



COMMENT

on

Proposed Amendments to the Law on Public Service Broadcasting of Montenegro

September 2008

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · <http://www.article19.org>

The following Comment has been prepared by ARTICLE 19 based on an unofficial English translation of the Draft Law on Amendments of Law on Public Broadcasting Services “Radio of Montenegro” and “Television of Montenegro” (OJ RMNE No. 51/02 and 62/02) (draft Law), dated 10 July 2008. The purpose of the Comment is to help promote the adoption of a law that is consistent with international standards, as well as best national practice, in this area.

Overall, the draft Law is a progressive piece of legislation which is in line with international standards and which should help ensure an effective and genuinely public service national broadcaster in Montenegro. At the same time, we have some suggestions for further improving the law. Our main suggestions relate to the question of appointments to the Radio and Television of Montenegro (RTCG) Council. We are also of the view that the rules on financing are unduly complex and inefficient, and that certain parts of the law would benefit from further elaboration.

This Comment is based on international standards on public service broadcasting as elaborated in various Council of Europe texts and decisions of the European Court of Human Rights, as well as similar documents adopted by other authoritative international bodies and courts around the world. The Comment draws heavily on two key ARTICLE 19 documents which encapsulate these standards, namely *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*¹ and *A Model Public Service Broadcasting Law*.²

¹ (London: ARTICLE 19, 2002). Available at: <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

² (London: ARTICLE 19, 2005). Available at: <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>.

1. Appointments to the RTCG Council

The process of appointments to the governing board of a public service broadcaster, and more generally the matter of ensuring its independence, is both one of the most difficult and yet one of the most important challenges facing legislative drafters. True independence in practice requires far more than a solid legislative base. It also requires political will since even the best legislation can be thwarted by determined politicians and other powerful figures.

The draft Law contains a number of important safeguards for the independence of the Council, including a clear statement of its independence, an appointments procedure which is clearly designed to prevent control by the governing party, protections against removal from office, strong rules on incompatibility (i.e. prohibiting certain individuals, for example those with strong political connections, from being appointed) and requirements of expertise.

At the same time, the rules are not as clear as they could be and there is some scope for political interference. The basic appointments model adopted in the legislation, as set out primarily in Article 16, is to have different sectors of society – academic, NGO, union, sport, etc. – nominate candidates for the RTCG Council and these candidates are then appointed by parliament. In several cases, the nominator is a discrete body or two bodies – such as the University of Montenegro, the Montenegro Trade Union, and the Montenegro Olympic Committee and Para-Olympic Committee. In these cases, there should be no problem with nominations.

However, in three cases the nominator is a group containing many actors, specifically non-governmental media organisations, national cultural institutions and non-governmental cultural organisations, and non-governmental organisations dealing with human rights. In such cases, there is a possibility that the ‘nominator’ will be unable to agree on the set number of candidates (which is two for each position on the Council). The draft Law provides a mechanism for resolving this situation. For human rights NGOs, this is to consider those submitted by a majority of organisations, while in the other two cases, the candidates shall not be considered (Articles 16(6) and (7)).

Neither of these mechanisms is appropriate. The first system is not democratic, since a very small NGO cannot be rated at the same importance as a very large one. Furthermore, a similar system has in the past led to problems such as the creation of front NGOs simply for the purpose of increasing ‘voting’ weight. The second system means that these groups are effectively excluded from the process unless they can agree on candidates. One member of the group could create this result, by refusing to agree on the two proposed candidate and forwarding a third of its own. This is not only wrong but could also pose a threat to the very existence of the Council, given that it is deemed to be established only when at least seven of the nine members have been appointed (Article 19(4)).

It would be far preferable to allocate the power of appointment to a single body, possibly an umbrella or network group that could speak for many members. This would ensure the capacity of executive decision making in conformity with the law and reduce the possibility of actions against the spirit of the law, such as those noted above.

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

A second problem is that the draft Law envisages nominators putting forward up to two candidates for each position, with Parliament then deciding which one should be appointed. There is nothing wrong in principle with Parliament, a representative, elected body, playing a role in the appointments process. When this is the case, however, certain rules should be put into place to ensure that the process is transparency, fair and participatory. This could be achieved, for example, by requiring open hearings to be held to decide between candidates, with members of the public having a right to be heard or to present comments. Absent these safeguards, there is a risk that a majority parliament will select candidates that systematically favour the governing party.

Finally, the draft Law fails to provide for the staggering of the tenure of the initial members of the Council, so that not all will be appointed, and end their term of office, at the same time. This has important practical implications in terms of experience and continuity, and may also be important politically (for example, in ensuring that the Council does not fall below the required seven members).

2. Funding for RTCG

Funding for public service broadcasters is another sensitive issue. On the one hand, funding needs to be sufficient to enable them to fulfil their public service mandate. At the same time, funding needs to be provided in ways which insulate them against the possibility of political interference, a complex task since ‘he who pays the piper calls the tune’.

The draft Law establishes a complex funding regime involving a broadcasting tax on radio and television receivers, advertisements, direct support from the Montenegro budget and other sources (such as sale of videos). A number of rules govern the expenditure of funds. All ‘surplus income’ must be used for programme quality improvement, although the idea of surplus income is not defined, and the broadcasting tax must also be used to fund programme production (Articles 9(2) and (3)). It seems, although it is not very clear, that funds from the State budget shall only be used for transmission costs (Article 12) and for minority language programming (Article 10), although this funding shall not influence editorial independence.

It would be preferable to simplify this regime. While it is good to impose clear constraints on funds provided directly out of the budget, given the risk of interference, the process of setting budgetary priorities, particularly involving funds from the broadcasting tax, should be left to RTCG under the supervision of the Council, and subject to overall budget approval by parliament.

Some nine articles – Articles 33a to 33i – govern the collection of the broadcasting tax, which is payable on radio and TV receivers in homes, cars, public bodies, businesses and other legal entities. Certain households with disabled people, along with entities such as schools, hospitals, diplomatic missions and international organisations, are exempted from paying the tax.

This system is reasonably well protected against interference, at least on paper (since it is almost always possible, as noted above, to interfere where there is a strong desire to do so). It is, however, extremely complex and this may pose practical and efficiency problems. Collection of a broadcasting fee poses challenges even in relatively simple and well-

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

established systems, such as that of the United Kingdom, where the fee is only levied on television sets (thereby relieving the system of the burden of collecting from vehicles).

Although ultimately this is a practical matter which depends on a complex mix of local circumstances which ARTICLE 19 cannot assess, we recommend that consideration be given to simplifying the system. There is no need, in this regard, to link the fee to the possession of receivers, anymore than other taxes for the public benefit are linked to presumed beneficiaries (no one would suggest that only those with bicycles should be taxed for bicycle paths, for example). A model that has been employed with some success in other countries (and we understand also in Montenegro) has been to levy an additional fee on electricity. This has a number of benefits, including that it avoids the need to set up a separate collection system, since electricity fees are already being collected, avoiding an costly inefficiency.

3. The Lack of Sufficient Detail

The draft Law is extremely detailed in some areas – including membership of the Council and funding arrangements, as discussed above – but, at the same time, it is rather too brief in some other areas.

The obligations of RTCG are set out in Articles 7 and 8. For the most part, these obligations are very general and brief in nature, for example, to satisfy public interests, to ensure that news and current affairs programming is balanced, and to keep the public informed. In contrast, the ARTICLE 19 Model Law has a page and a half of fairly detailed obligations, including such things as reflecting the full range of views held in society, contributing to a sense of national identity while reflecting diversity, providing programming both of wide appeal and which caters to more narrow interests, providing educational programming and so on.

The formal mandate of a public broadcaster is important both as an accountability function and to ensure independence. In terms of accountability, it presents a clear standard to which the organisation can be held. In terms of independence, it provides clear direction as to what the organisation should be doing, which can be held up in defence against those trying to influence it otherwise.

Article 15 of the draft Law requires the RTCG Council to report annually to the parliament, government and oversight agency by providing a report on its performance, a financial statement and an audit report. No detail is provided as to what should be in these reports.

Reporting is a key accountability mechanism for a public service broadcaster, ensuring that the oversight bodies, as well as the public generally, are informed about its work, challenges, expenditure and so on, and, as a result, are able to hold it to account. It would be preferable to include in the primary legislation greater detail as to what these reports, and particularly the performance report, should contain, so as to ensure maximum transparency and consistency of reporting. It should also be made clear that these reports are to be made available to the general public.

Issues relating to the meetings of RTCG are addressed in Articles 24 and 25 of the draft Law, which provide for monthly meetings, for meetings at the request of at least three members, for

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

decisions to be by majority vote and for exceptional exclusion of the public and/or Director General and other directors. Rules on quorum should also be provided for.

The draft Law envisages the possibilities of individuals making complaints to RTCG, and calls on the Council to appoint a Commission for Petitions and Complaints (Article 15(1)(14)). Public complaints are another important accountability mechanism and so this is very welcome. At the same time, it might be preferable to establish key parameters of the system in the primary legislation, rather than leaving this important matter entirely up to the Council. To be fair to both staff and the general public, a clear code of conduct against which complaints shall be measured should be required to be developed and published. The primary legislation might list key issues which the code should address – such as violence, protection of children, accuracy and balance, and advertising. The legislation might also establish basic ground rules for the processing of complaints, for example that anyone may lodge a complaint, that such complaints are to be processed fairly and in an open manner, and as to the sorts of remedies that are available (for example, a correction or apology).

Key Recommendations

Recommendations:

- The list of those who have the power to nominate members for the RTCG Council should be restricted to single entities, or a very small groups of entities.
- Nominators should either be asked to nominate a single candidate for parliamentary ratification or a framework of rules should be put in place to ensure that parliamentary decision-making regarding Council members is open and participatory.
- The terms of the initial members of the Council should be staggered.
- The proposed funding system for RTCG should be simplified. The allocation of funds, outside of those provided directly from the national budget, should be left to the organisation itself to decide, subject to overall parliamentary approval. Consideration should be given to simplifying the broadcast tax system, for example by providing for it to be calculated based on and added to the electricity bill.
- Consideration should be give to including more detailed provisions on RTCG's mandate in the primary legislation.
- More detail as to the content of the reports the RTCG Council is required to provide should be added to the law, along with a requirement to make these reports public.
- The primary legislation should establish a quorum for meetings.
- Greater detail on the complaints system should be added to the law, such as a requirement to adopt a code of conduct against which to measure complaints, a list of key issues which such a code should address, and basic rules on the processing of complaints and remedies.

About the ARTICLE 19 Law Programme

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

<http://www.article19.org/publications/law/standard-setting.html>.

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

If you would like to discuss this Comment further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us at the address listed on the front cover or by e-mail to law@article19.org