indicated that the larger the share of Albanian media products, the better the chances for bidders to acquire a licence.

Chapter VIII deals with organisation and funding arrangements for the public Albanian broadcaster. It also contains pathetic Declaration of Intent of the Public Broadcaster. The governing body of the public broadcaster, the Steering Board, is elected directly from the Parliament. Its members are given fixed terms and good guarantees for their irrevocability. Further down the line, it is the Steering Board that appoints the general manager of the broadcaster. To cut a long story short, it is fair to say that all governing bodies of the Albanian public broadcaster are elected in a way that makes them independent from the executive power of government.

Apart from these organisational arrangements, funding schemes make up the other big avenue whereby the independence of public broadcasters can be endangered. Funding of the public broadcaster is secured for the most part by a direct tax on owners of TV sets. The tax is collected once a year with the electricity bill and is calculated to make up the biggest part of the total budget of the broadcaster. Such tax is provided for in the law and consequently the Government may do nothing to alter that. Another major funding source for the public broadcaster is advertising revenue. Commercial activities of a public broadcaster are not much different from that of private broadcasters in scope. Several scholars have tried to argue that the public broadcaster should not get involved in the advertising and should leave the entire ‘pie’ to private broadcasters since the public broadcaster is supposed to live off the tax and, partly, state subsidies. Despite this argument, the Law in its definite form does not prohibit the public broadcaster from making profits on advertisements, on the ground that the tax is small and it would not suffice to support the public broadcaster.

The Law permits state subsidies to the broadcaster only in two circumstances: for those foreign language programmes that are intended to reach foreign audiences and for satellite broadcasting intended to reach Albanians living abroad. In other words, Albanian public broadcaster relies only slightly on state subsidies and is therefore financially independent from the Government.

Chapters IX, X and XI deal respectively with cable TV, signal repetition facilities and satellite transmission.

Despite all these substantial guarantees of independence, Albanian public broadcaster suffers from poor management. It is burdened by enormous staff and several moribund branches, which preclude its

economic efficiency. In addition, poor programming has caused serious loss of audiences in favour of vibrant private competitors. Unless the management of the public broadcasters does not change the current state of affairs, all those substantial guarantees of independence will be diluted to the point of annihilation. Improving management is therefore a challenge that lies ahead of Albanian public broadcaster. Attempts to address such a problem are already under way as public pressure increases.

## BOSNIA AND HERZEGOVINA

### LICENSING PROCEDURE AND THE MISSION OF COMMUNICATIONS REGULATORY AGENCY

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#### **Introduction**

High Representative Wolfgang Petritsch issued a Decision creating a single regulator for the communications sector in BiH, which combined regulatory responsibilities for telecommunications, currently under the Telecommunications Regulatory Agency (TRA), with those related to broadcasting, currently under the Independent Media Commission (IMC). Convergence of technology and transmission methods of radio-communications, broadcasting and telecommunications is a world-wide trend. Other European countries have already addressed this issue with the help of a single regulator, most recently in the UK. CRA will continue ongoing work of the IMC and the TRA unabated. For example, issue of long-term broadcasting licences will continue as planned.

The High Representative issued the Decision in accordance with the powers, which he enjoys under Annex 10 Article V of the Dayton Peace Agreement and the Declaration of the Peace Implementation Council in Bonn on 10 December 1997.

#### **PART 1**

##### **Licensing Phase 2: Goals and Policies Adopted 21 October 1999**

The IMC (Independent Media Commission) has essentially completed Phase 1 of broadcast licensing in Bosnia and Herzegovina, by granting provisional or temporary licenses to radio and television stations. No station that has satisfactorily completed the licensing process has been denied a license.

In the process, the IMC has established a binding contractual relationship with all broadcasters, and in turn has given them a level regulatory playing field—a basic, uniform set of professional requirements—on which to prove their merit. In Phase 2, long-term licences (2- to 5-year) are being issue, and the IMC is now in a position to use licensing as an instrument for addressing major issues of broadcasting policy.

In a previous policy paper (The Future Structure of Public and Private Networks in BiH, 17 May 1999) the IMC outlined its views on the future structure of large-scale networks. This structure in turn will influence the availability and distribution of spectrum for regional and local broadcasting. This policy paper outlines major regulatory issues that IMC now confronts in broadcasting and the IMC's strategy and policies to address these issues. In doing so, the IMC will now draft a substantial body of additional regulations, which will apply to all stations that qualify for long-term licences.

As noted in the 17 May policy paper, Bosnia and Herzegovina currently contains what may be the densest concentration of radio and television broadcasting in the world. IMC has identified 280

broadcast organisations using more than 750 radio and television transmitters, or one for every 4,700 people.

BiH broadcast media are almost certainly the most chaotic and politicised in Europe, and all that in a country where democratic institutions remain extremely fragile, and the market economy remains exceptionally weak. Approximately half the broadcasters in BiH are licensed to local or regional government agencies. Unregulated and non-audited public money in various forms—including funds from political parties and state-controlled enterprises—almost certainly flow to a much larger proportion of all broadcasters.

The large number of broadcasters in BiH is anomalous. But the number is not so much a problem in and of itself as it is a symptom of the highly politicised nature of broadcast media in this country and the absence of normal market forces, in which competition drives unqualified and unattractive stations out of business.

Dominant political parties continue to control or strongly influence most publicly funded broadcasting, as well as certain private broadcasters, which the parties see an instrument of self-perpetuation. The prevailing power of the nationalist parties cannot give way to a broader, more balanced political spectrum in the country until the parties' grip on broadcasting, particularly television, is loosened.

Broadcasters, however, will continue to accept, and actively seek, support from the wealthiest (and most militant) political parties until advertising and transparent public subscription fees replace under-the-table political funding as the main sources of revenue for private and public broadcasters respectively. This requires legislative reform for public broadcasting and the development of a regulated media market for private broadcasters.

These and other issues noted below are to be addressed in Phase 2 of the IMC licensing process, which involves granting long-term broadcast licences. Beyond the immediate future, this process aims to create a well functioning, democratic and transparent regulatory system, which will be adopted by the IMC's successor agency.

#### Problems of Broadcast Media

Broadcasting in BiH suffers from the following problems, all of which must be addressed by the IMC as a regulatory body and this primarily through the licensing process:

**Partisan political control over public broadcasting:** The large number of publicly funded stations reflects continued partisan political control over most stations at the municipal and cantonal level. HDZ and SDA in the Federation/BiH dominate local publicly funded broadcasters and the SDA continues to influence irregular funding of the main public broadcaster (what was previously RTVBiH); in the RS, municipal stations and the main public broadcaster (previously SRT) remain objects of contention between the Sloga coalition and the radical SDS/SRS parties.

**Partisan political control over private broadcasting:** Political groupings in both entities also control or heavily influence certain private broadcasters through direct support or by guiding sponsorship and advertising funds from party-controlled state enterprises (including PTTs) and nominally private companies, with close ties to party leaderships, to these broadcasters.

**Absence of media market and foreign investment in media:** Experience elsewhere in Central/Eastern Europe demonstrates that the emergence of market economy and resulting advertising revenue serves to liberate broadcasting from dependence on political groups. BiH currently attracts practically no foreign investment in any sector, including media. Few, if any, broadcasters currently survive entirely on their marketing skills. In lieu of foreign investment, many of the more qualified stations depend on a diminishing, still poorly coordinated, flow of donations from the international community.

**Rampant piracy:** Uncontrolled piracy permits over-saturation of the market with non-viable, low-grade television broadcasting, discourages participation by major international advertisers and disadvantages those commercial stations with the skills to survive in a regulated market.

**Absence of country-wide frequency planning:** Three uncoordinated licensing centres operating from 1992 to mid-1998 caused large-scale interference among broadcasters. They can be held partly responsible for obstructing orderly development of economically viable regional and country/nation-wide commercial networks. At the same time, certain stations have taken on the character of regional networks, not through regular competitive processes, driven by quality or audience appeal, but either through political connections or with artificial support from the international community.

**Poor quality of equipment and programme production:** General absence of regulations to establish quality standards in broadcasting has permitted proliferation of sub-standard stations that compound problems of signal interference. In addition, they are poorly equipped to provide any form or degree of public service. Even commercial broadcasters should be expected to provide some form of public broadcasting service in return for access to frequency spectrum— which is after all a public resource—but relatively few stations are able to do so.

### **Licensing as a Remedy**

Few would disagree that BiH nowadays has far more broadcasters than a commercial market or the normal sources of public funding in a country of this size can sustain, even with a far stronger economy. However, it is neither desirable nor feasible for a regulator to define an optimal number of stations or to act on arbitrary or subjective grounds to reduce the number of broadcasters to some optimum.

*A broadcast regulator in a democratic society is supposed to set and enforce the rules of conducts in the field of broadcasting, so as to encourage the development of professional commercial market and professional cluster of public broadcasters, providing at the same time a balance between the two.*

Public need and the availability of legal, transparent public funding should act as regulators of public broadcasting. Competition on commercial media market is the instrument that allows the public to determine which privately owned stations will survive. The regulator's responsibility is to promote fair competition through rules applied equally to all.

Having issued provisional licenses to all broadcasters, the IMC has now completed the initial phase of creating universally applicable regulations. These rules lay down the groundwork for more detailed regulation, which will set minimum standards of professionalism and inspire fair competition on the media market. IMC licensing rules must therefore be clear, transparent and applied equally to all. They also leave room for appeal by broadcasters to whom the license has been denied, and this process is already underway.

Phase 2 of licensing will now proceed down the two following tracks: (a) developing a more detailed body of regulations, which will address the specific problems of broadcasting in BiH as outlined in Section II; and (b) issue of long term licences to successful applicants. IMC must also design the rules that tie compliance with regulations to success of application for a long-term license.

IMC regulations, to be applied through licensing, have the following aims:

- 1. To untie the bond between broadcasters and centres of political control and manipulation, so as to strengthen democratic institutions and the foundations of a market economy.**

See IMC Rule 01/1999 Definition and Obligations of Public Radio and Television Broadcasting

## **2. To create a fair and legal commercial media market.**

- Copyright compliance: video and music
  - Expansion on the current place-marker in the General Terms and Conditions of License with specific regulations on copyright compliance. In terms of TV, this means that stations should have a valid contract for broadcasting all copyrighted material and should produce such contracts for IMC on demand. See IMC Rule 02/1999 Compliance with Copyright Obligations.
  - BiH lacks agencies that in most countries serve to negotiate and collect payments from broadcasters and other users of commercial music. Such a mechanism is needed in BiH.
- Advertising limits on public broadcasting: IMC will impose limits on advertising revenue for public broadcasters in consistence with the best of European practices and approaches developed in other Central/East European countries. Given the transparent and legal public funding that should be available to public broadcasters, such limits are necessary to protect the commercial media market and to ensure a balance between public and commercial broadcasting.
- Regional and country-wide commercial broadcasting: Existing regional private broadcasters have developed without the normal competitive processes that a regulator should provide in order to ensure maximum potential benefit to the public as well as the network's commercial viability.
  - IMC will develop a merit-based competitive process for the award of licences for regional and country-wide transmitter networks for commercial broadcasters (recognizing that individual broadcasters may freely establish virtual networks among themselves.) Auctioning frequencies in the absence of a genuine market economy would have undesirable policy consequences.
  - IMC will include plans for a limited number of regional and country-wide commercial radio and TV transmitter networks in its overall Frequency Management Plan.
- **New local broadcasters:** A similar merit-based competition will be required for new local broadcasters, where frequency spectrum is now full.
- **Monopoly ownership rules:** IMC will develop rules, consistent with the EU rules that encourage diversity of media ownership in all communities, including cross-ownership of newspapers and broadcasters in the same community. These rules would be taken into consideration when issuing licences.

## **3. To establish professional standards enforced through licensing:**

- Content standards: The IMC has already launched its Broadcasting Code of Practice and has begun to elaborate this code by issuing detailed, explanatory guidelines for compliance. This process will continue. The IMC will also define circumstances under which gross or repeated content violations should affect the granting or the terms of a long-term license.
- Technical professional standards: IMC will develop technical operations guidelines for radio and television transmitters. These guidelines should serve two purposes – to guide stations in proper operating techniques that minimize interference, and to provide minimum standards that may be used in the licensing process to exclude unqualified stations, or compel them to improve their standards.

## **4. To establish a uniform licence fee structure in BiH:**

- A future IMC, with a much-reduced international presence, can help ensure its own continued independence by generating at least part of its own operating revenue from licensing fees and other regulatory actions. Appropriate distinctions need to be made in any such fee structure among public, commercial and private non-commercial (public service) broadcasters, and on the basis of population coverage. Any such fee structure will be phased in over time, keeping step with the development of media market and the overall economy of BiH.

## PART 2

### EVALUATION METHODOLOGY

#### Introduction

Communications Regulatory Agency (CRA) is an independent regulatory body, whose activities and efforts are of pioneer nature in this country. Responsibilities concerning broadcasting include awarding of broadcasting licences, programme monitoring, and standard setting in terms of designing codes of practice. The name of the agency itself comprises a word *regulation*. Regulation in this sense presumes establishment and maintenance of order in the field of communication and broadcasting media in particular. It does not however mean that regulation is to be understood in terms of censorship. On the contrary, regulation means positive approach to establishment of and encouragement to, professional media in BiH, bearing in mind that the media are treated to be the forth power in any state, alongside legislative, executive and judicial institutions.

What also contributes to importance of regulating the media sphere is the understanding that freedom of speech and freedom of expression entail certain responsibilities. For this reason the Article 10 of the European Convention on Human Rights reads that the exercise of free expression may be subject to: “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

CRA has adopted standards applicable to programming aired by broadcasters. These standards are incorporated in the CRA Broadcasting Code of Practice, CRA Advertising and Sponsorship Code, and other rules and regulations, previously issued by the IMC and subsequently adopted by the CRA, together with those sections of individual licences applicable to programming. Every broadcaster was provided with copies of each of these documents the moment the documents came into effect, that is – as soon as they were officially promulgated. The CRA sets the standards relating to programming content (based on the aforementioned Codes, Rules, and Regulations) and ensures that broadcasters comply with them whilst not judging the specific choice in terms of programming style. Codes cover the following issues:

- ❑ decency and civility,
- ❑ false and deceptive material,
- ❑ access to information and freedom to publish,
- ❑ fair and impartial programming,
- ❑ accuracy and balance,
- ❑ guidelines on provocative language,
- ❑ religious programmes,
- ❑ advertising programmes,
- ❑ advertising and children, etc.

The CRA also has the responsibility to ensure that quality and diversity of public station’s programs are maintained, as stated in the CRA’s *Definition and Obligations of Public Broadcasting*.

Having established the contours of the media field as it was through the process of provisional licensing, the IMC launched the Merit Based Competitive Process for the Award of Long Term Broadcasting Licence, as of 1 October 2000. The Competition is now done by the CRA on the basis of the standing Competitive Rule. The objective of the Rule is to help the CRA select the most successful broadcasters in Bosnia and Herzegovina and awarding them the long-term broadcasting licence.

In this procedure, the initial process undergone by the CRA is the objective analysis, consisting of assessment and evaluation of each applicant, done by the joint efforts of relevant CRA departments. Standards and Complaints (S&C), Financing, and Engineering Departments give overall assessment of each station, reviewing levels of standards and professionalism of them.

### **S&C Evaluation Process**

S&C Department is tasked with assessment and evaluation of the programming content quality. This is specifically not “technical quality”, which is dealt with by Engineering Department. Issues of programming contents are most sensitive, and the process of assessment and evaluation is a complex and difficult one. That is why S&C evaluation process is very detailed and objective. Analyses are done in accordance with the procedure described below. Criteria and standards are based on the aforementioned CRA Codes, Regulations, and Rules.

Application requirements for a long-term licence are listed in the CRA Letter L-16. For the part concerning program content, each station is required to describe its own programming textually, and to substantiate this with recordings of its programming aired on any given two days where one must be a week day and the other a weekend day. Total of 10 people are involved in the process of programming assessment and evaluation, including 2 people from each of CRA’s regional offices.

The second step in this procedure involves the S&C coordinator, who suggests the grade for the programming, according to programme quality requirements included in the evaluation sheet and CRA’s analyses. The programme quality requirements are meant to give insight into the following:

- ❑ balance and depth of information aired in the news and other factual programmes,
- ❑ contribution to diversity of programme services available to general or specific audiences (including age, education, gender and ethnic or cultural background),
- ❑ use of documented demographic evidence in support of programme plans,
- ❑ production and on-air presentation quality (where this does not concern the technical quality but rather production quality),
- ❑ overall level of professional skills and experience of the programme management.

Grades suggested by the S&C coordinator are then discussed with the Head of S&C. S&C coordinator participates in meetings, where members of all relevant departments discuss and suggest grades in each of the required categories, i.e. engineering, finance and programming contents.

The third step concerns the Head of the Department, who is required to re-evaluate the analyses and grades suggested in order to reach the final assessment of the programming quality. The process is completed once points have been assigned to all broadcasters. The required minimum is 12 points, which grants the broadcaster a positive assessment by the S&C department. The maximum is 20 points. These grades are then presented at a final meeting, attended by heads of all relevant departments, where final decision on each license application is reached. It is important to note that each application is also commented on by the Licensing, Monitoring Compliance, Public Affairs and Legal Departments.

As part of licensing in long term, CRA informs relevant broadcasters that they are subject to the Competition Rule, and it also publicises its decisions in order to encourage public participation in the process. The local community, other broadcasters and interested parties all have the opportunity to submit their comments to the CRA within 30 days after the competition has been advertised. Public

opinion is taken into consideration during the process of assessment and evaluation of programming content. In order to encourage public participation, CRA has contracted PRISM Research Agency, Sarajevo, which does focus groups in order to explore reactions of audiences to the programmes that they can watch/listen in their respective regions. These groups have taken the form of Public Consultative Panels. Thirteen focus groups involving the total of approximately 100 participants took place in different cities of BiH. This provided CRA with valuable insight into views of the public on programmes by different broadcasters, in addition to information received by CRA through the regular process of notifying the public of CRA's intention to commence the evaluation of programming in the given region.

## **Programme Analysis**

First, the analysts review each application to distinguish between commercial and public broadcasters. This is particularly important since certain additional requirements apply to public broadcasters. Programming by public service broadcasters must comply with a special set of obligations, relating to variety of programs, percentage of information programs against other types of programming, marketing time, children's and religious programs, etc.

The second step taken by analysts is to read through and assess the textual part of application, referring to the programming content issues. Then the analyst proceeds to the actual assessment of recorded material, comparing it to the textual explanation provided in the application, which has to include listings of program schemes of the broadcaster. It is important for analysts to assess how seriously each station has approached the application process. Analysts also take into consideration the duration and timing of broadcasting listed in the programming schedule, comparing it to the actual recordings in order to check whether the recordings contain all programmes included in the schedule. Total amount of programming is also noted. This means that analysts identify any discrepancies between the programming schedule and the programming broadcast. Several aspects of the analysis include:

### **1. Quality of production assessment**

This part of analysis focuses on production components of broadcast programs in particular, including:

- quality of audio and/or video signal,
- interruption of programming, i.e. black screens for TV stations, sound interference for radio, etc.,
- quality of in-house produced reportage and other programming, for example coverage of press conferences,
- creativity displayed in production of commercials, jingles, and other.

### **2. Content analysis**

#### **Public broadcasters**

The following categories are used for analysis of programming by both public and private broadcasters (private stations that have diverse programs, comprising some or all of following categories):

- (a) Categorisation and segmentation of programming,
- (b) Informative programming (news and political overview programs, including news on events at home and abroad),
  - b.1** distinction between news and informative program:

- **when news programmes are in concern, analysis includes airing time, quality of broadcast, editorial balance, sources used, home news production, proportion of domestic and international political coverage, programme quality and professionalism of journalists;**
  - **in terms of informative programmes, analyses cover airing time, quality of broadcast, political events in focus, technical quality and professionalism of journalists.**
- (c) Children and educational programming
- **analysis of airing time,**
  - **quality of broadcast,**
  - **analysis of whether the programming really addresses the targeted audience,**
  - **professionalism of journalists.**
- (d) Religious programming
- purpose of broadcast – whether it is educational or is dedicated to a specific religious holiday.
- (e) Entertainment and music
- how the programme fits in the stated radio or TV station editorial policy,
  - professional performance,
  - correspondence to various tastes of the given population,
  - suitability of broadcast timing.
- (f) Films and documentaries
- richness (diversity) of programming scheme,
  - classification in accordance to content,
  - suitability of broadcast timing,
  - selection of documentaries.
- (g) Advertising
- compliance with CRA marketing regulations,

Other aspects of programming in connection to both private and public broadcasters concern the role and approach of anchors, journalists, editors and other personnel, since this category has enormous bearing on the overall impression with regard to professionalism of each broadcaster. This also refers to the way live programs are conducted, the approach to guests in various programmes and participating audience etc.

### **Commercial broadcasters**

Some commercial broadcasters focus mainly on one or few types of programming – there are so called music radios whose programming consists almost solely of music, advertising and live talk shows. Assessment and evaluation of programming content takes this into consideration. Emphasis is put on the evaluation of advertising, in terms of its compliance with the CRA regulations, since this is one of the only sources of income for private stations.

### **3. Analysis conclusions**

- evident or potential omissions in the programming content, according to CRA Codes and regulations,

- balance and political sensitivity,
- production flaws,
- quality of the programming within a week,
- difference to program scheme in regards to weekend or any other working day,
- assessment of whether the programming scheme and composition is adjusted to various tastes and needs of population and whether the broadcaster serves the community it covers.

### ***Conclusion***

CRA sets up standards of professional media conduct in B&H, based on the best of European and world practices through the process of licensing. This is all the more important since the media landscape in B&H is currently overcrowded, causing broadcast media blockade, in terms of too many competitors seeking to access most limited financial resources available in the country.

The procedure has now been implemented in Tuzla region. We have noted a lack of serious approach to the application process itself by several broadcasters. This is noticeable in terms of substantial omissions in submitted application forms and material. As far as possible we rectified this by repeatedly contacting the stations for either clarifications or additional material. As the competition process continues, S&C Department notes substantial improvement in the quality of applications submitted to us. The entire process is now evidently been taken much more seriously by the broadcasting community in BiH. This clearly speaks in favour of the approach, which the CRA has adopted with respect to programming of radio and television stations in BiH.

## BULGARIA

### BULGARIAN MEDIA LEGISLATION 2001

**Nelly Ognyanova, Ph.D.**  
Associate Professor in Law  
Commissioner, State Telecommunications Commission  
Sofia

Ladies and gentlemen,

Thank you for this invitation which gives me an opportunity to share with you some thoughts on a new approach to regulation of broadcasting in Bulgaria. I hope that we will have time to discuss regularly the progress made by each of the candidate countries of Central and Eastern Europe in preparations for membership.

Political situation in the country has remained stable over the last year. Commitment to EU membership remains high in the government agenda, as one of the key foreign policy goals and a major stimulus for internal reform policies.

The Regular Report 2000 by the European Commission has confirmed that Bulgaria has made visible efforts in the past year to put in place the basic principles of the *acquis communautaire*.

Bulgaria has made significant progress in alignment of audiovisual legislation to European legislative standards and is continuing to liberalise its telecommunications market. Substantial improvements can be noted – as the Report points out – in the fight against piracy, and amendments to the copyright law are the steps to be taken in that direction.

I will touch on three issues in this presentation:

- legislation;
- administrative capacity for *acquis communautaire* implementation;
- the market situation.

#### Broadcasting Legislation

Harmonisation of Bulgarian broadcasting law with the Television without Frontiers Directive started in 1998 as under the Agreement on the Accession Partnership between the EU and Bulgaria.

Bulgaria has adopted the Broadcasting Law at the end of 1998. The draft was prepared with the Directive TWF in mind whilst not disregarding the Council of Europe's Convention on Transfrontier Television. The draft has been amended rapidly in accordance with the new EU provisions and audiovisual *acquis communautaire*.

The law was regarded very highly by the EU. It regulates the broadcasting sphere in its totality – from the establishment of broadcasters to the supervision of their functioning at the national or local level. It also outlines general rules on the activity of all types of broadcasters – public and commercial alike, and covering all transmission models: terrestrial, cable and satellite.

The following measures have already been taken in order to improve the Law gradually:

- The Council of Europe's Transfrontier Television Convention came into effect in Bulgaria on 1 July 1999.

- The Protocol to the Council's Convention was ratified on 12 January 2000; and Bulgaria was among the first five countries that ratified it.
- Amendments to the Law on Broadcasting aiming at regulating some additional questions were adopted in the end of 2000. The main changes include: expansion of the list of events deemed to be of major importance; introduction of more rigid restrictions on advertising of alcohol; ban on radio and television market of medicinal substances and medical treatment; full incorporation of the definition of EU jurisdiction; enhanced protection of minors by certain new restrictions on the programming; improvement of the sanctioning system and law enforcement.

We are most interested in the full alignment of *acquis communautaire* and Council of Europe acts, and we follow carefully developments in both these legal frameworks.

As a direct result of thorough alignment of the national broadcasting legislation with the *acquis communautaire* in September 1999 Bulgaria was officially invited to join the Media II Program and now – Media Plus Program. Bulgaria nowadays has no agreements or legal texts incompatible with the *acquis communautaire*.

### **Administrative Capacity to Apply the *Acquis Communautaire***

There are two bodies in Bulgaria, which regulate broadcasting: the State Telecommunications Commission (STC) and the National Council for Radio and Television (NCRT). The STC is an administrative body dealing with telecom aspects of broadcasting. The National Council for Radio and Television (NCRT) is the implementing body under the Law on Broadcasting in the area of both the programming and content.

The NCRT is an independent expert organisation, established to defend the independence of radio and TV broadcasters and to meet the public interest. The NCRT has 9 members – 4 appointed by the President and 5 elected by the Parliament. The NCRT exercises control over implementation of the Law, decides on licensing of broadcasters (issue, modification, appeals) and on imposition of administrative penalties and fines.

Both regulators are members of European associations of national regulators.

What problems do we face and try to solve implementing our Law on Broadcasting?

- The independence of the NCRT from political influences is still being discussed. The President and the Parliament are the only two directly elected authorities in Bulgaria. The quota and rotation principles, provided for by the law, are premises for the independence of the Council.
- Funding. The linkage between policy making and budgeting is difficult – Bulgaria is in the environment of the Currency Board. The NRTC develops its activity in a dynamic environment with limited financial resources. In view of supporting its activity and improving its efficiency, opportunities for the use of various financial instruments should be sought (PHARE) for establishment of information infrastructure in the broadcasting sector, organisation of seminars on new forms of piracy and RTL infringement, studies on the market development etc.
- Participation by the civil society. It should be mentioned here that we are looking for involvement of actors other than the administration (e.g. professional associations) in elaboration of legal texts and their implementation if legislation is to be effective.
- Relevant monitoring structures are still to be developed. Equipment for monitoring and recording of programs is still far below the necessary standard. NCRT is now working on development of survey mechanisms for monitoring purposes.
- Professional training at all levels is crucial. Regulatory bodies are here assisted by the third sector very actively, for example in joint education programmes with PHARE – Intellectual Property Program being one of them.

- As we have two regulators in the field of broadcasting, some problems of their coordination still pop up, so we explore very carefully experiences of countries with an integrated regulator (Italy) and the reform of regulatory authorities in the countries like Switzerland and UK.
- The regulator (NCRT) appoints general directors of the national public broadcasters BNT and BNR. Decision-makers make efforts to prove that they are able to select the proper applicant on the basis of the applicant's competence and competence only, rather than in harmony with some political or personal preferences.

### **The Market Situation**

Development of broadcasting over the recent years has been exceptional, maybe even unique in the history of the national media. Liberalisation of a formerly monopolised sector has contributed greatly to this development. Over 1000 cable licenses – regional and local – have been issued.

TV broadcasting has been dominated for a long time by Bulgarian National Television as the only domestic nationwide broadcaster with terrestrial (92%) coverage and satellite program (digital transmission). The tender for the second and third private national TV broadcasters has been won by the Balkan News Corporation and Nova Televizia. There is an increasing number of local commercial channels. The first tender for a regional digital television is to be announced shortly.

The first private national terrestrial radio broadcaster Darik has been licensed. Licensing of private regional radio stations in major cities and towns is progressing. Ninety-five regional licenses were issued in the regions of Sofia, Plovdiv, Varva, Burgas, Rousse etc.

### **Future Development**

Bulgarian mid-term priorities in the area of broadcasting are:

- Digitalisation and new information technologies for production and distribution of broadcasting programs;
- Convergence of electronic communications and information technologies – we intend to make the IT developments one of our top priorities, taking into account that information society creates both opportunities and challenges.
- Development of new advertising and TV shopping models;
- Support to the national film and television production;
- Participation in MEDIA Plus Program.

In conclusion, let me stress once again that we intend to respond to challenges of the global information society with an open and competitive broadcasting market, and with flexible, rapid and coordinated regulatory approach. And we intend to do so in harmony with EU directives and in view of bettering the quality of life of our citizens.

Ladies and gentlemen, thank you very much for your attention.

## LEGAL FRAMEWORK OF BULGARIAN BROADCASTING – A BRIEF REVIEW

**Cvetan Cvetanov**

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Media Development Center

Sofia

Bulgarian media legislation provides some relatively new legal aspects which emerged during the complicated time of transition from a totalitarian political system towards democratic society, a society that has its roots deeply grounded in political pluralism, market economy and democratic values.

In this respect we consider all legal guarantees of the freedom of speech to be extremely important as well as guarantees of the right of expression, access to, distribution and exchange of information, and, ultimately, freedom of mass communication in general.

Main legal sources of Bulgarian media legislation that define the status of broadcasters and broadcasting in relation to the state, public institutions, judiciary and citizens, lay within the framework of the national legal system. The framework includes the Constitution, laws and other legal normative acts as well as conventions and practices of the international law, the judicial practice of Bulgarian courts of law, customary law, moral traditions and, finally, the rules of media regulation and self-regulation.

### **Domestic Legal Sources**

Several articles (39, 40 and 41) of Bulgarian Constitution enacted in 1991, proclaim the freedom of expression of all individuals and their right to distribute information in oral or written form, by sound, text or picture or any other means. These freedoms and rights include the access to and exchange of information. These rights cannot however be exercised in the purpose of intolerance, exculpating cruelty or violent acts – nor do they apply to libel and slander.

Article 40 of the Constitution defines media freedom and bans any exercise censorship over it. It permits confiscation, seizure or closure of print media in cases when laws or other legal regulations are violated, but only if Bulgarian Court rules so. The seizure has no legal force if the media is not confiscated within 24 hours after the seizure came into effect.

Other legal sources, which have undergone certain modification on several occasions, are the Broadcasting Law /RTL/ and Telecommunications Law /TL/, Elections Law, Competition Law, Law on the Access to Information, etc.

The Broadcasting Law regulates radio and TV broadcasting over the territory of the Republic of Bulgaria. Radio and television broadcasting consists of: production of radio and television programmes or any kind of information to be transmitted by terrestrial transmitters, cable, satellite or any other means of transmission, in encoded or non-encoded form, and intended for immediate reception by an indefinite number of persons.

According to the Broadcasting Law, broadcasters in the country are either public or commercial.

The Law directs the public broadcaster:

1. To broadcast political, economic, cultural, scientific, educational and any other socially relevant information;
2. To promote national and world cultural values, and to popularise scientific and technical achievements by broadcasting Bulgarian and foreign educational and cultural programming for persons of all ages;

3. To ensure through its editorial policy the protection of national interests and universal cultural values and to provide for the education and preservation of culture of all Bulgarian nationals regardless of their ethnic identity;
4. To promote national production and national artistic creation.

The Broadcasting Law defines Bulgarian National Radio (BNR) and Bulgarian National Television (BNT) as a national public radio broadcaster and a national public television broadcaster respectively, and as such they are supposed:

1. To provide programmes for all Bulgarian nationals;
2. To contribute to the development and popularisation of Bulgarian culture and language as well as ethnic cultures and languages of all Bulgarian citizens;
3. To provide access to national and European cultural heritage through their programming;
4. To broadcast programmes which inform, educate and entertain;
5. To implement new information technologies;
6. To reflect various ideas and beliefs within society;
7. To contribute to mutual understanding and tolerance in human relations;
8. To provide citizens with opportunity to acquaint themselves with the official position of the state on all issues of relevance for society.

The Broadcasting Law guarantees the independence of broadcasters and broadcasting from any political or financial influence. Article 9 of the Law guarantees free production of both radio and TV programming and bans all forms of censorship.

Freedom of reception is also guaranteed, and retransmission of radio and television programs is not restricted within the territory of the country under the terms of this law.

In broadcasting, broadcasters should be guided by the following principles:

1. guarantee of the right of free expression of opinion;
2. guarantee of the right to information;
3. protecting the secrecy of the source of information;
4. protecting personal integrity of citizens;
5. restraint from inspiring intolerance among citizens;
6. prohibition of programmes promoting or exculpating cruelty or violence;
7. guarantee of the right of reply;
8. observance of copyrights and neighbouring rights in broadcasts and programmes;
9. preserving purity of Bulgarian language;

At least 50 percent of the total annual airing time – excepting the news and sports events coverage, radio and television games, advertising and shopping – must be allocated to European and Bulgarian production when feasible. Duration of all broadcasts produced by external producers must not be less than 10 percent of the total annual airing time. The time for news, coverage of sports events, radio and television games, advertising, and shopping shall be excluded therefrom.

Any opinion may be freely expressed on air.

Journalists and other authors contracted by broadcasters may not be given any instructions or directions as to their work by persons and/or groups other than management bodies of the respective broadcaster. Public criticism of the broadcaster's policies by their staff shall not constitute disloyalty towards the employer.

Journalists working for broadcasters have the right to refuse an assignment when it is contrary to the provisions of this law or relevant contracts as well as their personal convictions. Owners and/or management bodies of broadcasters and affiliated journalists may agree upon editorial policy on issues pertaining to current political or other affairs.

Programmes are to be transmitted in the official language pursuant to the Constitution of the Republic of Bulgaria. Programmes can be transmitted in another language when those:

1. serve the purposes of education;
2. are meant for Bulgarian nationals whose mother tongue is not Bulgarian;
3. are intended for listeners or viewers abroad;
4. are foreign programmes retransmitted by cable or satellite;
5. are retransmitted programmes of foreign broadcasters licensed in Bulgaria;
6. are foreign programmes.

Broadcasters have the right to receive the information they need from state and other institutions provided that information is not officially classified in accordance with the law. Radio and television operators are obligated to use the information obtained accurately and without bias.

A broadcaster holding an exclusive right for coverage of major events is obligated to ensure access to other broadcasters for the purpose of coverage.

Broadcasters are obliged to record all the programmes they air and to retain such records for 3 months following the day of broadcast. In case a demand is filed for reply or an action is brought against the broadcaster in relation to the content of a broadcast or programme, the records shall be kept until the matter is settled. A person claiming that she or he has been affected by a broadcast has the right to access the archive and to copy the record at her (his) own expense. Officials authorised to monitor compliance of broadcasters with the Broadcasting Law have the right to access all materials in relation to their duties.

Broadcasting in Bulgaria is regulated by the National Council on Radio and Television (NCRT), an independent specialized collegiate body that protects the freedom of speech and independence of broadcasters as well as interests of viewers and listeners. The National Council on Radio and Television adopts regulations on its structure and duties. It is composed of 9 members, five of whom are elected by the National Assembly whereas 4 are appointed by the President of the Republic.

A member of the National Council on Radio and Television can be any person of Bulgarian nationality who resides in the country, holds a BA and has professional experience in the field of broadcasting, culture, journalism, audio-visual arts, telecommunications, law or economy. The National Council on Radio and Television:

1. monitors compliance of broadcasters with the relevant law;
2. elects and recalls general managers of Bulgarian National Radio and Bulgarian National Television;
3. approves the appointment of managing boards of the Bulgarian National Radio and the Bulgarian National Television upon recommendation by general directors of the public broadcasters;
4. comments on draft legislation and interstate agreements in the field of broadcasting;
5. comments on the proposed state budget subsidy for Bulgarian National Radio and Bulgarian National Television;
6. confirms the extra-budgetary draft account of the Broadcasting Fund annually;
7. organises surveys of audience on broadcasters and their programmes;
8. comments on any changes to license fees;
9. decides on the issue, amendment and termination of broadcasting licenses;
10. reports to respective bodies on violations of broadcasting legislation;
11. determines the composition of the managing board of the Broadcasting Fund; adopts regulations on the structure and activities of the Fund and of the managing board, and appoints the executive director.

The National Council on Radio and Television supervises activities of broadcasters only in respect of:

1. compliance with the principles provided for under the Broadcasting Law;
2. compliance with the requirements of Broadcasting Law;
3. elections coverage;

4. compliance with requirements on advertising;
5. compliance with provisions regarding charity and sponsorship;
6. preservation of classified information;
7. compliance with special conditions applicable to programming for children and adolescents;
8. reporting on court decisions and decisions by other public institutions in the cases provided for by the law;
9. protection of consumer rights;
10. technical quality of broadcasts and programming;
11. compliance with restrictions provided for by the law.

The National Council on Radio and Television makes decisions by an ordinary majority of all members.

Broadcasting must be done in accordance with the terms of broadcasting license granted by the State Telecommunications Commission.

Only physical – sole proprietors – and legal persons as defined by Bulgarian legislation are eligible to apply for a license.

Bulgarian National Radio and Bulgarian National Television broadcast as national public broadcasters on the basis of licenses granted to them by the State Telecommunications Commission. Licenses are non-transferable. In cases where a legal person simultaneously applies for license in the capacity of broadcaster and for a license as a telecommunications operator two separate licenses will be granted under the law.

Licensed broadcasters must ensure that broadcasting is done in accordance with the requirements and terms of the license. License is valid 10 years maximum.

License applicants file written applications with the State Telecommunications Commission. The application must enclose:

1. act of incorporation;
2. certificate of registration with the court or other documents verifying the applicant's status;
3. certificate on tax payment from tax authorities valid as of the moment of application;
4. proposal as to the means of broadcasting;
5. specification;
6. declaration that none of the facts under Article 105 apply;
7. a proof of financial viability;
8. description of programming project, concept, profile and scheme, compounded with the list of any additional broadcasting services;
9. a proof of commercial rights and granted copyright where applicable as well as granted neighbouring rights for broadcasting programmes other than home produced.

An authorised official of the State Telecommunications Commission verifies the documents. Where omissions and faults are established, the applicant is given 7 days to clarify or complete the respective segment of the application. In case of failure to comply with this in 7 days time, the application is not considered.

Only members of the State Telecommunications Commission and the National Council on Radio and Television have access to the documents submitted.

Within one month from submission of the documents the National Council on Radio and Television pronounces its decision on demand. Within 7 days thereupon the National Council on Radio and Television notifies the State Telecommunications Commission of its decision and forwards the respective application together with documents enclosed. In case the decision is affirmative, a draft license will also be attached. In this case, the State Telecommunications Commission issues the

license within one month, following the decision by the Council and in accordance with the procedure provided for under the Telecommunications Law.

In cases where the National Council on Radio and Television considers that licensing should be done on competitive basis, competition will be arranged under the terms and procedures in accordance with a decree issued by the Council of Ministers.

The Law on Broadcasting contains certain regulations concerning advertising and sponsorship. Advertising and sponsorship are arranged for on the basis of contracts between broadcasters on the one hand and advertisers or sponsors on the other. Advertising regulations are applicable to both radio and television broadcasters. Advertising on radio and TV must meet the requirements of fair competition pursuant to legislation in effect. Advertising must not encourage any forms of behaviour potentially harmful to health or personal safety of citizens – nor should it support any behaviour harmful to the environment.

Advertising targeted at minors must meet the following requirements:

1. not to appeal to minors to purchase a product or service, taking advantage of the latter's lack of experience, or their trustfulness;
2. not to take advantage of the special trust that minors feel for to their parents, teachers, and other authoritative persons;
3. not to exhibit minors in dangerous situations.

Advertisers are obligated not to exert any influence over the programming content. Advertising should not make use of the state coat of arms, the anthem of the Republic of Bulgaria, persons holding elective offices in state bodies, or voices and images of journalists working for the given broadcaster such as newscasters, other anchors or commentators of political and economic programmes.

Advertising of goods and services for the production of, or trade in, which a special permission is required may only be included in the programs of broadcasters once the advertiser has submitted the permission. Any kind of advertising tobacco products or smoking is prohibited.

Another specialised law regulating Bulgarian broadcasting is the Telecommunications Law /TL/ that regulates all public affairs in relation to telecommunications. Its purpose is to create a framework, which will ensure that the public demand for telecommunications services is satisfied. This law provides conditions for:

1. liberalisation of telecommunications activities and services, establishment of a free market and fair competition;
2. fair and non-discriminatory treatment of the operators;
3. provision of universal service on the entire territory of the country;
4. protection of national security.

According to the laws on broadcasting and telecommunications, two licenses are required for broadcasting radio or TV programming. One of those is the programming license whereas the other one covers telecommunications segment of broadcasting.

Telecommunications in Bulgaria are supervised by the State Telecommunications Commission (STC). STC is a state authority with the Council of Ministers. The Commission is Sofia-based legal entity with budget funding. The STC is a supreme authority regarding the use of allocated budget funds.

The Commission consists of five members, including a chairman and his deputy. The members are designated by the Government-designed regulations and appointed by the Prime Minister with a seven-year term of office. A member can hold no more than two consecutive terms.

The State Telecommunications Commission produces a preliminary study of requirements and technical feasibility prior to the granting a license for establishment of telecommunications networks

and for provision of public telecommunications services, using the frequency spectrum. It prepares required documents and carries out necessary activities in relation to licensing as under the law.

STC grants, amends, supplements, suspends, terminates and revokes licenses for telecommunications activities upon decision of the National Radio and Television Council. Acts issued by STC that concern licenses are subjected to judicial review and can be appealed against.

As far as fair competition among broadcasters in Bulgaria is concerned, Bulgarian legislation provides various mechanisms stemming from the Competition Law, the Consumers Law, the Copyright Law and other civil laws.

**International Sources of Bulgarian Legislation on Broadcasting are:**

The UN Declaration of Civic and Political Rights, the UN Declaration of Economic, Social and Cultural Rights, the General Declaration of Human Rights, the European Convention of Human Rights and Freedoms, EU Directive on Transfrontier Television, and the Directions and Guidelines for Telecommunications Development.

The very process of transition and democratisation of the country constantly generates the necessity to improve and update the legal framework of Bulgarian broadcasting.

## THE CZECH REPUBLIC

### INFORMATION ON THE NATIONAL LEGISLATION

#### **Artuš Rejent**

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Media Department, Ministry of Culture

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Ladies and gentlemen,

It is my pleasure to present at this occasion a short overview of the Czech Republic's broadcast media legislation and its development over the last decade. For the sake of brevity and doing, no doubt, quite an injustice to the complexity of actual, historical, social processes, I should like to begin with noting that there have been roughly two periods of the media legislation development in the Czech Republic since the fall of communism.

The first period, from the beginning of the 1990s to about 1998 was a period of relatively minor, though consequential<sup>3</sup> changes of the broadcast media legislation. Thus, there was a relatively developed, functioning and stable mechanism of media regulation in place that facilitated rapid building of a new mixed broadcast system. In fact, it was the first such system in the post-communist countries where public broadcast institutions coexisted (competed for audiences) with the private ones.

After this period of relative legislative inactivity, there came a period of major legislative changes. It seemed necessary to rework the existing system that lacked certain key provisions and displayed some serious shortcomings, which had been becoming more and more apparent. At the same time, adoption of the EU's Transfrontier TV Directive and the Council of Europe's Convention became an issue. More specifically, the changes concerned two key broadcast laws – the Act on Radio and Television Broadcasting and the Act on the Czech Television – that I shall discuss in turn.

Surely, the most discussed law since the 1990s has been the Act on Radio and Television Broadcasting, which was amended several times during the last decade and which is presently in the process of being replaced with a brand-new legal document. This new Broadcasting Act was passed by the Lower Chamber – House of Representatives and is pending approval by the Senate, the Upper Chamber of the Parliament. We shall soon know the outcome.

At the beginning, it is probably appropriate to mention that the new law was prepared by a group of representatives from the Lower Chamber of the Parliament since competing proposals of the Ministry of Culture were not met with support. The Ministry's attempts to bring together representatives of the industry, lawmakers and regulators in the process of drafting the new law failed despite a promising beginning. The industry found it easier to lobby directly with some lawmakers, who then presented, and succeeded in getting passed, what many consider to be an industry-friendly law.

Overall, the law is supposed to facilitate the operation of a more developed system of regulation and introduce some positive innovations. Here I can cite, for example, provisions concerning the Czech Republic's Council for Radio and Television Broadcasting, which is the regulative and supervisory body in the field of broadcasting. These provisions were hitherto incorporated in a special law.

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<sup>3</sup> The Amendment from 1995 abolished the institution of additional conditions, thus radically changing the position of the regulator.

The law also harmonizes the Czech broadcast legislation with the EU Directives on Transfrontier Television. Now, we can find new provisions like the jurisdiction principle or events of major importance for society. With respect to the latter, I should like to note that we expect to introduce the list of events shortly after the law gets ratified. In addition, the law reads required quotas of European and independent production. However, it is rather probable that these quotas will not be fully met by some/all commercial broadcasters because of the relatively open wording of the provision and for “objective” reasons. Some provisions conforming to the directives have been already present in the old law; e.g., terms of television advertising. The law also introduces definitions and clarifies conditions for granting and running broadcasts.

On the other hand, the law does not address issues relevant to the digital era at all. The present policy is that issues coming along with digitalisation will be taken up by a special committee. This committee is supposed to draw up a conceptual framework that will create the basis for further legislative work.

There was also a long discussion concerning the procedure of appointing members of the Czech Republic’s Council for Radio and Television Broadcasting. The Ministry here did not get lucky with its suggestion to divide this responsibility among three institutions – the Lower and the Upper Chambers of the Parliament and the President’s office. Nor did it succeed with the proposal to vote the members in on rotational basis. The election procedure therefore remains unchanged. The whole body and single members will be elected and recalled by the Lower Chamber of the Parliament.

Another intensely discussed issue concerns the licensing mechanism, especially the question of "automatic renewal of license". The new law allows for one, virtually automatic extension of license period. It is quite possible, according to media experts, that this practice could endanger or slow down the changeover towards terrestrial digital television.

Transparency of ownership is one of the criteria in the procedure of evaluating license applications and awarding licenses. The law requires the applicant to submit a number of documents, e.g., the composition of the Board, identification of partners, information on standing debts etc. However, according to some experts, even this does not guarantee the regulator a clear picture of the ownership structure. The principle of “putting the cards on the table” (*Auskunftspflicht*) as it is applied in Germany would hopefully offer more transparency of companies backing up the license holder. This legal uncertainty caused many a problem in the past.

Apart from these specific issues, there is a more general question that comes to mind with respect to any general broadcast law: Should the holder of the nation-wide broadcast license give something back to the community in return for using a valuable public resource – a bundle of broadcast frequencies? According to the new Czech broadcast law, the license holder will have to pay 200 mil. CZK, i.e. about \$5.25 mil. However, the payback does not always have to be the money. There are forms of compensation that can be demanded from private broadcasters such as, for example, reinvesting into home production, commissioning part of the production from independent producers, etc. Such conditions can be set as terms of license during the licensing procedure. However, some or even all of these terms may not be observed later on, and the Council has no powers to compel the broadcaster to deliver on earlier promises.

But enough about the broadcast law. Arguably, more heated atmosphere surrounded in recent months the Amendment to the Act on the Czech Television that regulates most of the activities of the Czech public TV broadcaster. That was because the adoption of the Amendment was speeded up, if not prompted, by the Christmas crisis and the ensuing strike of the Czech Television’s employees, allegedly in protest against illegitimate attempts of politicians to interfere with the public mission of the institution.

In the light of the current situation, it is not surprising that one of the main issues the new amendment was supposed to address concerns the need for greater independence from political power centres.

Concretely, the independence of the Council of the Czech Television, the Czech Television's supervisory body, was identified as most desirable of all solutions suggested.

The desired solution was supposedly embodied in a provision that binds the Lower Chamber of the Parliament to select the Council members from the list of candidates recommended by various civil society groups (associations, unions, interest groups of cultural, educational, scientific, environmental or ethnonational provenance). At the same time, candidates are subject to the incompatibility provisions. However the law grants the deputies the right to recall any council members on the basis of vague conditions.

Among other changes brought about by the amendment, I can name, for example, establishment of a new consultative body affiliated to the Council of the Czech Television that shall cooperate with the Council on financial matters. Its task is to monitor whether financial resources and property entrusted to the Czech Television are managed properly and efficiently. To help dispel the doubts concerning the Czech Television's financing, it was included in the list of public institutions that are subject to the Act on Free Access to Information.

The amendment also includes a more detailed definition of public service and related tasks. As a novelty, it is explicitly stated that the Czech Television supports Czech film production which, in fact, was successfully done already. The public broadcaster also operates 24-hour service on one channel and is actively promoting new technologies. Another provision makes meetings of the Council open to public.

Talking about the public broadcaster, one cannot avoid the seemingly eternal question of financing. The Czech Television's funding is drawn from license fees and business transactions related to its public broadcaster mission. These commercial activities basically consist of advertising (1% per channel) and selling and leasing estate. Citizens owning a TV set are obliged to pay the license fee. The fee is not very high in contrast to the usual European standards, and it gets devalued even further due to inflation. As a result, the Czech television is limited in its activities due to the endemic lack of money, but also due to what seems like chronic mismanagement. The fee could be raised if the Parliament changes the law on the Radio and TV fee. The Ministry of Culture would like to recommend such change soon and thus avert a serious threat to an important public institution.

Thank you very much for your attention.

## GERMANY

### GERMAN BROADCASTING LAW

#### **Dr. Verena Metze-Mangold**

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#### **I. Historical Development**

The development of today's structures must be seen against the background of Germany's experience with a centralized state broadcasting system under the Nazi regime. The Association of Public Broadcasting Stations in Germany (ARD), formed in 1950 as an association of broadcasting stations of German federal states, and Germany's Second Channel (ZDF), founded in 1961, are incorporated public-law institutions and therefore autonomous. They are subject to no more than limited state supervision. In order to be independent of the national budget, they are financed through television licence fees. Where content is concerned, they are largely free and independent. German Broadcasting Law specifies a number of principles that commit ARD and ZDF to a policy of balance and mutual respect. Compliance is monitored by supervisory boards with a pluralistic membership. Private broadcasting was introduced in the mid-eighties, with the emergence of broadband cable and satellite transmission. The Broadcasting Treaty in the United Germany, concluded in 1991, ensures preservation and development of public broadcasting, its share in promoting new technology and the continued financial basis of public broadcasting, while also creating necessary conditions for setting up and developing private broadcasting.

#### **II. Constitutional Basis**

##### **1. Competence**

*Competencies for regulating and organising the broadcasting system are in the hands of the federal states, as each of them has educational and cultural autonomy. Here, the competence of the German federal government is restricted to telecommunications services (transmission technology) required for broadcasting. According to court decisions made by the German Constitutional Court, telecommunications facilities are of secondary importance in relation to broadcasting ("subservient function of telecommunications").*

##### **2. The Broadcasting Guarantee of Article 5, Para. 1, Sentence 2 of the German Constitution**

In a number of decisions, German Constitutional Court issued some fundamental statements on the fundamental right of the freedom to broadcast (Article 5, para. 1, sentence 2 of German Constitution).<sup>4</sup> It warrants the freedom to form one's opinions, both to individuals and to the general public. As a medium and factor in the formation of public opinion, broadcasting is an indispensable media of mass communication. The freedom to broadcast is primarily a *subservient* freedom. The number of broadcasters is relatively small compared with the number of newspapers, partly because of the high costs involved. In view of the outstanding communicational significance of broadcasting, its specific mission and the dictate of autonomy, it has to be kept clear of state domination and influence. Emergence of a predominating opinion-forming power must be avoided. Moreover, it has to be ensured that the content reflects the diversity of different views as broadly and as comprehensively as possible. Legislators must create a so-called positive order (that is, material, organizational and

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<sup>4</sup> Details presented herein are based on the so-called Broadcasting Decisions of German Constitutional Court.

procedural rules), warranting the freedom to form one's opinions, both at the individual and public level, and ensuring that broadcasting as an opinion-forming institution does not become the tool of the state or a specific social group.

### **3. The Dual Broadcasting System**

One of the basic decisions that have to be made by legislators concerns the broadcasting model. The German federal states have done so through a *dual* structure. Commercial broadcasting must not become the tool of individual social groups, and all the relevant forces must have a say in their overall content. However, commercial broadcasting cannot become subject to the same demands as public broadcasting since economic contingencies compel the former to propagate content which appeals to broad sections of society, providing wide coverage for as little money as possible. They are therefore not in a position to ensure comprehensive balance. The fulfilment of the broadcasting mission includes the formation of opinions, the formulation of demands and objectives, the provision of entertainment and information as well as a cultural responsibility – objectives that remain the task of public broadcasting corporations. This is not a reduction to minimum provision or the demarcation of a dividing line between private and public broadcasting. Rather, the requirement to provide “basic services” (*Grundversorgung*) means to supply content for the entire population and to ensure comprehensiveness, offering the full breadth of information and ensuring a diversity of opinions. As long as and to the extent that public broadcasting secures these functions, legislators do not need to demand the same high standards from private broadcasters. The reduced requirements on private broadcasters are therefore inextricably connected with the safeguarding of public broadcasting and its opportunities for development.

### **III. The Broadcasting Mission**

While formulating the constitutionally based mission to provide for basic needs, German broadcasting law and treaties also add substance to this mission. Where *quality* is concerned, principles are set up, committing public organisations to broadcast high-quality content and offer comprehensive and objective reporting. Each broadcasting area is geographically defined, and each regional and multi-state broadcasting corporation must also provide area-specific programmes. In addition, it must cater for regional specifics, cultures and languages. Moreover, the law makes certain stipulation on the number and types of channels. As regards *quantity*, this concerns not only creation of two main channels, but also the existence of a further television channel with a cultural emphasis in addition to two thematic channels. Where technical capacities are concerned, the digital array of ARD and ZDF is restricted to the equivalent of three analogue channels. The provision of further channels would be subject to legislation. Finally, public broadcasting corporations are also permitted to offer online facilities with primarily channel-related content. They are not allowed to advertise or receive sponsoring in this context.

### **IV. Organisation and Supervision**

#### **1. Public Broadcasting**

Broadcasters are not part of the *state*. Rather, because of their special mission and the resulting commitment to autonomy, they are part of *society*. As there is tension between responsibility within the state, on the one hand, and the warranting of freedom from the state and autonomy, on the other, detailed regulations are required for organisation of broadcasters. In particular, diversity of opinions and balance of content must be ensured through structural measures, both organizationally and with regard to procedures. The Broadcasting Council, which is composed of representatives of all socially relevant groups, functions as an internal, “interior-pluralistic” monitoring body, representing interests of the public at large and ensuring, among other things, that the content genuinely matches the existing diversity of opinions. The state has no supervisory function in matters of content. Instead, its function is restricted to monitoring issues of legality.

## 2. Private Broadcasting

By and large, private broadcasting is shared between two large corporate groups – Kirch and Bertelsmann. Licensing and monitoring of channels are handled by media authorities of German federal states. To receive a licence, a channel must be financially viable and must fulfil certain requirements in terms of content. Moreover, the Commission for Identification of Media Concentrations, which is associated to the Media Authorities, seeks to prevent violations of pluralism in terms of opinions.

## V. Funding

While private channels are funded through advertising, sponsoring, pay TV and telesales, public broadcasters receive their revenue through licence fees and only to a small extent from advertising and other sources. Funding through licensing largely makes them independent of audience ratings and enables them to fulfil their mission. The law serves to specify financial conditions for fulfilment of the broadcasting mission.

Licence fees are defined in a process of co-operation, which proceeds in several stages. First, each broadcasting corporation submits its requirements. These are subsequently analysed and assessed by a Commission for Identification of Financial Requirements – *Kommission zur Ermittlung des Finanzbedarfs* (KEF), consisting of independent experts. The federal states, which eventually decide upon the amount of licence fees, are basically committed to accepting the proposal of the KEF.

The Media Authorities of the federal states receive 2% of the fees. Advertising is only permitted in public broadcasting to a very limited extent (that is, only on the two main television channels, ARD and ZDF, and only on weekdays before 8pm on TV and only in certain time windows on the radio). The KEF reduces the required licence fees by the income generated in this way. The funding method (whether purely through licence fees or as a mixture) is a matter for legislation, with the proviso that all funding must line up with the *functions* of public broadcasting. Advertising does not contradict these functions, but it would be incompatible with the broadcasting mission if funding took place primarily through advertising revenue. Mixed funding is therefore a suitable method of preventing one-sided dependence, while at the same time strengthening the broadcasters' freedom to provide content and relieving the financial strain on fee payers.

## MACEDONIA

### THE LAW ON BROADCASTING<sup>5</sup>

#### **Lidija Ivanovska**

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I come from the Republic of Macedonia, and I represent the Ministry of Transport and Communications where I work on matters related to the regulation of broadcasting.

I have had a chance to work on the draft Law on Broadcasting, and I have been able to see that many of the principles relate to the broadcasting standards and recommendations by the Council of Europe. I hope that this workshop, which is indeed very comprehensive, will be useful to me personally and my country as we start the review of our broadcasting legislation.

The Law on Broadcasting in the Republic of Macedonia first came into effect on May 8, 1997. That was the very first legal text to lay down the legal framework for operation of electronic media in our Republic since the introduction of multi-party system and emergence of plural media scene.

The Law stipulates basic conditions for broadcasting drawing on the principles of freedom of expression and freedom of receiving and accessing information, as guaranteed by the Constitution of the Republic of Macedonia and Article 10 of the European Convention for Protection of Human Rights and Freedoms.

The Law also incorporates some general principles, rules and obligations incorporated in relevant international documents, which the Republic of Macedonia signed and ratified, or listed in the documents (declarations, resolutions, directives and recommendations) adopted by the Council of Europe and European Union.

The Law has provided for development of *dual system*, that is – a media system made up of public and commercial broadcasting. The dual system (private/commercial broadcasters and public enterprises), as defined by the Law, characterises broadcasting in democratic Europe, and it should not be questioned further.

Macedonian Radio-Television Public Enterprise and Macedonian Broadcasting operate as public enterprises in the Republic of Macedonia. On a local level, public broadcasters can be established on the ground of a decision by the respective municipality and the city of Skopje, a relevant founding act, and upon approval by the Broadcasting Council.

Nation-wide or local commercial broadcasting companies can be established by natural or legal persons provided that both frequency and broadcasting licenses have been granted. The Law rules that commercial broadcasting company can be awarded only one radio and television broadcasting license for a given region while the maximum of two licenses, one for radio and the other one for television, can be granted for broadcasting in other regions, but only the ones which do not border the region of company's origin.

The Law provides for establishment of the Broadcasting Council as an independent body that represents public interest in the field of broadcasting. The Council is comprised of 9 members, elected by the Parliament. Members are supposed to be competent persons from areas of public information,

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<sup>5</sup> The title added by the editor.

economics, education, culture and other. The Council must include representatives of ethnic minorities in the Republic of Macedonia. According to the Law, the Council is not to be affiliated to any political party – nor is it to be related to the government. Further more, the Law separately regulates the issue of broadcasting license, in which case the complete procedure (the tender, recommendation) is done by the Broadcasting Council, while the very act of reaching a decision is a matter for the Government.

In the light of overall topic of my presentation, I will also address several other important provisions of the Law on Broadcasting.

1. Public broadcasting service in the Republic of Macedonia is established on the basis of two legal acts: the Law on Broadcasting and the Law on Macedonian Radio and Television, i.e. Macedonian national broadcaster. This public broadcaster is financed from the tax or a fee paid by all TV set owners. The tax collection is tied to the payment of electricity bills, and the payment of the fee is considered to be a civic duty. As a beneficiary, Macedonian Radio and Television gets 61% of the total amount collected, in addition to 7.5% allocated for further development of the national public broadcaster and necessary equipment. There has been a lively debate over the question of this fee, and local public and commercial broadcasters have objected to the percentage of the fee allocated to Macedonian Radio and Television. Namely, local public broadcasters, which get 5% of the total amount, consider this amount too low. On the other hand, commercial broadcasters get a certain share for production and broadcasting of programmes of public interest and promotion of independent production, which ultimately amounts to 10% as under the Law. Commercial broadcasters have however repeatedly insisted that their share of the ‘pie’ should be reconsidered.
2. *The procedure through which local public broadcasters should have been established, i.e. coordination among the existing local radio broadcasters (29 of them) did not yield the expected results. What are the problems?*
  - *The most difficult problem is by far the status of local public broadcasters, which remains unclear and uncertain, since the Law directs that they become local public broadcasting companies with respective municipalities as founders.*
  - Another major problem concerns financing of local radio stations. The local public broadcasters get only 5% of the total fee. One other source of funding is municipal budget. The third source is advertising, which however is limited to 7% of one-hour programme.
3. Commercial broadcaster can be established in the Republic of Macedonia by legal and natural persons. It can cover either the entire state territory or a certain area within the country. After the Law had come into effect, 127 commercial broadcasters emerged:
  - three nation-wide broadcasters ( 2 TV stations and 1 radio)
  - one hundred and twenty-four local broadcasters (52 TV and 72 radio stations)

**Efforts put by commercial broadcasters into revising the existing Law, the most pressing issues *inter alia* to be tackled are the following:**

- Does the national Macedonian RTV accomplish its function as a public service for all citizens?
- Is the share of 10% from the tax on TV sets, allocated to commercial broadcasters and independent producers for production and broadcasting programmes of public interest, adequate and sufficient?
- Should MRTV get involved into advertising, sponsorship and telesales, and, if yes, what should the percentage be?

As a conclusion, I would like to inform you that the initial phase of drafting amendments to the Law is underway. The Ministry will aspire to incorporate broadcasting standards and principles of the Council of Europe into the Law, and we shall also be happy to take into consideration discussions and views presented at this Workshop.

## **BROADCASTING LEGISLATION IN THE REPUBLIC OF MACEDONIA**

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Broadcasting system in the Republic of Macedonia, so-called 'dual system', promotes – in addition to public broadcasting, which is responsible for general social interest and adapted to requirements for independence, political neutrality, diversity and quality of information – a certain limited level of commercialisation. This is considered to be essential for general democratisation and development of media. The system in its essence cherishes the principle of plurality, a competitive confrontation of two subjects: public broadcasting service and commercial media. It meets normatively and declaratively the basic prerequisites for media functioning in conditions of parliamentary democracy and market-driven economy.

Institutionally, all fundamental legal acts regulating this matter were passed by January 1998, thereby practically meeting all formal conditions for the functioning of modern broadcasting. The first to be passed were laws on licensing, telecommunications, trade associations, copyrights, and only after subsequently, in April 1997, the fundamental Law on Broadcasting and the Law on the Public Enterprise of Macedonian Radio and Television in January 1998. Looking through numbers, the existing broadcast communication structure is composed of the public service, which includes Macedonian Radio Television (three TV and five radio channels) and 29 local public radio and TV stations, on one hand, and 111 private radio and TV stations (two national and 49 local TV stations, and two national and 58 local radio stations) on the other. This large number of media was described by the state as a 'high degree of democratisation and plurality' in the media sphere. Namely the sphere comprises a total of 148 broadcasters that satisfy the needs of a little less than two million citizens of the Republic of Macedonia.

Subjects in the communication sphere do not perform the same function, and the lawmakers have clearly separated them. Conceptually, editing in the public broadcasting sphere is based on the universal right of 'public good' or 'public interest'. The lawmakers have defined it as satisfaction of general social interests and a response to informative, educational, cultural, scientific, sports, music, entertainment and other needs relating to the life and work of citizens of the Republic of Macedonia. In practice, Macedonian Radio and Television, as the national broadcasting service, daily broadcasts around 90 hours of radio and 60 hours of TV programme. TV channel 1 (whose signal covers 96 percent of Macedonian's territory) is primarily focused on news, culture, education and entertainment. Channel 2 covers 94 percent of the national territory and, in addition to other content, also broadcasts programming in languages of national minorities (17 hours a week in Albanian, 9 hours in Turkish, and one hour each in Romany, Serbian and Vlach languages). TV channel 3 covers only 50 percent of the territory and broadcasts over satellite also.

According to the respective Law, the editorial policy of MRTV is a matter for the Management Board, Financial Supervisory Board, MRTV Director General, Directors and Editors in Chief of Macedonian Radio and Macedonian Television, as well as programme councils for radio and television. Due to the fact that the Director General and Management Board are appointed by the Parliament, influence of the state and authorities on the broadcaster's editorial policy cannot be avoided. Broadcasting practice however teaches us that whenever the balance of political power in the authorities changes, the MRTV Director General gets removed from office, and the new one is appointed. The procedure is very simple. MRTV is obliged to submit annual report on its work to the founder – the Parliament. Whenever the balance of power in the Parliament changes, the report does not get accepted due to whatever reasons and, of course, a new Director General is appointed. After that, he appoints new Editors in Chief of radio and television.

In contrast, situation on the local level is much more complicated. The lawmakers have thrown public local broadcasters out of the normative framework of the media system. First they had given them a 'temporary status', granting them nine months to take over the founding rights from local administration, and then they placed them at the mercy of the Government. As local administration fails to agree on the work of radio stations (due to political polarisation of interest between municipal councils on one hand and mayors on the other), Macedonian Government takes over the founding rights. Today, the majority of local broadcasters are under direct and open influence of the authorities as the Government appoints their directors.

The main source of financing for the public service is the broadcasting tax, i.e. a fee on ownership of TV set, which is paid together with the electricity bill. MRTV draws funding for its work from this broadcasting tax paid by citizens (67.5%), and from advertising, sale of its own programming, sponsorship and donations, as well as from resources provided by the state for special programmes such as programmes for Diaspora. Public broadcasters at local level, apart from the share of the broadcasting tax (5%), also receive subsidies from municipal budgets, and if needed, also support from the state budget. In practice, only the 5% of the broadcasting tax are real, but that amount does not meet even the basic requirements for normal work. Due to the unresolved status of local broadcasters, municipalities are not participating (or are participating only occasionally) in their financing. For them, this is only a burden to be rid of, since obligations of municipalities themselves are not defined precisely enough. In addition, the Law on Local Self-Rule is being amended as the new administrative organisation of the country is coming into place and who knows what will the destiny of these broadcasters be.

On the other hand, public service (MRTV and public local) has a legal right to broadcast commercials – 7% per broadcasting hour, which is usually not adhered to. It is precisely due to this 7% of commercials that MRTV is holding a financial monopoly by reducing advertising fees to the minimum, which commercial broadcasters consider an act of unfair competition. Where is the problem? Commercial broadcasters are allowed 20% of commercials per broadcasting hour, a little more than the public service. If we know that advertising is one of the main sources of their revenue, parallel broadcasting of commercials on the public service is considered an act of unfair competition, and even the direct cause of closure of some private broadcasters. On the top of all this, legal provisions on advertising are not very clear and precise. It is unclear what happens if this 20% is not used in the given hour time frame. Can it be carried over to the next broadcasting hour, especially if it is legally specified that commercials shall not be aired so as to mutilate programmes, that news programs shorter than 30 minutes shall not be interrupted by commercials, and movies may be interrupted only after first 45 minutes of broadcasting?

There is one specific legal arrangement incorporated in Macedonian broadcasting system, which represents (or should represent) not the foundation but already the 'upgrade' of the process of media pluralisation. It concerns the so-called 'projects in public interest'. Under the Law on Broadcasting, 10% from broadcasting tax are intended for production and broadcasting in public interest, and these resources may apply only to private broadcasters or independent producers. The decision on how to distribute these resources is made by the Government at the Council's proposal, upon conducting a public contest. Their funds are not used merely to engage resources of broadcasting companies, but to finance the programme production directly. Two public contests were announced so far, and the third is underway, and the majority of projects have already been implemented and aired by broadcasters. However, the 'idea' may well fail, because it lacks some important elements - transparency and, most importantly, the very citizens who know nothing about these projects, and even less that they are the ones who are providing the resources for their implementation. Even the private concessionaires who have received some of these resources are dissatisfied with this kind of help in their work, because by competing for these projects they lose valuable time, which disturbs both their programming and their viewers/listeners. At the same time, the huge funds raised and distributed this way are not proportionate to the quality of the final product. And what is really devastating is the outcome of the last competition when the Government intervened directly at the Council's proposal. All these speak

about the erosion of the initial idea of boosting the quality of private broadcaster's programming production.

Finally, a word should be said about the Broadcasting Council. The Broadcasting Council, constituted when the Law on Broadcasting was passed in 1997, represents citizens' interests in the field of broadcasting. According to the Law, the Council is an independent body that consists of nine members who are chosen and revoked by the Parliament of the Republic of Macedonia. These are competent and expert persons from the domain of public information, economy, education, culture and other areas. Members of the Council are elected on a six-year term, with the right to re-election, whereby the Council members from the first composition are elected so that three members are elected for extra two years, three members for four years and the remaining three members for six years. Paradox is that this body plays, more or less, only a 'consulting' role. Its competencies and responsibilities include:

- discussing issues related to broadcasting,
- preparing recommendations regarding licensing or revoking licenses,
- monitoring of the concession contracts implementation,
- ensuring implementation of legal provisions relating to programme production and broadcasting,
- proposing distribution of the funds from the broadcasting tax for the public broadcasting companies,
- proposing distribution of the funds from the broadcasting tax for the production of programmes of public interest for commercial broadcasting companies and independent producers,
- issues opinion and suggestions on broadcasting promotion and development,
- ensuring implementation of the provisions of the Broadcasting Law with regard to programme production and broadcasting.

Fortunately, the Broadcasting Council has now initiated amendment to the Law on Broadcasting Act.

## SLOVENIA

### HOW THE MASS MEDIA ACT CAME INTO BEING AND WHAT IT BRINGS

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#### **1. Reasons for Drafting a New Act**

After the Mass Media Act (*Zakon o javnih glasilih*; Ur. l. RS, No. 18/94) had been in force for four years, it was felt in Slovenia that the act was not having the optimal effect, primarily due to the deficient supervisory system and incomplete system of sanctions. Conditions in the field changed radically over the period of four years, and new issues that the act neither envisaged nor regulated popped up. This caused considerable disturbances in the media sphere and was furthermore reflected in the lowering of quality criteria and a fall-off in the diversity of programming disseminated by Slovenian producers via their mass media. Given the large number of amendments and additions required, the new terminology dictated by European legislation, urgency of a fundamental systemic overhaul of media legislation and the evident ineffectiveness of the previous system, only the replacement of the old act with an altogether new act seemed reasonable. This of course did not mean that the new bill would annihilate the need for retaining or updating certain provisions of the old mass media act that in practice proved to be relevant and of the appropriate quality.

A priority package of urgent changes was dictated by the process of legal harmonisation of media legislation with current European law, primarily the European Convention on Transfrontier Television (Council of Europe, 1989) and the Council Directive 89/552/EEC. The latter directs coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (amended and updated via the European Parliament and European Council directive of the same name, Directive 97/36/EC). In this light, even the definitions of certain basic terms in the previous act proved deficient. The difficulty in such cases was not merely terminological, but also substantive, which was the reason for some of the more fundamental interventions in the previous legislation. It was necessary to adapt certain existing definitions of terms to European definitions, and to introduce others entirely anew. Legal arrangements in terms of European criteria for defining national jurisdiction in individual cases needed to be devised. It was also necessary to set out the legal basis for regulating legal relations in connection with exclusive television broadcasts for events of national importance. The previous act did not prescribe that under specific conditions, i.e. with specific reservations, television stations had to include a majority proportion of European production and a specific proportion of independent production. It was necessary to prescribe new legal provisions in order to regulate relations between copyright holders and television broadcasters, and also to define the criteria regarding broadcasters to whom the aforementioned European quotas should apply and those that should be exempt. European minimum standards had to apply to all conditions in connection with the transmission of paid advertisements, the time restrictions thereon and distribution thereof within the framework of the daily programming schedule, and restrictions in connection with specific methods and types of advertising and telesales. Special protective provisions had to be designed for protecting minors and public order from specific programming, and stricter rules in connection with media sponsorship had to be set.

It was established that the majority of mass media did not apply the valid legal provisions prescribing mandatory release of information on sources of financing, entities holding a capital stake or share of

the management rights in the assets of the company above the specified maximum, and members of management bodies. Such provisions were aimed at ensuring transparency in capital and management relations in the media area. This further entailed consistent implementation of the provisions on the restriction of maximum holdings, and the restriction of cross-ownership media plurality would thus have been protected in concrete terms. This transparency was supposed to have provided for identification of any capital dependency a particular mass medium on specific interest influences. Despite the provisions, there would still have been concealed interests present in Slovenian media environment. This would mean that influence would be exerted over programming. The transparency was thus not ensured, as the previous legislation did not prescribe any penal sanctions for infringing the obligation to publicise information. The legal provisions restricting holdings on the part of a single person in a particular media outlet also proved to be unworkable in practice. In any case, it was necessary for the new legal provisions to provide more effective protection of media plurality, whereby deliberation of concerns for preserving the national identity were at the forefront.

In this context, national and cultural identity as an unresolved issue referred to the maximal ratio between domestic and foreign capital invested in media companies (publishers of the most important printed political/informative media). Following transposition of the *acquis communautaire* in this area (in 1999), such arrangement was no longer acceptable given the free movement of capital within the EU. Publishers of printed media (in contrast to broadcasting where the state has retained a relatively direct influence over national broadcasting) appear on the market as persons under private law that nevertheless should still operate, at least indirectly, in the public interest. Under the previous legislation the state did not secure a major share of the management rights in the most important political/informative media for legitimate bearers of the public interest, and it became necessary to find new legal solutions in the view of protecting national identity. At this moment in history these should be almost exclusively tied to a more precise definition of the rules requiring the mandatory use of Slovene in the dissemination of programming via mass media, and perhaps certain specific conditions in connection with the appointment of officials to leading positions (e.g. editor in chief).

Among the thorniest problems awakened by the intense debate on the initiatives for amendments and additions to media legislation, it is necessary to mention the urgent issue of more appropriate legal demarcation between public and private electronic media. In the area of radio and TV broadcasters, the public and private sectors have been distinguished primarily in terms of the primary sources of financing, and of course have faced each other on the market as competitors, which has already caused serious friction among television stations in particular. For example, owing to the inefficient system of licence fee financing, problematic internal organisational/legal arrangements and several other factors, Radiotelevizija Slovenija (Slovenian national public service broadcaster) was compelled to engage in advertising more actively than it would have been necessary under normally regulated conditions. This has led to a relative decrease in advertising revenues for both sectors. As a result the same problem – in the opinion of many – was reflected in a drain of potential advertisers away from the printed media to the increasingly cheaper electronic media. This was also connected to the issue of the optimum profitability of newspapers and magazines, the gradual general fall in which was reflected in, among other things, a contraction in the plurality and diversity of publicly accessible high-quality programming. One effect, a side effect at first sight but actually an important consequence, of these developments was reflected in the commercialisation of programming on all Slovenian mass media dictated by market legality. The process described is already leading, in long term, to the undesirable historical consequence of downfall in the overall cultural development in Slovenia.

Under the current circumstances the old legal definition of local non-commercial radio and television stations was called into question. After the privatisation process had been completed, the basic difference between such stations and the stations of commercial radio and television organisations almost entirely vanished. The two sectors were tied to the same primary source of financing (advertising revenue), which gave rise to the permanent alteration of the stations of local non-commercial radio and television organisations in the direction of advertising and commercialisation. The issue was raised of the suitability of the definition of local programming, which was to be one of the basic criteria for distinguishing between the two sectors in question, as were the issue of the

proportion of such programming in an individual local station's output and the problem of the anchoring (or lack thereof) of local non-commercial radio and television organisations in the existing section of the local government system at least.

There was much talk about this in the course of discussion on amendments and additions to media legislation. Not only was there intense resistance individually expressed to the tying of such stations in programming and political terms to individual local communities or bodies thereof (which would be in opposition to the principle of democracy and plurality in the working of the mass media), but also various ideas on establishing future regional media centres came up. The old legislation had no definition of a regional station, but the linkage of smaller groups of stations into larger groups covering several neighbouring municipalities had already been seen in practice. Intensive efforts at overhauling the systemic levers for encouraging the development of local stations were first aimed at enshrining additional sources of financing in law (local communities and partial participation in the RTV licence fee). This was compounded by enactment of measures for easing operation (e.g. free use of transmitters and telecommunications links, lower fees for the use of radio frequencies). The other objective of these efforts covered a legally prescribed rise in the quota of advertising permitted on local stations, with the rise being supported by parallel legal restriction of advertising space on competing commercial stations.

Although these interests might have seemed somewhat contradictory, they nevertheless reflected the key problem to be addressed by the new legal provisions, namely that the new law should clearly demarcate the separation line between commercial and non-commercial local stations. During heated debate some reproached the registered local non-commercial broadcasters with – in addition to their noticeable commercialisation – the passive role of the local population in creating local stations and hardly visible distinction between local and national programming. One of the central legislative challenges proved to be the inconsistently regulated status of local non-commercial radio and television broadcasters based on which they created “non-commercial” programming as commercial companies. This challenge was also linked to the question of the incompatibility of conceptual locality of certain local radio and television broadcasters with their actual range of reception, going well beyond the area of a particular local community. The problem was of course exacerbated by the failure of local communities to co-finance programmes, the frequent failure to reach the prescribed proportion of in-house production, lacking regulation of relations between the stations and local cable operators, and competition between different radio and television broadcasters in the same local community. There are also numerous other difficulties, all deriving largely from the critical economic situation of local broadcasters as a consequence of the increasingly powerful and effectively competitive commercial broadcasters. One of the most significant causes is certainly to do with the deficiency of effective systemic arrangements. There was no effective supervisory mechanism envisaged to enable the fulfilment of the precisely stipulated conditions for justifying or verifying the status of a local non-commercial radio or television station. There was no suitable legal basis for budget co-financing of specific more demanding programming areas, which would have been in the public or local interest. There was no systemic solution for establishing non-commercial forms of cooperation between national and local radio and television broadcasters. There was no legal basis for the mutual linkage thereof into wider networks, and no mechanism for supervising the actual utilisation of frequencies assigned.

It was assessed that the proportion of in-house production on commercial radio and television stations, including the proportion of Slovene cultural and artistic production therein, was not appropriate. Proceeding from the fact that radio frequencies and broadcasting frequency bands are a public resource, the new legal provisions had to ensure the prescribed minimum proportions for Slovenian cultural, educational, informative and other non-commercial programming on the commercial stations (and even more on non-commercial stations). In accordance with the constitutionally defined concern for harmonious civilisational and cultural development of Slovenia, the state had to condition the acquisition of the right to use broadcasting frequency bands and radio frequencies upon explicitly defined minimum proportion of Slovenian arts and culture production. In the media legislation at the time, the state proclaimed its obligation to preserve the national and cultural identity, but only in

principle. In the laws themselves there were no effective provisions to ensure consistent application of these principles.

There were some problems with the obligations of cable operators under the old legislation. Cable operators were obligated to disseminate broadcasts by national and non-coded local radio and television broadcasters that were visible or audible in the area covered by the operator's cable distribution systems. In practice, there were different interpretations of the legal void in connection with charging for cable distribution services for broadcasters whose broadcasts the individual cable operator was obliged to disseminate on the basis of a decision by the programming council (representatives of the local community and the users concerned). A particular problem was the valid criterion according to which broadcasters using cable distribution networks with fewer than 100 connections were not classed as public media. Pertaining to the acquisition of the status of a cable operator, it was necessary to restrict the possibility of automatic compatibility of the operator's primary activities with dissemination of the operator's own radio and television stations. In addition, new solutions had already been required by technological development (the anticipated gradual introduction of optical cables), particularly in connection with the problem of protection of competition.

Experts found the procedure of radio frequencies allocation to be insufficiently regulated. The criticism mainly concerned the overload of available resources. This criticism was mostly motivated by economic reasoning as the increment number of competitors boosted competition. But there were also objections founded on purely technical problems of troubled audibility due to the exhaustion of resources. Opponents of enhancing commercialisation, which started increasingly affecting even the national network and local non-commercial broadcasters and jeopardising overall cultural development in the country, made themselves particularly loud and clear in this debate. Since the frequency spectrum is considered a public resource, any allocation of frequency must be done in public interest and in compliance with the constitutional guarantee of freedom of expression. In the light of these requirements, the legislator had to ensure and encourage harmonious cultural development in this area.

Public discussions also initiated a review of effective licences and introduction of mandatory renewal. For all these reasons, it was essential for the prospective amendments to the legislation on frequency management to strike a fine balance between the user's need to make profit and the user's responsibility to use the allocated frequency, as a public resource, in the public interest. This problem was inevitably linked to the role played by the state in this respect and the necessity to demarcate responsibilities of relevant administrative bodies in both allocation of frequencies and supervision of usage. The Broadcasting Council, in conjunction with Telecommunications Directorate, was in charge of assigning or revoking frequencies under the old legislation. The Council operated as a semi-professional, semi-state body since it consisted of civil servants and experts appointed by the National Assembly of the Republic of Slovenia. One half of the Council's members was recommended by the Government of the Republic of Slovenia, and those could even be members of political parties. The Council however lacked the capacity to perform effectively. Namely, the Council could not act in the supervisory capacity because it did not have any relevant powers – nor was it allowed to have them under the law.

At the same time, the law empowered the Public Relations and Media Office of the Government to perform these functions but the Office has long since ceased to do so, since the nature of the matter made it suitable only for ministerial jurisdiction. Undoubtedly the fact that no minister in Slovenia was however responsible for the media sphere contributed rather poor regulation of this area in practice. Given all the difficulties and problems generated by insufficient clarity and precision of the old law, the new law had to place additional requirements upon potential users as well as administrative bodies involved in frequency management if the area was ever to be effectively regulated.

At the time when Radiotelevizija Slovenija suffered financial loss, challenged by its commercial competitors and compelled to commercialise itself, there was much talk about amendment to media

legislation. Public discussions made it clear that the public institution of Radiotelevizija Slovenija needed a fundamental reform of the applicable legislation as well as enactment of a separate law on internal affairs and organisation of the national broadcaster. In addition, commercial media repeatedly reproached Radiotelevizija Slovenija for the failure to pursue cultural and national objectives which constitutes its very *raison d'être*. In other words, TV Slovenija was accused of not differing much from commercial broadcasters, which added to justifiability of demands by other broadcasters to get a fairer share of the license fee. Commercial broadcasters harshly criticised Radiotelevizija Slovenija, claiming that the public broadcaster intended to cover its losses by raising its commercial revenues while keeping labour costs at the same level, which would have unreasonably lowered down advertising prices.

The act on public media failed to take a position on essential issues connected with the exercise of founding rights and obligations with regard to Radiotelevizija Slovenija as a public institution of special national and cultural significance. Certain important provisions, which by their nature were tied to the operation of all broadcasters and their mutual relations (e.g. advertising and sponsorship limits and the definition of acceptable mode of advertising and sponsorship) and which did not belong in the same legal text, used to be regulated by a separate law. Due to rather sloppy handling of these matters, even the relationship between the Broadcasting Council and the Council of Radiotelevizija Slovenija got called into question in practice. One of the most difficult matters of principle concerned the regulation of relations between the Government of the Republic of Slovenia and the public institution of Radiotelevizija Slovenija, since Radiotelevizija Slovenija was founded by the National Assembly of the Republic of Slovenia.

One other matter that remained unsettled under the old legislation concerned freelance journalists and their status. The procedure for acquiring this status was poorly defined, as were the rights that should be derived thereof or at least a significant number of journalists found them poorly defined. Information contained by the register of freelance journalists was unreliable, as there was no legal obligation placed upon journalists to report any changes in their status and or to verify the status periodically. Moreover, the law did not provide for access to the register of freelance journalists by members of the public with a legitimate interest. There was no supervisory mechanism either, which meant that the public could not have any insight into the actual fulfilment of the sole condition for acquisition of the freelance journalist's status. Let alone that one single condition hardly satisfied the public interest.

The register of public media functioned in a similar manner in practice: its lack of transparency and lack of up-to-date information was the immediate consequence of the deficiency of the relevant legal provisions. In addition, the circumstances indirectly led to a general lack of transparency of legal relations and matters in the media sphere as a whole. While the approach to relations among journalists, editorial boards, editors and publishers by the old law was satisfactory, the mass media development eventually called these relations into question, introducing some new elements and aspects. What proved to be of special importance was the concept of programming. European law stipulates that the concept is a sole responsibility of the broadcaster, and this entails substantial autonomy of editorial personnel, journalists and authors/creators in the creation of media programming.

Thus once the old public media act was re-read in the light of all aforementioned practical matters or new trends, a whole range of minor issues got opened up. It however proved that only the legislation treated them as minor whereas their settlement in practice effected demanding shifts. The recommended integral review, based on which the old act would be replaced with a new legal text, provided for adoption of modern, transparent legal arrangements. These arrangements were hoped to help strengthen the system of expert and administrative supervision and to introduce a system of sanctions to regulate legal relations in this area more effectively.

## 2. The Course of Legislative Procedure

On the basis of numerous ideas by the Broadcasting Council regarding the amendment of the Public Media Act (*Zakon o javnih glasilih*; Ur. l. RS, No. 18/94), a range of individual initiatives by the organisations concerned and the relevant standpoints of the Government of the Republic of Slovenia, and in harmony with the standpoint of the European Commission, the Ministry of Culture took to draft urgent amendments and annexes to mass media legislation. The first working draft of the mass media bill appeared in October 1998 (as internal working material). Not long after the National Programme for the Adoption of the *Acquis Communautaire* had been adopted by the Government of the Republic of Slovenia and approved by the National Assembly of the Republic of Slovenia, a deadline for the adoption and enactment of new media legislation was set. The deadline was the beginning of 2000. In December 1998 the Ministry of Culture organised a public discussion on the mass media at the Cankarjev Dom, a cultural and conference centre. Conclusions of the discussion were incorporated into the draft Bill. The draft was submitted to all organisations concerned and governmental departments for further expert discussions.

The draft bill was discussed again at a special session by the Government's Cultural Council in April 1999, and most of the Council's comments were taken into consideration. By the end of the month, the comments from the organisations concerned (e.g. the Broadcasting Council, the Chamber of Commerce and Industry of Slovenia, Radiotelevizija Slovenija, the relevant directorate at the European Commission) and relevant governmental departments had been built into the draft bill. Special coordination among the parties in the governing coalition was launched. On the basis of a special resolution in May 1999, the Government of the Republic of Slovenia released the mass media bill for first reading and instructed the Ministry of Culture to obtain additional comments. The Ministry opened discussions of the bill online. It also took part in conferences and meetings on the bill, organised by legal experts with an interest in the matter. Various domestic and foreign experts were consulted, and numerous opinions, initiatives, proposals and views expressed within the framework of state bodies (primarily bodies in the state administration) and by representatives of the European Commission. All throughout the Ministry of Culture gave particular consideration to arguments presented at a conference on social duties of the mass media (the National Council and the Civic Forum Society) as well as views voiced by representatives of the Press and Media Association at the Chamber of Commerce and Industry of Slovenia, within which commercial interest associations of printed media and individual groups of broadcasters operate. There was a series of other discussions as well, and those involved: expert EU organisations (the TFNA, DG X, DG EAC), representative of the Broadcasting Council, the management and representatives of Radiotelevizija Slovenija (and, through them, indirectly with the IPI, an international NGO based in Vienna), by experts from the Council of Europe, the Union of Journalists of Slovenia (within the framework of the Phare programme), representatives of the Journalists' Society of Slovenia and the Union of Journalists of Slovenia, the core group negotiating Slovenia's accession to the European Union. All this was accompanied by frequent working meetings and an electronic conference with members of a special working group for reviewing the section of the bill referring to the right to reply and the right to correction.

During all the preparatory activities, the Ministry undertook to coordinate initiatives with all of the above contributors, and also the Slovenian Chamber of Advertising, the Association of Cable Operators of Slovenia, the Office of the Republic of Slovenia for Intellectual Property, the Telecommunications Directorate of the Republic of Slovenia and certain others. The coordination was done through extensive correspondence. All these interests of different origins were balanced and, with maximum consideration for the expert criteria and the cultural and economic aspects, the newly founded Media Department at the Ministry of Culture drafted a document entitled *Standpoints from Expert Discussions on the Mass Media Bill, EPA-811-II, First Reading*. The document summarised and condensed the material in the form of guidelines for further improvement of the mass media bill through the regular legislative procedure. The material served as the groundwork for standpoints of the National Assembly's Culture, Education and Sports Committee to be formulated on the mass media bill prior to the first reading. In April 2000 the National Assembly of the Republic of Slovenia held the

first reading and adopted 30 standpoints, instructing the Government of the Republic of Slovenia to take them into consideration and to draft a bill for the second reading as soon as possible.

The Ministry drafted a bill for the second reading and organised inter-departmental discussions. The text was also discussed at the relevant governmental committee and was included in the agenda of a cabinet session, which had already been called off due to the formation of a new government. The amendments to the bill for the second reading (regarding two recommendations made by the National Assembly of the Republic of Slovenia that did not meet with the consent of the representatives of the Ministry of Finance), as recommended by the Government, were enclosed.

Following the formation of the new government (July 2000), the Ministry of Transport and Communications fundamentally altered its standpoint regarding individual matters over which a consensus had previously been reached. Those were the matters that also related to the telecommunications bill (use of the frequency spectrum, the intended dissemination of programming via the mass media, and the position of the Broadcasting Council). The new government forwarded the bill to the National Assembly of the Republic of Slovenia in July 2000 for the second reading. Only four other amendments were incorporated in the main text, which had been drafted before the end of the previous government's term, and those involved the provisions on the creation of media fund, while the deletion of provisions on advertising fees was demanded.

In the course of the legislative procedure, a public presentation and discussion of views on the bill was held in July of the same year, organised in the parliament by the Culture, Education and Sports Committee of the National Assembly. Questions raised covered the following issues in particular: clear demarcation between the public and commercial broadcasters, the position of special broadcasters, the restriction of holdings in the assets of a publisher, restrictions on media plurality, programme requirements and restrictions (stipulation of a minimum share of in-house production and advertising by TV broadcasters), the media fund, the status and authorities of the Broadcasting Council, and self-management rights of journalists. The opinions were – as ever – divided. The representative of the lawmaker defended the bill's content in accordance with the standpoints of the Government of the Republic of Slovenia and the standpoints of the National Assembly of the Republic of Slovenia from the first reading. In July parliamentary deputies tabled amendments to the bill (these primarily covered the views expressed in the aforementioned public presentation of opinions), and in August a session of the National Assembly's Culture, Education and Sports Committee was convened. What came out of that session was a resolution instructing the Government of the Republic of Slovenia to take all necessary legal steps to include standpoints of the National Assembly concerning liberalisation of holdings by individual persons in the assets of media companies in the bill for second reading.

In September the Government of the Republic of Slovenia adopted opinions regarding the deputies' amendments lodged before the end of the final session of the National Assembly's Culture, Education and Sports committee and made the amendments in accordance with the Committee's resolution. Those were then submitted to the National Assembly of the Republic of Slovenia. The Ministry of Culture drafted standpoints for the Government of the Republic of Slovenia regarding the opinion of the National Assembly's Secretariat for Legislation and Legal Affairs and amendments to be made in accordance with this opinion. The Government of the Republic of Slovenia adopted these proposed amendments in September and submitted them to the National Assembly of the Republic of Slovenia.

In December 2000 proposed amendments, drawing on resolutions adopted at the working meeting between representatives of Slovenian government and the European Commission which took place at the DG EAC in Brussels, were drafted for the Minister's office by the media and audio-visual culture department at the Ministry of Culture. The amendments reflected the settlement of certain pending questions, which had been harmonised during negotiations with the European Commission. Those concerned broadcasting and were in close connection with the mass media bill. The most important of these were: definition of Republic of Slovenia's jurisdiction with regard to TV broadcasting, definition of Slovenian audio-visual works in connection with the position of Hungarian and Italian ethnic

communities in the Republic of Slovenia, definition of the concept of Slovenian music and the list of important events to be covered and broadcast by TV broadcasters.

In January 2001 the new leadership at the Ministry of Culture conducted the final round of discussions with the governmental departments and members of the public concerned. A comprehensive package of amendments was produced by the new government, and on 2 February 2001 the Government of the Republic of Slovenia replaced the previous government's amendments with this new package. In February 2001 the National Assembly's Culture, Education and Sports Committee defined its position on the government-proposed amendments and adopted a resolution recommending the National Assembly of the Republic of Slovenia to adopt the mass media bill in its second reading together with the amendments, which won the Committee's support.

It could be said that the political consensus forged in a very short time by the new government with representatives of the media and the Broadcasting Council was the basis for a relatively simple and prompt third reading of the bill in the Parliament. It could also be argued that, in terms of the principal content, the wording of the bill after the third reading did not significantly differ from the wording of the bill drafted for second reading, or from the original draft. The only significant innovation was actually initiated by the telecommunications act, which was handled in a parallel legislative procedure. The novelty concerned the founding of Telecommunications Agency. After coordination between the newly founded Ministry for Information Society and the Culture Ministry, it was decided that the Telecommunications Agency would also cover the field of broadcasting with regard to the management of the frequency spectrum. This however fundamentally altered the original intention of the law, according to which the Broadcasting Council was also to be responsible for the implementation of legal acts in administrative procedure. At the same time, the legislator's intention to define in clearer terms the legal status of the independent regulatory authority in the area of broadcast media was aborted.

Thus in the new act, adopted in April 2001, the majority of legal objectives set before the legislative procedure commenced found their place and are defined in detail. If the new act can pursue these objectives in the course of implementations, it will create greater transparency and ensure a higher level of legality in the functioning of mass media. It will allow for the adaptation of the whole range of legal texts on media (implementing regulations, the Radiotelevizija Slovenija act) to European law and eventually to support economic growth in the area of mass media. It will also foster the role played by both relevant experts and the public at large in connection with the mass media, and will provide the ground for an effective system of administrative supervision over functioning of the mass media to emerge. The appropriate use of Slovene in the mass media will be ensured, irrespective of the origin or ownership structure of publishers and producers of programming. The basis for the definition of fundamental public interest concerning the mass media will be provided, while the effective exercise of fundamental human rights in this field will be ensured and better access to information by the public will be facilitated. It will require faultless performance by the mass media in relation to advertising. It will ensure a higher level of media plurality and will provide the basis for protection of competition in the field. The terms of exercise of exclusive rights in connection with the mass media and the criteria for acquiring the status of special broadcasters, as well as the rules and regulations of their operation, will be defined. This will additionally encourage Slovenian audio-visual production as well as independent producers, while the transparent allocation of frequencies for the purpose of radio and television broadcasting and all related financial matters will be prescribed. Relations with foreign elements in the area of the mass media will be suitably regulated. General regulations concerning online communications will thus be facilitated, and the basis for an effective penalising system will be created.

In the course of law implementation, the following principles will be pursued: freedom of public information and preservation and development of Slovenia's national and cultural identity (as worded in the first draft bill), the right to be informed, freedom of expression, inviolability and protection of privacy, integrity and dignity, creative autonomy of editors, journalists and other authors/creators, free

dissemination of programming from other countries, the principle of ethnic, religious, sexual, racial and other tolerance and equality, and the protection of children and minors.

### **3. Anticipated Financial Effects of the New Act**

Given Slovenia's new position within the international (European) community, the country is gradually taking on some important legal obligations that by their very nature are bound to affect the national budget. These imply that restrictions on foreign persons' holdings in the assets of mass media under Republic of Slovenia jurisdiction be lifted. Even though the programming of such media will generally be disseminated within Slovenia in Slovene, it will be vital to encourage the development of audio-visual production in particular, to cultivate the arts and culture programming important for preservation of the national cultural identity. If substantial state funding is not provided, commercial programming will become even more dominant in this area, and this will eventually result in decline of cultural awareness, which is unacceptable for Slovenia from a historical viewpoint. This production segment will be indirectly included in the mandatory programming quota for European audio-visual works. For production of those it will be possible to utilise remainder of resources from relatively modest funds, created for this very purpose by relevant European organisations. To give impetus to the cultural segment, which is already a relatively independent cultural/commercial branch in contemporary European countries, the budget funding will be allocated to individual high-quality media projects by the relevant ministry. This will be done via public tenders and in accordance with the Act.

In order to ensure high-quality operation of special broadcasters – whose basic purpose is to inform, to raise cultural awareness within local communities and to encourage municipal media in particular to link together into regional stations – it is necessary to compensate for the revenue such media are likely to lose due to legal restrictions on the amount of advertising. By contrast to other media, where less rigid restrictions apply, as these media do not have any special programming missions, special broadcasters have important tasks connected with the exercise of public interest and individual local interests. The operation of regional media is also in the public interest, and the state, i.e. the law provides for budget subsidies to projects and broadcasters whose programming is targeted at local inhabitants.

The Act stipulates the creation of the budget fund for broadcasters, to be funded from the state budget, but also from broadcasting license fees and fees paid by broadcasters for broadcast of programming by means of the radio spectrum and telecommunications networks to individual users. These resources are earmarked in their entirety for incentive measures in the broadcasting field, in addition to the budget co-financing of relevant projects. The draft national cultural programme envisages that revenues will significantly increase in the area of telecommunications in the mid-term. A considerable share of this growth will be based on the development of domestic media, audio-visual and other cultural informative programming disseminated within the information society by means of the aforementioned telecommunications/technological infrastructure.

It is important to note here that the state has defined equal conditions of access to telecommunications networks. Pursuant to the Act, part of the revenues from telecommunications services will therefore have to be used to promote the creation and production of programming transmitted via telecommunications/technological infrastructure, particularly Slovenian audio-visual works (TV films and series, radio plays, radio and audio works under copyright, documentaries and educational programming, reportage programmes, series, cultural programmes, digital media projects, etc.). The future development of Slovenia's cultural identity in wider European environment and the world at large is conditioned upon this. The two external sources will in all likelihood significantly strengthen the effect of the relatively modest purpose-specific funding to be contributed to the fund by the state from its overall budget. Of course the fundamental reason for such legal measures is the anticipated rise in the state's revenues from the resulting development of national media, broadcasting and information activities.

It is still necessary to point out once again that all budget subsidies for media projects are meant for promotional and developmental purposes, that is they are envisaged to have an effect on expanding production activities in the area of the nascent Slovenian broadcasting industry and thus European broadcasting industry on the whole. This will allow a gradual reduction in the proportion of budget subsidies for projects in the public interest given the anticipated parallel increase in revenues that could be generated by such promoted development of broadcasting.

#### **4. Conclusion**

When the Act on Mass Media finally came into effect at the end of May 2001, this meant that Slovenia succeeded in temporarily closing one chapter of negotiations on accession to the European Union, at least in the field of broadcasting. The Act presents one of the steps towards new European integration. However there is a second, more important step to be taken. From the day the new act enters into force, it is necessary to implement it. This will probably cause problems to all relevant authorities and concerned sections of civil society, and those problems are not likely to be any less difficult than the ones encountered by the law-makers in the process of drafting, discussing and passing the law. At this moment (June 2001) it is too early to predict whether – or when – the relevant social structures will be ready and able to face the tasks of implementing the Act on Mass Media. In terms of the regulation of general issues facing the state, this is by no means the most important sector. What is however clear is that the media are far from being insignificant or irrelevant for a healthy and effective development of this very society.

<b>POLAND</b>
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## **BROADCASTING IN POLAND**

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### **1.**

The Broadcasting Act of 29<sup>th</sup> December 1992, compounded with the regulations of National Broadcasting Council, and Press Law of 26<sup>th</sup> January 1984 are the acts governing the broadcasting sector in Poland.

Enacting the Broadcasting Act became a turning point in developing the electronic media market. Till 1989, the legal status of broadcasting market in Poland was governed by the Act on Committee for Radio and Television – *Polish Radio and Television* of 2<sup>nd</sup> December 1960, and Act on Publication and Programming Control of 31<sup>st</sup> July 1981, which effectively constituted censorship. The state's monopoly precluded any possibility of commercial broadcasters.

The Broadcasting Act heralded a new era. It created a legal framework for emerging broadcasting system, opening possibilities for commercial broadcasters to emerge.

### **2.**

Poland ratified European Convention on Transfrontier Television in 1990, and was one of the first among European countries to do so. It was a crucial step on its towards admission into the Council of Europe, which took place in 1991. At the same time, the Broadcasting Act incorporated many European standards laid down by the Convention, which ensures basic compatibility of Polish legislation with European legal arrangements in the area of broadcasting.

European agreement of 1991 establishing associative ties between the Polish Republic on the one hand, and European Community and its member states, on the other, of 1991 induced the need to harmonise Polish broadcasting regulations with those defined by the Council Directive (89/552/EEC) of 3<sup>rd</sup> October 1989. The latter refer to co-ordination of certain provisions laid down by law, regulation or administrative practice in EU member states concerning the pursuit of television broadcasting, as revised on 19<sup>th</sup> June 1997 by the Directive 97/36/EC of European Parliament and the Council.

A revised European Convention on Transfrontier Television was adopted in September 1998. The new Convention laid down the ground for substantial changes. These changes have been under way on the broadcasting market ever since 1989, and their primary goal is to harmonise relevant provisions with the revised Directive, thus facilitating unification of general legislative standards on broadcasting all over Europe.

Poland, as a member of the Council of Europe since 26<sup>th</sup> November 1991 and being in the process of accession to European Union, has been endeavouring to approximate its legislation to European legislative system, directed at preservation of European cultural heritage and common European values. This is why the following amendments to Broadcasting Act successfully approximate Polish broadcasting to what is regarded as European standard of broadcasting. .

### 3.

The Broadcasting Act and other legal documents applicable to broadcasting sector comply with most of European requirements. It must be pointed out that the degree to which the national legislation is harmonised with legislation of European Union is more than considerable. Any doubts or concerns in this area arose mostly from the revised Directive 97/36/EC. That is why the Amendment to Broadcasting Act, enacted by the Parliament on 31<sup>st</sup> March 2000, aspires to approximate even further the national broadcasting legislation to the standards of European Union while taking into account other international obligations.

Legal arrangements devised by the Amendment to Broadcasting Act draw on the fundamental principles laid down by the Directive on Transfrontier Television. The Amendment also takes into account the need and possibilities to introduce stricter or more detailed rules at a national level, using appropriate instruments of the national legislation. Consequent legal solutions are therefore in full agreement with the requirements of European Union whereas most of the issues settled by the EU law are now covered through the Amendment.

***Certain definitions and other matters of terminology were also adjusted to provisions of the Directives 89/552/EEC and 97/36/EC. This is how the definition of “sponsoring” got amended whereas the institution of “telesales” and “surreptitious advertising” were introduced.***

Advertising issues are mostly regulated by the Broadcasting Act, but more specific issues, including interruption of programming such as motion pictures or TV films by commercials or telesales, are to be governed by the regulations of the National Broadcasting Council.

Some of the advertising bans are more restrictive and extensive than it is the case in the EU law. One of the most striking examples in this respect is the overall ban on alcohol advertising, stated in the Act of 26<sup>th</sup> October 1982 in the view of preventing and fighting alcoholism.

It is also important to note that the ban on surreptitious advertising was introduced while the ban on advertising using any subliminal techniques was derived from NBS's regulations and incorporated into the Broadcasting Act.

All forms of telesales, provided for under the EU law, were introduced, including telesales spots and windows, as well as whole channels exclusively devoted to telesales. Certain issues connected with telesales are regulated together with advertising, e.g. airing time, bans and restrictions on specific forms of advertising, etc.

All adopted solutions, including those referring to sponsoring, generally reflect provisions of Directives 89/552/EEC and 97/36/EC.

***Protection of minors from programmes, which might, or are likely to, impair their physical, mental or moral development as well as all relating issues, is ensured by the Act. Programs that include pornography or promote violence are prohibited.***

***The requirement to protect public order has resulted in another ban: broadcasts that contain any incitement to hatred on the ground of race, sex or nationality are prohibited. Programmes must not contain any hazards to human health, public order or natural environment, according to provisions of the Directive.***

***It is also ensured that events of major importance to society are not broadcast in any such way that would deprive a substantial proportion of the public of the possibility to follow them. This refers to e.g. live coverage of sport events or deferred coverage on free television.***

***The quota of domestic production was redefined as a quota of programmes originally produced in Polish language.***

*The European quota was defined on the basis of NBS's regulations and in accordance with the flexible formula identified by the Directive 89/552/EEC and 97/36/EC as well as European Convention on Transfrontier Television.*

*It is also stated that broadcasters must reserve at least ten per cent of their transmission time for independent European quota.*

*The provision, which had been in effect until the latest Amendment to the Broadcasting Act was enacted, had allowed the NBC to identify the minimum share of domestic quota and European quota of TV programming retransmitted by cable networks and designated for Poland by foreign broadcasters. This stirred some concern over the possible overlap of jurisdictions but the provision has now been revoked.*

*Gradual changes within broadcasting legislation lay down the ground for development of Polish broadcasting market.*

## ROMANIA

### SOME ASPECTS OF THE MEDIA LAW

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#### I. OBLIGATIONS OF ROMANIA UNDER INTERNATIONAL LAW

Romanian Government is bound by fundamental international treaties and documents on civil and political rights, which guarantee the right to freedom of expression and information.

The general principle of law *pacta sunt servanda* stated by 1969 Vienna Convention on the Law of Treaties is found in Article 11, paragraph 1 of Romanian Constitution[2], which reads that "*the state of Romania pledges to fulfil in good faith its obligations as such and as derived from the treaties to which the state is a party.*"

Moreover, the Constitution establishes the principle of direct applicability of international norms. Article 11, paragraph 2 reads: "*treaties ratified by the Parliament...are part of the national law*". In the human rights domain the Constitution goes even further, stating in Article 20 paragraph 2 that "*where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws on the other hand, international regulations shall take precedence.*"

International legal documents upholding the right to freedom of expression and information applicable in Romania include the following: the Universal Declaration of Human Rights, signed at the moment of adoption in 1948; the International Covenant on Civil and Political Rights, ratified in 1974, and the Optional Protocol to the Covenant ratified in 1993[3]; the European Convention on Human Rights ratified in 1994[4] and Protocol 11 ratified in 1995[5], accepting therefore both the Court's jurisdiction and the individual right to petition. In addition, as a member of the Council of Europe, Romania is legally and/or politically bound by all documents adopted by this organisation. Moreover, as a member of the Organisation for Security and Co-operation in Europe, Romania is politically bound by all provisions set out in the Helsinki Final Act (1975) and the concluding documents adopted at the subsequent meetings. The 1993 Association Agreement with the European Union stipulates that Romanian Government is to respect human rights and to ensure enforcement of the European standards.

Having committed themselves to the international standards, Romanian authorities must observe the principle of unrestricted flow of information and ideas. In this respect, the European Court of Human Rights has stated: "*freedom of expression...constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment[6]*"; under the European Convention of Human Rights the protection covers not only the information and ideas that are "*favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb*", because "*such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society[7]*." The offending, shocking or disturbing ideas in particular must be supported and protected in the newly emerging democracies, since societies in transition have only recently liberated themselves of the 'uniformity' rule, which suppressed all "different" ideas and opinions.

In a democracy, media freedom is crucial for informed citizenry. As the European Court of Human Rights has stated: "*freedom of the press affords the public one of the best means of discovering, and forming an opinion on, the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society*[8]." Equal protection is extended to the broadcast media: "*it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media... The audio-visual media have means of conveying through images meanings which the print media are not able to impart*". Moreover, the strong public influence of the broadcast media does not allow the state authorities "*to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. ... Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed*[9]."

Romania is bound by positive duties to ensure the full protection of media. Article 2 of the International Covenant on Civil and Political Rights reads that member states must "*(1) adopt such legislative or other measures as may be necessary to give effect to the rights protected by the treaty, and (2) remedy violations of those rights*". Moreover, when it was recommended that Romania is admitted to the Council of Europe, the Parliamentary Assembly called "*the attention of the Romanian authorities to the necessity of...guaranteeing the real independence of the media...[10].*"

The exercise of freedom of expression and information may be restricted under the international law only under exceptional and special circumstances: in cases defined by law, when there is a legitimate aim expressly specified by the treaties and when proved to be necessary. In addition, the third requirement was rephrased to comply with the European Convention on Human Rights, and it now reads: "*necessary in a democratic society*". The European Court of Human Rights seeks to give make the freedom of expression a rule rather than exception by requiring the national authorities to demonstrate a "*pressing social need*" where interfering with the exercise of the freedom of expression, in particular with the media freedom. Moreover, the political speech has been accorded a privileged position given a narrower interpretation of the restrictions. The strong protection of political speech is not restricted to matters of pure politics. The European Court of Human Rights Court has stated that "*there is no warrant in its case-law for distinguishing between political discussion and discussion of other matters of public concern*[11]."

In addition, the provisions requiring states to "*respect and ensure*[12]" as well as to "*secure*[13]" the exercise of the civil and political rights have been interpreted as to impose positive duties on governments in order to prevent interference not only by public authorities but by private individuals or groups as well.

## **II. THE CONSTITUTIONAL PROVISIONS ON MEDIA FREEDOM**

The right to freedom of expression is provided for by two different sets of provisions, namely "*freedom of expression*" (Article 30) and "*the right to information*" (Article 31).

Article 30 deals with freedom of expression. The exercise of this right is guaranteed by paragraphs 1-4, which read: "*Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, orally, in writing, in pictures, by sounds or other means of communication in public are inviolable*" (paragraph 1); "*Any censorship shall be prohibited*" (paragraph 2); "*Freedom of the press also involves free publishing*" (paragraph 3); "*No publication may be suppressed*" (paragraph 4).

The subsequent paragraphs of Article 30 impose restrictions: "*The law may impose upon the mass media the obligation to release details on their source of funding.*" (paragraph 5); "*Freedom of expression shall not be prejudicial to dignity, honour or privacy of person, and the right to one's own reputation*" (paragraph 6); "*Any offence to the country and nation, any instigation to war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be*

*prohibited by law*" (paragraph 7). The final paragraph of Article 30 regulates the issue of civil liability, stating that *"civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law."*

Paragraphs 6 and 7 of Article 30 subject the right to freedom of expression to severe content-based limitations. The imperative legal wording of these provisions creates a hierarchy of values and unconditioned restraints on the speech. Consequently, the courts are barred from balancing the conflicting interests and applying the proportionality principle. In addition, the defence of "public interest" is not yet part of either the law or the legal culture.

Moreover, many of the prohibitive provisions laid down by paragraph 7 of Article 30 such as *"defamation of the country and the nation", "instigation to...class...hatred", "instigation...to territorial separatism"* cannot be found in any international document related to acceptable limitations on freedom of expression.

The right to freedom of information is regulated in Article 31, which reads: *"A person's right of access to any information of public interest cannot be restricted"* (paragraph 1); *"Public authorities, according to their competence, shall be bound to provide correct details on citizens in public affairs and matters of personal interest"* (paragraph 2); *"The right to information shall not harm either the protection of minors or national security"* (paragraph 3); *"Public and private media shall be bound to provide correct information to the public"* (paragraph 4); *"Public broadcasting services shall be independent. They must guarantee exercise of the right to be on the air to any important social and political group. Organisation of these services and parliamentary control over their activity shall be regulated by a separate law..."* (paragraph 5).

However, the right of individuals to information<sup>[14]</sup> was not given effect by any further legislation. Such an omission constitutes a clear violation of Article 21 of the Constitution, which reads: "every person is entitled to bring cases before the courts for the defence of the person's legitimate rights, liberties and interests."

At present, the Parliament debates an amendment to some of the constitutional provisions. None of those concerns freedom of expression and information.

### **III. CRIMINAL RESTRICTIONS**

Freedom of expression and information is still severely restricted by the criminal law, in particular by the Penal Code. Notably, no press law exists in Romania.

#### **A. THE PENAL CODE**

##### **1. General Considerations**

Adopted in 1968, Romania's Penal Code had come into force in 1969, and it was repeatedly amended after 1990. However, all media related restrictions have been retained. In addition, Law 140/1996 amending the Penal Code increased punishments for media related offences and introduced new provisions severely infringing the press freedom. Consequently, state authority, official symbols, notions such as "country", "nation" or "international relations of the country" came to enjoy protection of the criminal law against "defamation". However, the Parliament is currently debating a draft (hereinafter the Draft), amending some of the existing media related provisions in order to harmonise them with European standards.

Criminal courts may rule civil in addition to criminal penalties. However, alleged victims of defamation may also file lawsuits alternatively to criminal charges.

Prohibition to practice the journalistic profession may also be ordered by criminal courts where criminal guilt is established.

Injunctions against publishers are not provided for either by the criminal or any other law. Nor is the seizure of publications regulated by specific provisions. However, general rules providing for the seizure of objects used by a criminal perpetrator could be taken to refer to the seizure of newspapers. Seizure of equipment is however provided for under the broadcasting law. Seizure of either newspapers or broadcasting equipment has not been ruled so far.

## **2. Libel and Defamation**

### **2.1 Defamation (Article 205)**

Article 205 relates to expression of opinion, and rules that insulting a person intentionally constitutes a crime punishable by fine or imprisonment of up to two years. The Draft currently discussed in the Parliament eliminates the imprisonment in cases of defamation but not the fine (which still implies a criminal record). Criminal charges are now to be raised by the injured party without action on the part of prosecutor's office. The Draft proposes that charges be raised by investigative bodies only, i.e. police authorities or the prosecutor's office.

But even under the Draft, Article 205 violates the respective principles of international law. The European Court of Human Rights has repeatedly stated that freedom of expression "is applicable not only to 'information' and 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb", because "such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'[15]".

Notably, over the last two years, the courts have acquitted many journalists accused of defamation or have rules reduced fines. However, the mere existence of these provisions is offensive to freedom of expression and functions as *a priori* censorship of media freedom. Speech should not be punished only for being offensive. Under Swedish law, for example, opinions or value judgements about a person can never be libellous. In a recent case against Romania, the European Court stated that "the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation[16]". As ARTICLE 19 recommended in its 1997 Report, "liability for the following should be abolished immediately as it is contrary to European human rights jurisprudence and offensive to guarantees of freedom of expression: insult...[17]."

### **2.2 Libel (Article 206)**

Libel is defined as the "public statement or reproach of a certain fact", which, "if true, would expose that person to criminal, administrative, or disciplinary punishment, or to public contempt". It is punished by either fine or imprisonment for up to three years. Judicial proceedings are at the moment similar to those applied in cases of defamation. The Draft only provides for a reduced prison sentence, that is up to one year and for investigative bodies to raise the charges.

Malicious intent is not required and therefore even statements made in good faith are punished if the accused cannot prove their truthfulness[18]. International standards however tie punishable defamation to malicious intent. In Germany, for example, defamation stemming from publication of untrue facts is a crime if only the person who published the statement knew it was false or showed malicious disregard for its truth. The United States' jurisprudence applies a similar standard, but the offender may only be liable under the civil law.

Although not commonly ruled by the courts, the prison sentence, foreseen as well by the Draft, is highly disproportionate, and it has an intimidating effect on the journalists. As Romanian Helsinki Committee recommended to Romanian Parliament, "the liability for libel should be shifted to the civil

law, or at least the prison penalty should be eliminated" parallel "to introducing the malicious intent requirement in the text."

### **2.3 Truth Proof (Article 207)**

Article 207 provides for the truth proof defence in cases of both "defamation" and "libel". Defence on the ground of neither "good faith" nor "public interest" is provided for by the law in cases of defamation. In the Netherlands, for example, journalists do not need to prove the truth of their accusations; it is sufficient that they assumed the accuracy of their statements in good faith and that they made them in the public interest.

Moreover, the truth proof requirement in defamation cases is contrary to European law and jurisprudence. As the European Court ruled, "...a careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value judgements is not susceptible of proof. ... As regards value judgements this requirement [the truth proof] is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by article 10 of the Convention[19]". Recently, in a case against Romania, the European Court stated that "it would be unacceptable for a journalist to be debarred from expressing critical value judgements unless he or she could prove their truth[20]".

### **2.4 Defamation of Politicians and Civil Servants**

#### **(Articles 238 and 239)**

Insult to or defamation of "persons performing an important state or public function" (Article 238) and of "civil servants" (Article 239) is severely punished with imprisonment. The penalty goes up to five years in the former case and up to four years when it relates to civil servants. However, if the victims are members of the judiciary or military the penalty may be increased to seven years. The law does not provide for fine as an alternative penalty. Investigations are initiated *ex officio* since such acts are seen as undermining the state's authority.

Following frequent requests by the Council of Europe, the Draft currently debated by the Parliament proposes elimination of Articles 238 and 239 on the defamation of officials.

Punishing criticism, even if harsh, of the officials, runs contrary to international standards on the freedom of expression. As the European Court repeatedly stated, the limits of acceptable criticism are "wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every single word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance[21]". Under the US Supreme Court jurisprudence, public officials must tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks". Protection of "lusty and imaginative expression of contempt" used in a "figurative sense" "provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our nation[22]".

Criticism of civil servants such as members of police is equally protected. In a case involving defamation of police officers who were described as "wild beasts in uniform that creep around", the European Court observed that where it comes to the protection of freedom of expression there is no reason for "distinguishing ... between political discussion and discussion of other matters of public concern[23]" such as police brutality.

### **2.5 Offence to Official Symbols or Country and Nation (Articles 236 and 236/1)**

Article 236 prohibits acts of disrespect towards state symbols (such as the national flag) and symbols used by public authorities. Penalties go up to three years imprisonment; alternatively, fine is ruled in

cases of disrespect towards symbols of public authorities. Investigations are initiated *ex officio*. The Draft on the Amendment to the Penal Code left the text untouched.

Although not enforced over the last ten years, such provisions endanger the very core of the freedom of expression, and satirical expression in particular. German Constitutional Court has held that attacks against national symbols, such as the flag and anthem, even if harsh and satirical, must be tolerated in view of the constitutional protection of speech, press and arts. Similarly, the US Supreme Court has stated that "punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering[24]". The 1995 Johannesburg Principles prohibit under Principle 7 any punishment for "criticizing or insulting...the state or its symbols...unless the criticism or insult was intended and likely to incite imminent violence."

In 1996, Romanian Parliament adopted a new criminal provision entitled, "defamation of the country and the nation", prohibiting public acts aimed at defamation of the country or the nation. The applicable penalty goes up to three years in prison. Investigations are initiated *ex officio*.

Notably, there has been no enforcement of these provisions. However, its mere existence, alongside vague and ambiguous wording, threatens the expression critical to political power. "Nation" and "country" express collective interests traditionally used to justify dictatorships. Such restriction upon freedom of expression is contrary to all international standards; "nation" and "country" cannot be the grounds to justify state interference with freedom of expression[25].

Under Principle 7 of the Johannesburg Principles it is prohibited to punish anyone for "criticizing or insulting the nation, the state, ...unless the criticism or insult was intended and likely to incite imminent violence."

### **3. Hate Speech**

#### **3.1 Nationalist-Chauvinistic Propaganda (Article 317)**

Article 317 provides for a penalty amounting to five years imprisonment for acts of "nationalist-chauvinist propaganda, incitement to racial or national hatred". The text does not require a demonstrated harm or danger to the peace to be entailed. Investigations are initiated *ex officio*. The text was not amended by the Draft currently debated in the Parliament.

Propaganda of racist views is prohibited under international law. Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination requires the signatory states to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof...". Equally, the European Commission of Human Rights has repeatedly stated that, where expression is directed at undermining democracy and human rights themselves, as for example incitement to racial discrimination, states may interfere with the exercise of the freedom of expression[26]. However, the mere fact that racist speech is involved does not inevitably mean that any interference is justified.

The US Supreme Court's jurisprudence has required incitement to "immediate breach of the peace" and "a clear and present danger" to justify restrictions on hate speech. In a case involving race-baiting speech, it is held that speech, which "stirs...to anger" or "invites dispute", is protected since "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger[27]".

Even under the more rigid European standards, criminal prohibition imposed by Article 317 is not fully justified. Provisions on "nationalist-chauvinist propaganda" do not require any act of incitement

to be established but punishes mere speech. Such a broad concept could be successfully used for prosecution of abstract and harmless social or historical doctrines. Offensive language against identifiable groups or persons should be subject to punishment only if a harm is demonstrated and only at the request of the injured party.

### **3.2 Propaganda for a Totalitarian State (Article 166)**

Article 166 paragraph 1 proscribes a punishment of up to five years imprisonment for any act of "propaganda aimed to establish a totalitarian state" if perpetrated "in public" and "by any means". Investigations are initiated *ex officio*. The text was left unchanged by the Draft amending the Penal Code. As in the case of "nationalist-chauvinist propaganda", the text requires a demonstrated harm or imminent danger to be established as to make the distinction between advocacy of unlawful action, on the one hand, and of abstract doctrine on the other. Its broadness and ambiguity could pose a risk to mere expression of abstract political ideas and doctrines.

Paragraph 2 of Article 166 defines propaganda as "the systematic dissemination or advocacy of ideas, opinions or theories with the intent of convincing others and gaining supporters." The reader would certainly notice that this could well be the definition of free speech. Any speech is aimed at sharing ideas and making followers. By defining such "propaganda" as criminal, the law set up a system where pure speech is at any time at risk of being severely restricted due to its contents and place, time or manner of expressing.

In addition, punishments provided for by both Article 317 and Article 166/1 (imprisonment up to five years) are highly disproportionate. Pure speech, even if offensive or seen as unlawful, cannot justify deprivation of personal liberty.

### **4. Transmission of False Information (Article 168/1)**

Adopted by Romanian Parliament in 1996, Article 168/1 prohibits any "communication or dissemination, by any possible means, of false news, facts or information or forged documents, if this could impair state security or its international relations". The penalty is imprisonment between one and five years. Investigations are initiated *ex officio*. The Draft did not amend this provision in any way.

Although the text does not imply journalists, they stand a high risk to support the consequences of its enforcement. It is the nature of their profession to disseminate news, information and documents. This criminal provision poses a threat to freedom of expression both by its vague and ambiguous wording and its political contents. The alleged potential damage to the international relations of the country may only be determined on political and therefore subjective and changeable criteria depending on the foreign policy of the party in power. Moreover, the text does not require a demonstrated harm to the "national security" or the "international relations of the country" but merely refers to a possible and undefined danger whose existence will be at the discretion of the Government. Nor is the public interest an argument in favour of disseminating such information, although criticism of foreign policy or national security policy is one area where media plays a crucial role.

In addition, since the element of ill intentions is not required, even dissemination of "false" information in good faith is subject to punishment. Value judgements are also covered by the text, which threatens the very core of the freedom of expression.

This provision has not been enforced so far. However, its mere existence poses a danger to the freedom of journalists and to the watchdog role played by the press.

### **5. Disclosure of State Secrets (Article 169 para. 4)**

Article 169 paragraph 4 specifies that anyone – including journalists – who possesses or discloses "documents or information which constitute state secret or any documents or information..." can be

punished with up to seven years in prison if the national security might be jeopardised. Investigations are initiated *ex officio*. The text has not been amended since it came into force in 1969. Nor does the Draft amending the Penal Code contain any change.

As in the previous text, no actual harm is required. It is at the discretion of the Government, through its secret services, to decide on whether there is a potential of harm. In addition, Article 2 of the Law 51/1991 on National Security provides for a very broad range of activities to be considered as threatening to the national security while the authorities concerned failed to provide any list of the classified information and documents. Article 12 of the Law on National Security effectively marginalises freedom of expression and information: "no one may reveal the secret activities related to national security on the basis of the free access to information...and the right to freedom of expression." There is no provision to guarantee dissemination of information in the public interest.

Article 169 of the Penal Code is based exclusively on assessment of the secret services on the "secret" character of a certain document or information, and the possibility that the dissemination of that document or information endangers the national security. The judiciary has no competence to decide on classification of a piece of information or document, or on the denial of access to such information. Moreover, the wording of Article 169 of the Penal Code, which subjects to criminal penalty the possession or dissemination of "any other documents or information" which, while not a "state secret" can nevertheless constitute a threat to the national security, creates a high risk of abuse by the secret services. Namely, secret services may declare any document at any time a threat to the national security, and they can raise criminal charges accordingly.

## **B. CRIMINAL PROVISIONS OF THE LAW ON BROADCASTING**

The 1992 Law on Broadcasting imposes even more severe restrictions on media freedom. All content-based limitations provided for by Article 30 paragraphs 6 and 7 of the 1991 Constitution are given the statutory power of criminal law.

In accordance with Article 39, any programming and broadcasting which i) is harmful to the dignity, honour, private life and one's public image can be punished with imprisonment of up to five years; ii) defames the country and the nation, instigate to war of aggression, national, racial, class or religious hatred, or incites to discrimination, territorial separatism or public violence can be punished with imprisonment of up to seven years; iii) disseminates secret information or any other information potentially jeopardising the national security can be punished with imprisonment up to ten years; and iv) contains obscene manifestations, contrary to moral norms of society can be punished with fine or imprisonment of up to two years.

Criminal charges can be raised at the request of the National Council of Broadcasting that must also suspend the broadcasting license of the alleged offender until a final decision is reached. The National Council may also require the prosecutor's office to seize the equipment of the broadcaster in question.

Although they have been in effect for eight years now, these provisions have never been actually enforced. The Parliament currently debates a draft aimed at essentially changing the 1992 Law on Broadcasting.

Such harsh penalties as provided for by the current law on broadcasting subject broadcasters and their journalists to more severe sanctions than the journalists in the printed media. The entire penalty system set up by the Law on Broadcasting plays a censorship role and undermines the very core of freedom of expression and information of the broadcasting journalists.

## **IV. PROTECTION OF SOURCES**

Protection of sources of information is one of the basic conditions for press freedom. This right has been repeatedly affirmed in several international documents on freedom of journalists: the 1994

Resolution on the Confidentiality of Journalists' Sources, adopted by the European Parliament; the 1994 Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy.

### **A. Print Media**

The Parliament failed to adopt any legal provisions protecting the confidentiality of sources in the area of the print media. Equally, there is no legal provision prohibiting or limiting the search of premises occupied by media companies. Therefore, journalists can be ordered to disclose their sources. Moreover, the truth proof is required in defamation cases, which means that journalists are likely to reveal their sources since this is their only possible defence against criminal conviction.

The risk of being prosecuted for perjury if they refuse to reveal information places an unjustified and additional burden on the journalists. However, there has not been a single case of such prosecutions against journalists for the last ten years.

It is crucial that legal guarantees to protect the sources used by journalists be adopted. Under German legal system, for example, journalists have the right to refuse to testify and are exempted from search and seizure. As the European Court has ruled, "without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest[28]".

### **B. Broadcasting Media**

Law 124/1998 amending the 1994 Law on the Public Television and Radio contains Article 14 paragraph 12, which reads that "the confidentiality of sources of the [broadcast journalists] is protected by law". However, the next paragraph weakens the protection, holding that "sources may be revealed following a court order where public interest is at risk".

It is only the journalists working full time in public broadcasters who enjoy this protection. Journalists in the print media and private broadcasting media, as well as those working part-time in the public broadcasting do not enjoy the right to protection of sources.

## **V. RIGHT TO REPLY AND CORRECTION**

### **A. Print Media**

There is no legal norm regulating the right to reply and correction in the print media. In practice, the editor in chief or other decision-makers exercises discretionary and final authority in these matters. Although the Code of Ethics adopted by the Press Council[29] includes provisions on reply and correction, the entire document remains on paper only. There is no need for reply and correction to be regulated by law. However, a voluntary and effective code of ethics should govern these issues.

### **B. Broadcasting Media**

The Law 48/1992 on broadcasting frames general rules governing the right to reply and correction for commercial broadcasters. Article 4 holds that anyone who feels injured may ask for a correction or reply. Public broadcasting falls under provisions of the Law 41/1994 as amended by the Law 124/1998. Article 14 reads that news proved false must be corrected, and that anyone who feels injured may ask for correction or reply to be aired within 48 hours.

In addition to these legal provisions, all broadcasters are subject to regulatory norms issued by the National Broadcasting Council. The failure to follow the Council's regulations may be ground for public reproach, fine, temporary suspension of the license, shortening of license validity period, revoke of the license.

Both public and commercial broadcasting media should be governed by unique rules framed such as to be both reasonable and effective. At present, correction and reply are afforded discretionary by the broadcasters whose decisions are, in practice, final.

## **VI. CODE OF ETHICS**

In its session of September 12, 1994, the House of Representatives adopted Decision no. 25 on the Resolutions of the Parliamentary Assembly of the Council of Europe on journalistic ethics (Resolutions no. 1003/1993 and no. 1215/1993). The House of Representatives recommended to all journalists and media outlets to observe and apply ethical principles stated by the Resolutions. The decision by the Deputies was however not backed by the Senate. As things stand at the moment, the decision by the House of Representatives does not bind journalists.

In addition, Romanian Press Council has adopted a code of ethics, but it is not observed by journalists.

## **VII. ACCESS TO INFORMATION**

### **A. General Issues**

In Romania, access to information is guaranteed by Article 31 of the 1991 Constitution. Public authorities are to provide correct information in matters of public affairs and personal interest. National security and protection of the minors are the constitutional limits on the right of access to information.

In principle, the judicial review procedure of administrative acts provided for by the Law no. 20/1990 can be applied when information are denied. Nevertheless, this procedure does not apply in cases of access to government information. Thus, Article 2 of the Law no. 29/1990 prohibits legal action against "acts concerning the relationship between Parliament and the President...and the Government; [...] administrative acts concerning the internal and external security of the State, as well as those concerning the interpretation and enforcement of international acts Romania is a party to; emergency measures taken by executive authorities to pre-empt or to eliminate the effects of events posing a danger to the public, [...] acts of administration performed by the State in its capacity as a legal person and for the management of its heritage; administrative acts adopted in the exercise of hierarchical control prerogatives." Obviously, all the acts listed in Article 2 contain information of public interest, and therefore judicial review of denial of information is prohibited.

### **B. Limitations on the Access to Information**

Article 169 paragraph 1 of the Penal Code stipulates a sentence of up to fifteen years for a civil servant who possesses outside official capacity or reveals "documents or information, which constitute state secret or any other documents or information...if this could endanger the national security." If the same act is committed by any other individual (including a journalist), paragraph 4 provides for a sentence of up to seven years of imprisonment[30].

Article 39(c) of the Law on Broadcasting prohibits any programming or broadcasting of programmes, which disseminate any "information that contain a secret or may undermine the national security." The sentence is imprisonment for up to ten years.

Both criminal provisions aforementioned must be interpreted in accordance with the Law no. 51/1991 on the national security, which provides for a broad range of activities to be considered as threatening to the national security and prohibits disclosure of secrets on the pretext of exercising the right to information.

Courts cannot challenge the secret character of a particular information or document. In the Netherlands, for example, the courts may decide whether a document remains classified or not. In addition, the Supreme Court ruled that a publisher could not be punished or prevented from publishing simply on the ground that the publication might endanger national security. Rather, the government must establish that, based on experience, it may reasonably be assumed that, under the given circumstances, the feared consequences would occur. In Germany, "state secrets" are limited by the Penal Code to those data, which must be kept secret from foreign powers to avert serious damage to the external security of the country.

The 1995 Johannesburg Principles have established general rules on access to information and any limitations to it on the ground of national security. Principle 12 states that a "state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest." Principle 13 holds that "the public interest in knowing the information shall be a primary consideration" in all decisions concerning the right to obtain information. Under the same principle, it is a duty of state to adopt appropriate measures to effect the right of information, and the principle also requires the authorities to specify in writing, as soon as reasonably possible, their reasons for denying access to information. Judicial review on merits and validity of such a denial is also provided for, including the right to examine the information withheld. Principle 14 prohibits punishment "on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure." Equally, in accordance with Principle 16, "no person may be subject to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure." Further, Principle 17 holds that "once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know." The following Principle states that "protection of national security may not be used as a reason to compel a journalist to reveal a journalistic source."

Criminal limitations provided for by the Romanian law on access to information are contrary to international principles, and they need to be changed substantially. Amendments to the law on national security have been drafted. However, they have not yet been discussed in the Parliament.

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#### References:

1. This paper is based on *Romania – An Analysis of Media Law and Practice*, a report by Article 19 in July 1997.
2. The Constitution of Romania was adopted at the session of the Constituent Assembly on November 21, 1991 and entered into force pursuant to its verification on the national referendum December 8, 1991.
3. Law no 39/1993.
4. Law No 30/1994. The Protocol 11 was ratified by Law 79/1995.
5. *Lingens v. Austria*, verdict of July 8, 1986.
6. *Ibid.*
7. *Castells v. Spain*, verdict of April 23, 1992.
8. *Jersild v. Denmark*, verdict of September 23, 1994.
9. Opinion 176/1993.
10. *Thorgeirson v. Island*, verdict of June 25, 1992.
11. Article 2 of the International Covenant on Civil and Political Rights.

12. Article 1 of the European Convention on Human Rights.
13. The legal status of the public broadcasting media will be discussed in the respective chapter.
14. *Handyside v. UK*, verdict of December 7, 1976; *Lingens v. Austria*, verdict of July 8, 1986.
15. *Dalban v. Romania*, verdict of September 28, 1999.
16. *Romania – An Analysis of Media Law and Practice*, July 1997, Article 19 - International Centre Against Censorship, ISBN 1 870798 09 0; p.24.
17. See supra "truth proof".
18. *Lingens v. Austria*, see above ft.5
19. *Dalban v. Romania*, see above ft.16.
20. *Lingens v. Austria*, see ft.5.
21. *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 US 6 (1970); *Old Dominion Letter Carriers v. Austin*, 418 US 264 (1974).
22. *Thorgeirson v. Island*, see above ft. 11.
23. *United States v. Eichman*, 496 US 315 (1990).
24. See, for example, Article 10 of the European Convention of Human Rights; Article 19 of the International Covenant on Civil and Political Rights.
25. See, for example, *Glimmerveen and Hagenback v. Netherlands* (1979); *Kuhnen v. FRG* (1988).
26. *Terminiello v. Chicago*, 337 US 1 (1949).
27. *Goodwin v. UK*, verdict of March 27, 1996.
28. Press Council is formed of directors of the main newspapers.
29. See also supra section III.A.5.
30. Pointed out by the Resolution 53/1996 of the UN Human Rights Commission.

## **PUBLIC BROADCASTING IN ROMANIA**

### **Alexandru Mironov**

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of the Romanian TV Society  
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As you may remember, the former socialist Romania was one of the most Stalinist, most closed country to the outside world, and – most controlled by what was then called the Press Section of the Central Committee of the Communist Party. Especially the period 1978-1989 was such a disaster that people had started putting up aerials and pointing them towards Bulgaria, Yugoslavia – which was then for us a model of democracy among our neighbours – Hungary, even to the Soviet Union, in order to be able to catch at least glimpses of the world reality. I saw for instance the great show of the fall of the Berlin Wall in a town not far from the border of what is nowadays the Republic of Moldova, then a part of the former Soviet Union. The fall of Communism was an unexpected shock for everybody. It so happened that I was myself involved into that sudden change of history, being part of a team that conquered the Romanian Radio and started the first free broadcasting. It was at 11<sup>05</sup> a.m., on 22<sup>d</sup> of December 1989.

Things moved quickly and chaotically, both on radio and TV, although the 1991 Law on Broadcasting instituted the Broadcasting Council (Board), composed of 11 members elected on parliamentary principles – according to the quotas that political parties had in the then Parliament.

Commercial radio stations followed immediately and the first private TV station – encouraged by the George Soros Foundation – started broadcasting in 1992.

Then the broadcasting system nearly exploded, and we now have 109 TV stations, 229 radio stations and more than 1550 TV (cable) networks, some of whom started broadcasting their own cable TV programmes.

As for the Broadcasting Council, it has so far justified its existence. I shall here stress the importance of 3 of its moves. First of all, it obligated TV stations to classify films broadcast and warn the public of the film contents. Lottery and other gambling "sports" are now not be broadcast before 10 p.m. (that is, after prime time). Finally, the Council enforced interdiction of misconduct, offensive statements, libel and defamation for the 2000 elections, the result being that we couldn't make fools of ourselves.

The Public Broadcasting System was founded in 1994 (The Law 41), separating Radio Romania from Romanian Television. The Law was reinforced by some amendments in 1998, when previous interim management got removed from office in both national public broadcasters and replaced by Executive Boards. Executive board consists of 13 members: 1 representing the President of the Republic, 1 representing the Government, 1 on behalf of the Council of Minorities, 2 on behalf of the broadcaster itself and 8 representing political parties in the Parliament.

As a member of such a Board, I have to say that the system does not work properly, it is too political and – surprisingly – it tried to push public broadcasters into market competition with commercial broadcasters!

The two Boards will be in function till July 2002, if the Parliament does not accept their annual reports – the law recognises such a possibility.

There are plans for the next 6 years, and we hope to be able to implement them. Romanian Radio already broadcasts on 6 different channels. Romanian TV has 3 channels (Romania 1 – 99.1%, TVR-2 – 60% and TVRi). We hope that, by switching to cable TV and encouraging the cable installation in most of our homes (with state's support), the public TV will stimulate local development while presenting the other, non-institutional school to all Romanians and growing into the main Internet and phone provider by 2006.

# PART IV

## CONCENTRATIONS IN BROADCASTING SECTOR

**Bachtiar Djalil,**  
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### INTRODUCTION

The last decade has been marked with a great transformation within the broadcasting sector – rapid technological progress, especially in digital technology, leading to the development of new products, programmes and, ultimately, technological convergence of telecommunications, media and information technology. Such a development drastically increased investment costs, which could be covered by TV operators, programme owners and others entering into mergers or other strategic alliances.

### DEFINITION

So, what is a concentration?

A concentration arises in three different situations.

The first one is a merger, that is, when two or more previously independent companies merge.

The second situation is a situation where one or more persons already controlling at least one company, or one or more companies, acquire direct or indirect control over the whole or parts of one or more other companies by purchase of securities or assets, on the basis of contract or in any other way. Such an acquisition of control can therefore be a sole acquisition of control or a joint acquisition of control.

The third type of a concentration is a joint venture, which performs all the functions of an autonomous economic entity on a lasting basis.

The main element of the concept of concentration is change in control. In the case that the change of control exists, the concentration arises. If there is no change in control, there is no concentration either.

### CONCENTRATIONS: *PRO ET CONTRA*

Numerous hypotheses, aspiring to explain why mergers occur, have been developed.

According to the *market power hypothesis*, horizontal mergers create monopolistic power by reducing the number of competing companies. The number of competitors is reduced; thus the merged companies are able to raise their prices, such as prices of advertising, pay-TV subscription fees, etc.

Mergers generate synergetic gains if the production, administrative and marketing costs of the merged companies are smaller than the sum of the two individual companies before the merger (*the synergy hypothesis*). Lower costs lead to increased profits and higher stock prices to bidders, unless the price

of the target is pushed up to the level where the price reflects the value of expected synergetic gains due to the competition among the bidders. In the case of media, this is the way to raise additional financial resources for the development of new products or services.

For a company, which is seeking to extend its operations downmarket into the distributional sphere, it can be more efficient to merge with an existing distributor than to develop its own know-how, its own distribution network and build the infrastructure from scratch.

According to the *tax hypothesis*, the tax liability of the merged entity can be smaller than the tax liabilities of the individual companies, i.e. in the case of profit-loss compensation.

The *inefficient-management hypothesis* suggests that mergers provide mechanisms to remove inefficient management of the target enterprise.

## COMPETITIVE ASSESSMENT

**“A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.”**

This was a provision of the EC Merger Regulation, which was transposed in competition legislation of most of the European countries.

How does a competition authority assess a concentration? Of course, we have to define the relevant market – its product or service and geographic scope – before we can establish concentration’s position in the market.

**A relevant product market comprises all those products and/or services regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and intended use. A relevant product market may in some cases be composed of a number of individual products and/or services, which present largely identical physical or technical characteristics and are interchangeable.**

In the process of the definition of the relevant product markets the competition authority takes into consideration factors such as substitutability, conditions of competition, prices, cross-price elasticity of demand and other factors.

**A relevant geographic market covers the area where the enterprises concerned are involved in the supply and demand of relevant products and services, where conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring geographic areas because, and in particular, conditions of competition are appreciably different in those areas.**

In the process of defining the relevant geographic markets the competition authority takes into consideration factors such as the nature and characteristics of the products and services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the enterprises’ market shares between the neighbouring geographic areas or substantial price differences.

Let us now try to apply these rules to the case of broadcasting. Even though the definition of the relevant market has to be done on the case-by-case basis, certain guidelines have been developed.

The first two markets are separate markets for free-access TV, that is fee- and advertising- financed TV, and for pay-TV. Why a division? The division is justified by the trade relationship, which is in the case of free-access TV established only between the programme supplier and advertisers, whereas in the case of pay-TV the trade relationship exists between the programme supplier and viewers as subscribers. In view of these trade relationships, the conditions of competition are accordingly

different for the two types of television. Whereas in the case of advertising financed TV the audience share and the advertising rates are the key parameters, in the case of pay-TV the key factors concern tailoring of programmes to the interests of the target groups of viewers and the level of subscriptions. If the subscribers are prepared to pay considerable sums for pay-TV, that fact indicates that pay-TV is a distinguishable product with specific extra utility.

There were attempts to foster the distinction between these markets. The distinction between the markets for digital and analogue TV was not found. Digital TV was found to be just a further development of analogue TV. Additionally, there was no definition of separate TV markets in terms of their means of transmission – terrestrial, satellite and cable.

With respect to pay-TV, a distinction has to be made between general interest channels and special interest channels. As regards the supply of film and sport channels to pay-TV, a distinction has to be made between the supply of channels which are sold on an individual basis and at a premium to the subscriber by the TV operator, as opposed to the package of general interest and thematic channels.

A separate market was found to exist for digital interactive television services. The operators of digital interactive television services will provide a platform through which content providers will promote and sell their goods and services, such as home banking, home shopping, entertainment, holiday and travel services etc. The primary source of demand and income of the operators will be content providers, which will choose the operator according to the popularity of the platform and the services provided to the final consumers.

With respect to TV productions, a distinction has to be made between in-house productions by broadcasters and used for captive purposes, and productions commissioned by a broadcaster to a producer. Only the productions commissioned by a broadcaster to a producer are offered on the market. The relevant market is therefore limited to TV productions that are not used for captive use.

Another separate market was found to exist for the acquisition of broadcasting rights, in particular for films and sporting events, which are the most popular pay-TV products. In order to convince potential subscribers to pay for the receiving TV services, such products have to be included. In case of films, the distinction has to be made between rights for pay-TV, free access and pay-per-view, as pay-TV rights may be exploited prior to the free access broadcasting rights. A similar situation arises in case of sporting events.

The last market we will talk about now is the market in technical services for pay-TV. The operation of pay-TV requires a special technical infrastructure in order to encrypt the television signals and to enable the authorised viewer to decode them. This is done by the installation of a terminal (decoder or set-top box) in the home of each pay-TV subscriber. In addition, the pay-TV operator must have a conditional access system, which comprises the transmission of encrypted data containing information on the programmes or packages of programmes subscribed to and on the entitlement of the pay-TV subscribers to receive those programmes, together with the television signals. Smart cards, which are made available to subscribers and which are able to decipher the encrypted authorisation data and transfer them to the decoder, are usually included in the system.

As regards the geographic scope of the relevant markets, the relevant markets for pay- and free-access TV are national in scope, mainly due to different regulatory regimes, existing language barriers, cultural factors and other different conditions of competition prevailing in the various markets. In the case of broadcasting rights, such rights are normally granted for one specified language region or one specific country. Occasionally, such rights are granted for the territory of the whole Europe. Such is the case with some sports events.

Now that we've defined the markets, we can move on to the substantive analysis of the concentration. The factors usually used in the assessment of the concentration can be divided to four general groups:

market shares, characteristics of the concentrating companies, barriers to entry and the characteristics of demand.

*Market shares are the most important indication of the market power of the companies. They have to be observed in a complex way; purely absolute share levels of the companies can hardly provide strong evidence of market power. Very high market shares (such as above 50%) are very strong indicators of the existence of a dominant position, but in certain circumstances, like if sufficiently active competitors are present in the market, even such market shares may not necessarily result in dominance. Thus, absolute market shares have to be observed in combination with market shares of other competitors and durability of these market shares.*

*The difference between the market shares of the companies in question and their competitors is important mostly in cases where a company with a high market share is confronted with competitors with low market shares.*

*When the dominant position of the concentration is established, it has to be analysed whether such a situation is permanent or it is likely to be changed. Situations of a dominant position being only temporary are, for example, where the company increasingly loses its market share due to effective competitors, where the company has only one large customer, and is therefore dependent on it, where the merging parties' operations or regions are geographically focused in different states or regions within the same state, or, where the market is new and very dynamic. This is especially true for digital technology, which is characterised by rapid changes.*

*Characteristics of the concentration in question, which may bring certain advantages over the competitors, might be of great relevance in the process of concentration assessment. Important factors are financial strength of the companies, coverage of the whole range of products or services, technological expertise, a more extensive distribution network or exclusive or preferential distribution arrangements. Such factors might create or strengthen the dominant position of the company through, i.e. cost savings by establishing common marketing and product support, offering favourable conditions for specific products or services in mixed deals, further development of their activities, etc. This, of course, applies to broadcasting as well. The number and the type (general or specific) of programme channels, provided by the TV operator is very important. Such programme channels can be sold in bouquets, binding the non- or less-attractive channels to the more attractive ones. Broadcasting sector involves specialised technological, marketing and distribution know-how, the development of which is extremely costly; therefore, the financial strength of companies is one of the more important factors. In this case, of course, a TV heavily subsidised by the state, is in a much better position in comparison with a free-access TV financed exclusively by advertisers.*

*By owning broadcasting sport or film rights, especially if such deals are concluded on a longer time period, a concentration can limit its competitors' access to content, as any operator has to offer programmes that are attractive to viewers. Control over the technical infrastructure required to encrypt television signals and to enable the authorised viewer to decode them, especially if such technology becomes the standard technology, can additionally prevent potential competitors from entering the market.*

*Obviously, the largest threat of the vertical concentration is generated by the foreclosure of the market.*

*When assessing the demand side, the important element is whether the concentration is able to act independently of customers. Especially in the cases of very well established brand names, the distributors cannot afford not to sell the product if they do not wish to lose their customers. On certain occasions large customers have the possibility to exercise countervailing bargaining power to defeat anti-competitive behaviour that might be attempted by the concentration. In a monopsony*

*(or near-monopsony) situation, where one customer represents all or nearly all of the market demand for the relevant product, the single customer can exercise market power by decreasing prices below competitive levels.*

*Dominant position of an enterprise can be undermined by the possibility of entry of new enterprises to the market, either through an establishment of a new enterprise, geographic or product/service line expansion, vertical integration by customers or suppliers, or through direct import to the market. It has to be analysed whether potential competitors exist and whether they have an actual possibility of entry into the market.*

*Different barriers can be imposed upon the possible entrants to the market. In the case of broadcasting, a lot of such barriers exist. The market position of a TV can be protected by various legal barriers, such as intellectual property rights (i.e. licences) or restrictive government regulations, which pose impediments to competitors. Technical barriers include the sophisticated know-how needed to enter the broadcasting sector and the need to adapt to national technical standards, especially in the case of the absence of harmonisation. Economic barriers, such as very high costs of entry, especially if high risk exists that the costs would not be recovered, maturity of the market, that is, if the demand does not grow or even declines, and loyalty of the customers to particular established programme channel may dissuade potential entrants to enter the market.*

So, if a concentration is to be declared incompatible with rules of competition, it has to create or strengthen a dominant position of the concentration in the market, AND it has to be established that because of this concentration the effective competition will be distorted.

What can a competition authority do in case that such a situation occurs? The most radical solution is to declare it incompatible with the rules of competition and prohibit such a concentration. The less radical solution is to impose remedies, such as, for example, divestment, unbundling of programme bouquets, provision of access to programme platforms and technical infrastructure.

I've tried to introduce to you the competition law approach concerning concentrations in the broadcasting sector, especially regarding the definition of relevant markets and the substantive review of such concentrations. This is an extremely rapidly developing market, so sometimes the decisions of competition authorities aimed at prevention of anti-competitive situations in fact created anti-competitive situations. It is quite difficult to assess a concentration, if the market conditions change so quickly, and the effects of the concentration are not really predictable at the moment of the adoption of the decision.

**BETWEEN SCYLLA OF POLITISATION AND CHARYBDIS OF  
COMMERCIALIZATION:  
SHOULD PBS BE PROTECTED BY CONSTITUTION – AND HOW?**

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An immediate incentive for my paper were the words of the Director of the Competition Protection Office in Slovenia at the end of the first day of the conference, who discussed the issues of competition between the public and private televisions in Slovenia (and within the EU countries) exclusively based on commercial criteria – as though the case involved competition between potato or car dealers. I was particularly bothered by the treatment of the “TV subscription”, as it used to be called in former Yugoslavia (and it may still be called so in the new states located on this territory – although in Slovenia at least, based on the German-French model, it has been transformed by the law into a para-fiscal tax, into the “RTV contribution”), as though it involves some sort of state aid, favouring the public TV over the commercial TV stations – which, in relation to the rules of free competition, should be suspicious or even disallowed.

If top state officials have such reasoning even in Slovenia, I thought, then there will be not much difference in other places of this region either ... And then I also remembered my bitter experience as a former judge of Slovenian Constitutional Court, where referral to the practice of German Constitutional Court and French Constitutional Council did not help me convince my colleagues that this “TV subscription”, regardless of its illogical name, is not any sort of civil obligation, but a specific para-fiscal duty prescribed by the state (or by the authorized governing body of the public TV) on citizens (that is, holders of TV sets), in order to finance a public state-level project or public duty (*öffentliche Aufgabe*, as the Germans call it).

Alas, lucky Germans, because over there this “public duty” is not only a public one, it is also deemed to be a “constitutional duty” even by their constitutional court. Based on what? Based on a half of a sentence in the constitution mentioning the radio (Rundfunk) back in 1949. This is Article 5 of German Constitution, addressing freedom of opinion. The Article has three paragraphs, paragraph one has three sentences, and the second of these literally reads: “Freedom of press and **freedom of reporting through the radio** and the film shall be guaranteed.”

German Constitutional Court has used these six bolded words to develop a whole system of constitutional law principles – ranging from the principle of balanced funding for electronic media – through the use of both state-imposed tax and commercial revenues (in order to secure independence from the government!) – to the constitutional duty of unbiased and truthful reporting, etc. Unfortunately, we in the transition countries do not boast constitutional courts of such power, quality and reputation as Germans do. Nor do our constitutions (I know about Slovenian Constitution, and I assume it is the same with all the others) contain even a single word pertaining to electronic media – in spite of their crucial influence on democracy as well as the cultural and other life in contemporary society.

Drawing on this, it was not hard to come to conclusion that it will be very difficult to accomplish the position of electronic media such as advocated for by EBU, UNESCO and others in the transition countries, and such as we mentioned at the conference, without determining (fixing) the foundation points of such position in their constitutions. It is only this, in addition to an appropriate monitoring function performed by constitutional courts, of course, that could offer the public media in our countries a chance to steer clear of collisions both with the Scylla of the state, that is, political dominance, and with the Charybdis of commercial competition or their own excessive commercialisation.

I thus proposed to the conference to discuss the following:

**DRAFT ARTICLE**

**FOR THE CONSTITUTIONS OF STATES IN TRANSITION**

(in addition to the articles on freedom of expression and media freedoms in general)

(1) Freedom of broadcasting is guaranteed.<sup>[1]</sup> Licences are granted by an independent body, established in accordance with the law. A proper balance between public and private broadcasting stations must be achieved (*possible addition*: guaranteeing a fair competition between them, taking into account their different nature?)

(2) Public broadcasting organization(s) must be established by law. Its (their) constitutional task is contribution to cultural development of the people, to free formation of the opinion and to their entertainment.<sup>[2]</sup>

(3) Its (their) independence from the state must be ensured by means of an independent (governing?) body in which representatives of non-governmental organisations and/or of general public must prevail and by means of mixed system of funding (financing): licence-fee, advertising and other sources. The balance between these sources is established by law (or by an independent regulatory body, according to the criteria, established by law) and is not submitted to decisions of governmental bodies, competent for matters of general economic competition.

(4) Public broadcasting media (*or, better*: Both public and private broadcasting media) faithfully portray events and fairly represent the diversity of opinions.<sup>[3]</sup> *Possible addition*: They must assure political (and ideological?) non-partisanship (*or*: balance?), objectivity and completeness of reporting and commenting.<sup>[4]</sup>

In an article published by Bosnian “online-newspaper” *Media Online*, dated May 25, Gojko Bervar provided a following commentary of the discussion on this proposal: “The response to these proposals was a very positive one among the participants coming from the transition countries, while those from the developed democracies, understandably had more critical remarks, although they did not discard such manner of reasoning altogether.” True, I am not quite clear as to where he heard such “very positive response” from the participants coming from the transition countries, (maybe during the break) – I did not hear it myself. And I was not surprised with this either, given that the proposal was a rather radical one, that it was introduced suddenly and that the participants were mainly journalists, not lawyers.

Let me not even talk about how I fared with my proposals pertaining to the domain of media legislation back at home, in Slovenia, with lawyers and journalists. Initially, it was always a general consternation. By the means of persistency, ultimately patient argumentation and of course willingness to accept reasonable counter-arguments, seeking new solutions and compromises, finally, over the past two years, the lawyers, journalists and politicians in Slovenia have effected a significant step ahead, at least with two special issues of the media law. Namely, in spite of the initial general resistance on the part of almost all legal and journalist “experts”, the legal transformation was accepted. The “TV subscription” thus became a para-fiscal tax (“TV contribution” modelled after the German-French system), which has, by the way, also considerably reduced “tax evasion” and significantly improved the financial status of the RTV of Slovenia (without changing the actual amount paid). Secondly, in the otherwise poor new media law, the chapter on the right to correction and reply was significantly improved (more information on this issue is available in the bilingual brochure issued by Ljubljana-based *Media Watch*, also handed out to the participants of the Bled conference), and the legal provisions have also been improved guaranteeing autonomy for editors and journalists in relation to media owners and publishers.

I apologise for this excursion into the issues of Slovenian media legislation, but this may be of interest to participants/readers from former Yugoslavia, given our former common Yugoslav legislation.

Let me go back to the initial proposals not only for the legal but also even the constitutional “fixation” of some key points for the positions of both public and private broadcasting media. For the “Western” participants of the Conference, including lawyers, the proposal – given the existence of only several (or even none) words on this in their own constitutions – seemed to be primarily too detailed, and then in the discussion they let the polemic take them in too much detail about specific proposed provisions or wording. I replied there and I also do it here: when staring at individual trees, do not overlook a forest, as our popular proverb says. This proposal was written literally overnight, in a hurry. It is not specific formulations that matter, what matters is the basic idea – to perform a constitutional “fixation” of some foundations or basic points for media freedom in this domain most relevant for the modern democracy, the domain of electronic, that is, broadcasting media:

- Paragraph one: a dual system, balance and de-statism (*de-etatisation*) within it;
- Paragraph two: “constitutional duty” of public broadcasting media;
- Paragraph three: reaching their independence from the state in administration and finances;
- Paragraph four: constitutionally ordered pluralism, non-bias and integrity, at least for public (and for all if possible) broadcasting media.

Why for all media instead of only for public ones in this segment? We in the transition countries need to follow the models of many, maybe already the majority of, European countries where the matter has already been regulated in this way, instead of for instance the “model” of Italy, where private televisions by coincidence remained beyond the reach of the state legislation – and have been massively used to exert political influence (Berlusconi being the case in point).

Please allow me to illustrate the problem using my experience from Slovenia again. During the preparations for the new law on media, I publicly asked the question as to why the law did not respect the elementary “European” experience in this domain, that no same rules can exist for printed and for electronic media. Actually, first I asked “only” why the law does not provide the obligation for public (or all) broadcasting media to report without political bias, in a pluralist fashion, etc. The “official” answer of the competent ministry was: “Well, we do obligate all the media, all the journalists, to perform so!” What kind of “obligation” it would be and what it consists of, I had better not tell. This answer itself clearly showed that neither our politicians nor our journalists (who accepted this silently) had any idea about the relevant difference between the printed and electronic media: with the former ones, pluralism is reached through the market (plus a potential state support to pluralisation), whereas with the latter ones, it is reached through the aforementioned law-imposed obligation. Why with the latter ones (only)? It is not hard to guess: because of the extraordinary, you can feel free to even say crucial, influence of the radio and television on shaping public opinion in a modern society. A biased television can ruin democracy. A private one equally – or even more than a public one, depending on its power in a particular country. (The epilogue of this story in Slovenia, at least for the time being: nothing has changed in the legislation domain over there yet, the press and RTV are treated as one and the same kind of media by the legislator in those terms, the special law on the public RTV only restricts it from broadcasting “political propaganda”, not requiring anything else from it, believe it or not.)

If it is so hard even in the somewhat more developed Slovenia to “push through” some modern principles of the media law into legislation, how hard will it then be to “push through” such principles into the constitutions of Slovenia and other transition countries? Ultimately hard, I am aware of this. After all, adoption of a law requires only an ordinary majority in the Parliament, and the Constitution requires much more than that. But on the other hand, particularly in the transition countries (and some other places too to some extent), the “ordinary” legislation is often degraded down to the compromises of everyday politics, whereas with constitutional changes the seriousness is after all shifted up, within the politics and with the broader public, to a higher level which then, with an adequate effort by the legal and other experts, at least sometimes makes possible that which is impossible and unattainable in the ordinary everyday legislation. Of course, I am also aware that laws are passed on a daily basis

whereas constitutional changes are very seldom. It is exactly because of this that the public debate in these terms should be initiated earlier, not only when the “political elite” decides that something in the constitution needs to be changed, after all. Then it will be too late to “insert” this, which is the subject of my proposal too.

And finally, one more reference to the initial incentive, mentioned in the beginning of this article. At least with such transition countries approximating the EU accession, and these are not so few in number, as soon as they accept only the association agreements with the EU (already obligating them to accept “European” criteria for economic competition), their public radio-televisions are threatened by another risk: that, particularly with the local (inexperienced) competition monitors, and maybe even with the EU monitors (given their unbalanced legislation in those terms and given the deficiency of EU regulations), those public radio-televisions will find it difficult to withstand the legal assaults of the commercial televisions, unless they can refer to the constitutional (or at least law-based) guarantees for their specific position. If the EU regulations in those terms remain deficient, after the EU accession law-based guarantees only will not be sufficient either: the EU law has precedence over the local legislation – and the constitutional guarantees will become relevant.

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[1] I was wavering between the terms “electronic media” and “broadcasting”. Although the term “electronic media” may be more familiar, its drawback is in its scope: it encompasses not only the radio and the television, but new media as well, such as the Internet, etc. (and their constitutional and legal regulating is a separate issue not included in my proposal).

[2] The formulation of this sentence is (except of the first 3 words) literally taken from Art. 55b of the Swiss Constitution (quoted from: *Implementation of Constitutional Provisions Regarding Mass Media in a Pluralist Democracy*, European Commission for Democracy through Law, Council of Europe Publishing, 1995, p. 69). Nearly the same in Winfried Brugger, “Rundfunkfreiheit und Verfassungsinterpretation, Müller Verlag, Heidelberg 1991, p. 38-39: “... der klassische Auftrag des Rundfunks, der ... die Meinungs- und politische Willensbildung, Unterhaltung und über laufende Berichterstattung hinausgehende Information seine kulturelle Verantwortung umfasst.” “... essentiellen Funktionen des Rundfunks für die demokratische Ordnung wie für das kulturelle Leben”.

[3] Also taken from Art. 55b of Swiss Constitution.

[4] Taken from: R. Hoffmann, F. Merli, J. Marko, E. Wiederin “Information, Medien und Demokratie – ein europäischer Rechtsvergleich”, Verlag Oesterreich, Wien 1997, p. 36-38. Original text (in German): *Meinungsvielfalt, Ueberparteilichkeit, Ausgewogenheit, Objektivität und Vollständigkeit der Berichterstattung. ... Für die privaten Veranstalter sind ... in der Regel dieselben Neutralitäts-, Ausgewogenheits- und Vielfaltsgebote massgeblich wie für den öffentlichem Rundfunk. Privater “Tendenzrundfunk” ist durchwegs unzulässig. - With an interesting addition: Die quantitativen Werbebeschränkungen (der privaten Veranstalter) dienen in erster Linie nicht dem Schutz der Konsumenten, sondern sollen die wirtschaftliche Basis des öffentlichen Rundfunks und der Printmedien sichern; auch sie haben also eine medien- und demokratiepolitische Bedeutung. – And, a propos the term “completeness (?) of reporting and commenting” – see in W. Brugger, *op. cit.*, p. 39: “... dass die Vielfalt der bestehenden Meinungen im Rundfunk in möglicher Breite und Vollständigkeit Ausdruck finden.”*

## ON THE POSITION, STATUS AND ROLE OF PUBLIC SERVICE BROADCASTER<sup>6</sup>

**Cene Grcar**

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Pro Plus

Ljubljana

Since we have already heard from Dr. Rumphorst what the role and obligations of public broadcasters should be, please let me present in few words the situation in Slovenia.

My short presentation is reflecting **a view of a commercial broadcaster in Slovenia on the position, status and role of the public broadcaster in Slovenia.**

Being a public broadcaster is a public service – such service implies special obligations and special modes of financing. It does not mean either business or profit making. Both however are the main goal of private broadcasters.

A public service is financed publicly because it provides something that the market does not. If a public service offers a product or a service that is already available on the market, there is no need for public financing.

Private broadcasters in Slovenia are convinced that our public service does not provide a service that is in public interest. When we are talking about public interests, this is actually a question of the contents of programming offered by the public broadcaster.

Allow me to present some facts and figures.

In the year 1998 (those are the most recent data available on the RTV Slovenia's homepage) the programming of our public TV broadcaster consisted of the following:

- Films, series, music, entertainment, sport, promotional videos, telesales and advertising, all of those are the so-called commercial programs, and they represented 63.5 % of all the programmes.

To be more specific – telesales, advertising and promotional videos together made up 10.5 % of total programming. On the other hand, educational programs, youth and children programs and TV dramas represented only 7.5 % of all the programs.

According to those figures, we could ask ourselves some questions. Is the programming of our public broadcaster really "in the public interest"? Are not the majority of our public broadcaster's programming contents available on the market? In Slovenia we have 3 commercial TV stations with national coverage that do the very same programmes – films, series, entertainment, TV shop program, advertisements and so on.

There is one single answer to this question and two possible solutions. The answer is NO. Our public broadcaster does not provide us with the contents that are in public interest. It clearly does not justify all the public money that it gets. More than 60% of its programming is available on commercial TV stations free of charge.

There are two possible solutions. The first one is purely theoretical – the public broadcaster goes to the market. It quits the safe publicly financed system and gets privatised. It is decided what contents are in public interest and every TV broadcaster is entitled to compete for public money to produce such

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<sup>6</sup> The title was added by the editor.

programmes. It is really theoretical – I am convinced that it is in public interest to have a strong, well-financed public broadcaster to produce and air programmes that are usually not seen on other stations and are important for public well being.

There is also another, more prosaic reason – if our RTV depended on its actual results for one single month, it would be dead the next day.

Another, more realistic solution is that we first decide what programming contents are so important and in public interest that they must be produced by the public broadcaster, funded by the license fee. That must be defined in a rather precise way so that the proportionality between the public funds and the programming contents is visible.

After that, once the programming contents to be seen on a public TV have been defined, we must examine the funding requirements to facilitate their production and broadcasting.

To do that we must have a system of financing that is well organised and therefore predictable and strong enough. In Slovenia we have a new system of collecting license fees, which now brings to our public broadcaster much more money than before.

The second way of financing the public broadcaster is advertising. What is the right limitation of the advertising time on the public TV does of course not depend on the results of lobbying in the Parliament, as it has been done in Slovenia recently, but strictly on numbers and percentages.

If we find out, after we agreed on the programming contents that should be produced by the public broadcaster, that public money – license fee does not suffice to cover the production costs of such programmes, the public broadcaster is allowed to resort to advertising – but only to the extent to cover the costs of public programming and not to make profit.

Only in that way the special system of financing the public broadcaster with public money stays legitimate and does not affect the conditions and competition on the TV market, where market implies not only the advertising market but also the TV production market.

This would also be in accordance with the Protocol on the System of Public Broadcasting of the Amsterdam Treaty and some other EC documents, like the Transparency Directive (that forbids the so-called cross-subsidies in public enterprises) and also with the national legislation that regulates fair competition.

Let me just add that the EU Commission has applied the same standards in implementation of the aforementioned EC documents when deciding on complaints by broadcasters. In all the cases their decision was that it is compatible with the EC Treaty to allocate public funding to programming production if it is granted as compensation for the delivery of services of general interest and does not exceed its actual costs and is therefore proportionate to the public service provided.

Since in Slovenia we have not yet defined the programming obligations of the public broadcaster nor have we identified the financial requirements accordingly, we could not run a legitimacy test, and therefore our system of public broadcasting *a priori* constitutes an illegal form of state aid.

The so-called Association Agreement between Slovenia and EC also stipulates obligations of our country to implement some provisions of the EC Treaty prior to full accession. Those provisions are already in force and refer to competition, state aid and public enterprises. I am therefore not convinced that our media legislation is actually in compliance with the so-called *Acquis Communautaire*.

Thank you very much.

# PART V

## CONCLUSIONS AND RECOMMENDATIONS<sup>7</sup>

### Key Aspects of Broadcasting Regulation

Although the basic principles of journalistic and editorial freedom are universal, regulation of the broadcasting field necessarily varies from one country to another, given the different cultural and political tradition and the history of broadcasting.

According to current European standards, the audio-visual landscape should be mixed, i.e. a dual broadcasting system that features both an editorially independent public service sector and a commercial broadcasting sector.

### Legislation should ensure the following aspects of the broadcasting system:

- Definition of the function and the role of public broadcasting within society, and, in transition countries, the transformation of state broadcasting into editorially independent public broadcasting;
- Establishment of functional dual broadcasting system which features both public broadcasting and private broadcasters.
- Prevention of monopolization and other restraints on competition which can undermine pluralism of voices within the media system; this also includes providing conditions for fair competition among broadcasters;
- Stimulation of competition which favours the programming quality and diversity;
- Establishing and ensuring independent status of broadcasting regulatory authorities involved in defining program standards, frequency licensing and monitoring procedures;
- Defining the programming obligations, both for public service broadcasters and for private, commercial broadcasters;
- Providing for stable and sufficient funding of public broadcasters, which will allow them to operate in public interest;
- Defining the requirements that can guarantee transparency of media ownership;
- Providing mechanisms for the impact of civil society on the management of public service broadcasters;
- Creating the environment that favours non-intervention by state, for the sake of editorial independence, which is the most obvious prerequisite for ensuring fair, uncensored and independent information;
- Providing the mechanism for the right to reply.

### Self-Regulation as a Necessary Supplement to Legislation

There is necessarily a need for self-regulation as a supplement to media legislation, possibly including a code of conduct.

Precondition for self-regulation is nevertheless competence of media professionals, but also of the public. Therefore, self-regulation, media education, building media competence and discussing the role of civil society should be important issues on any agenda regarding broadcasting issues and problems.

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<sup>7</sup> This is the final version of conclusions and recommendations, compiled by Tarik Jusic.

## **Public Broadcasting Service**

There are three key characteristics of the public service broadcasting that have to be considered:

1. public service broadcasting is intended for public;
2. public service broadcasting is financed by the public; and
3. public service broadcasting is controlled by the public.

Public service broadcasting is intended for the public, and it therefore has to reach its public. In order to achieve this, public service broadcasting has to feature a sound combination of mass appeal programmes and minority programs. In many countries concerned, the full territorial coverage is achieved only by public/state broadcasters.

The primary role of public service broadcasting is to provide information, cultural, educational and entertainment contents that would serve the public bound together by specific cultural traditions and circumstances of the country in question.

In other words, public service broadcasting should support the values underlying political, legal and social structures of democratic societies, and it should particularly respect human rights, culture and political pluralism.

Among the main policy objectives of the whole set of rules in the public broadcasting field, the following categories are traditionally distinguished:

- editorial independence;
- non-partisan information;
- political pluralism;
- educational programs;
- protection of cultural identity and diversity, including minority programmes;
- quality of programmes;
- respect for linguistic diversity;
- stimulation of European, national and local production.

## **Funding of Public Service Broadcasters and the Media Market**

Appropriate funding of the public service broadcasters is fundamental to their specific role. States should maintain and, where necessary, establish an appropriate and secure funding framework, which guarantees public broadcasting service the means necessary to accomplish its mission.

The level of license fee or public subsidy should be projected over a sufficiently long time span so as to allow public service broadcasters to engage in long-term planning. Funding must be sound, sufficient and stable.

Since public service broadcasting is financed publicly, funding has to be strictly controlled. This requires control on two levels:

1. The first level is the level of programme control through independent council that would provide light-handed ex-post guidance for the director general; and
2. The second level is financial and management control, which has to be done by an external expert group. In other words, there is need for efficient external control over the management board.

One of the fundamental issues in relation to public broadcaster is its position on the market: Can public service broadcasters be financed both from public sources and from advertisements and other commercial activities without any restrictions? In most states additional advertising or sponsoring revenue is necessary to cover the expenses of public service broadcasters, but the daily and hourly amount of commercials should be defined by law.

Effective measures and legislation should be enacted to prevent excessive concentration of media ownership. Ownership and financing of all broadcasters should be transparent and publicly declared. States must encourage diversity in forms of ownership by means of legal guarantees and through allocation of public funds on a non-discriminatory basis.

The compatibility of public and mixed funding is guaranteed, but on the following conditions:

- the state provides for clear definition of public service remit;
- public service activities are funded mainly from public sources; recourse to the advertising market should remain secondary; public service broadcasting should strive for higher audience ratings but not to the detriment of programme quality;
- it is necessary to provide for continuous and stable sources of financing public broadcasters operation, to unburden the budget and to prevent political or any other undue influence on the public service broadcaster via budget subsidies;
- public funding has to be transparent and can only be used for clearly defined tasks.

### **Independent Regulatory Bodies**

In the accomplishment of their goals, radio and television should be accountable to an independent regulatory body, i.e. independent from broadcasters and from the government.

Regulatory policies are now being applied by independent bodies (broadcasting councils, commissions) in most European countries. Their independent status and responsibilities must be recognized by the law.

#### **The responsibilities of such bodies should be:**

- to preserve and encourage the independence of the broadcasting sector;
- to award licenses;
- to ensure in practice effective regulation of the sector in conformity with the public interest, taking into account the equilibrium between the public sector and private sector, by monitoring compliance of all broadcasters with the rules in all aspects (economic and financial, programming content, etc.);
- to exercise supervision and impose sanctions.

### **Broadcasting Regulation in Transitional Societies**

In societies in transition, where the entire broadcasting system has to be almost fully reviewed, an active public policy is required to create a legal framework for broadcasting which serves the needs and interests of the country in question. In adopting broadcasting legislation not only the level of democracy should be taken into consideration but also the degree of the broadcasting development and even the size of the country, economic situation, linguistic problems etc. which may affect the solutions to be adopted.

Several key problems that stand in the way of creating public service broadcasting in transitional societies are the following:

- ❑ Firstly, politicians are not ready to give up their grip on state/public broadcasters.
- ❑ Secondly, financial and technical inadequacy also presents an obstacle *per se*.
- ❑ Thirdly, employment policy precludes radical cuts in staffing, and this presents additional burden for the broadcasters' budget. Furthermore, public broadcasters are frequently prevented from paying competitive market salaries to their employees. As a result, they lose the best staff.
- ❑ Fourthly, there is a lack of efficient management in some broadcasters.

- Finally, weak civil society is unable to exercise pressures on authorities and broadcasters, thus failing to provide its support for successful transformation of public service broadcasting in general.

*In most of these countries the transformation of state broadcaster under political control into public service broadcasting has yet to be completed. Hence, one of the most important aims of this process is to achieve a greater independence from the state. Therefore, a possible solution could be to define the role of public broadcasting service within the constitution. Additionally, such provision could perhaps ensure that the competition in media field would not be determined by the market criteria alone.*

### **The Future of Public Service Broadcasting in Digital Age – Issues for Discussion**

What is the future of public service broadcasting in a digital age? There is no doubt that one of the most important functions of the public service broadcasting in the increasingly fragmented societies will be that of socio-cultural integration.

The key precondition for successful performance of this function is adoption of new technologies, to the extent of integration with the Internet and digital TV of the future. It is necessary to support the development and use of new technologies by public service broadcasters, whenever it is useful for their mission or improves their service in the public interest.

# *PART VI*

*ANNEX 1*

## INTERNATIONAL WORKSHOP LEGISLATION IN THE FIELD OF BROADCASTING - PUBLIC SERVICE AND COMMERCIAL BROADCASTERS

11-12 May 2001, Bled, Slovenia

# AGENDA

## *Thursday, May 10*

**19.30:** Welcome Drink  
**20.00:** Dinner

## *Friday, May 11*

**10.00 – 10.45:** Opening remarks by:  
- a representative of the Ministry of Culture of the Republic of Slovenia  
- a representative of the Ministry of Foreign Affairs of the Republic of Slovenia  
- a representative of Media Plan Institute, BiH

**10.45 – 11.00:** Coffee Break

**11.00 – 12.00:** Introductory remarks by Dr Jaroslava Moserova, President of the General Conference of UNESCO  
Discussion

**12.00 – 13.00:** Public Broadcasting Legislation: Basic Requirements, presented by dr. Werner Rumphorst, Director of the Department of Legal Affairs, EBU  
Discussion

**13.00 – 15.00:** Lunch

**15.00 – 16.00:** On the Status and Role of Independent Broadcasting Regulatory Authorities, presented by Greger Lindberg, Chairman of EPRA (European Platform of Regulatory Authorities) and Director of Swedish Broadcasting Commission

**16.00 – 17.00:** Media Legislation in Transition Countries – Introducing Principles of Democracy and Observing European Standards, presented by Mehmed Halilovic, Media Plan Institute  
Discussion

**17.00 – 17.30:** Coffee Break

**17.30 – 18.30:** Protecting Competition in the Media Arena, presented by Andrej Plahutnik, Director of the Competition Protection Office, RS  
Discussion

**20.00:** Dinner

***Saturday, May 12***

- 9.00 – 10.00:** Programming of RTV Slovenia: *On Airwaves of the New Europe*, presented by Kaja Jakopic, RTV Slovenia
- 10.00 – 13.00:** Short Presentations by Invited Experts  
Discussion
- 13.00 – 15.00:** Lunch
- 15.00 – 16.00:** Regulation of Satellite Broadcasters by Boris Bergant, Deputy Director General of RTV Slovenia  
Discussion
- 16.00 – 17.30:** Reports on Broadcasting Legislation in the States Participating in the Workshop  
New Media Legislation in Slovenia, presented by Matjaž Jarc, Head of the Department of Media and Audiovisual Culture, Ministry of Culture RS
- 17.30 – 18.00:** Coffee Break
- 18.00 – 19.00:** Conclusions and Recommendations, presented by Tarik Jusic, Media Plan Institute
- 20.00:** Dinner

INTERNATIONAL  
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-  
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11-12 May 2001, Bled, Slovenia

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