



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**

Foreword

After its independence, Croatia has committed to reform its public and private media before and it reiterated this commitment upon its entry into the Council of Europe. As a member of the OSCE, Croatia is also committed to abide by the Copenhagen principles and other OSCE media commitments.

The Office of the Representative on Freedom of the Media, as the institution which most closely follows the media in the OSCE participating States, has commissioned this analysis of media legislation in order to assist the Croatian authorities and Croatian media professionals in the process of transformation of its broadcasting legislation.

The transformation of the media system, including the transformation of state broadcasting into public service broadcasting, is a necessary element of media change in post-Communist countries, as part of general transition towards a democratic system. Media cannot be part of a system of governmental accountability if they are an extension of the government, or, more generally, of the State, as is the case with state broadcasting.

Moreover, freedom of expression without interference by public authority is a fundamental human right, enshrined in Article 10 of the European Convention of Human Rights and clearly precludes involvement by public authorities of any kind in the operation of any media, including public media.

Croatia's reform of the state broadcaster is still at its beginning. The Law it adopted in February 2001 is a step forward but it crucially fails to detach HRT from the influence of the Government and the Parliament of the day. The enclosed analysis recommends that a number of key amendments to the laws be adopted so as to provide HRT with the legal basis to move successfully towards an independent public broadcasting service.

Changes in the Law on Telecommunications may require the adoption of a whole new law given the inadequacies of the present Law, which preserves a system regulating the private sector under the control of the Government of the day.

This analysis recommends the development of a separate broadcasting law, which would establish a full-fledged, independent broadcasting regulatory body responsible for overseeing all broadcasting stations, including HRT.

It is my hope that the expert advice provided herewith will benefit Croatia's media.

Vienna, 29 November 2001

Freimunt Duve



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ANALYSIS AND COMMENTS

on

LAW ON THE CROATIAN RADIO-TELEVISION (2001)

and

**LAW ON TELECOMMUNICATIONS
(1999, as amended in 2001)**

by

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BACKGROUND

Transformation of the media system, including the transformation of state broadcasting into public service broadcasting, is a necessary element of media change in post-Communist countries, as part of general transition towards a democratic system.

The fundamental reasons why this is necessary are well explained by the document adopted at the October 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE. It states in part that:

participating States reaffirmed the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.

They consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards (emphases added - K.J.).

Media cannot be part of a system of governmental accountability if they are an extension of the government, or, more generally, of the State, as is the case with state broadcasting. Moreover, freedom of expression without interference by public authority (a fundamental human right, enshrined in Article 10 of the European Convention of Human Rights) clearly precludes involvement by public authorities of any kind in the operation of any media, including public media.

The success of transformation of state into public broadcasters depends on two sets of factors:

1. The legal, institutional and financial arrangements created in order to create public service broadcasting properly so called ¹, in the context of general constitutional arrangements (presidential vs. parliamentary system, success in achieving proper separation of powers, etc.)

¹ The 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) adopted Resolution No. 1: "The Future of Public Service Broadcasting". In that Resolution, member States defined the programme mission of public service broadcasting and (i) affirmed their commitment to maintain and develop a strong public service broadcasting system in an environment characterised by an increasingly competitive offer of programme services and rapid technological change; (ii) and undertook "to define clearly, in accordance with appropriate arrangements in domestic law and practice and in respect for their international obligations, the role, missions and responsibilities of public service broadcasters and to ensure their editorial independence against political and economic interference", and to "guarantee public service broadcasters secure and appropriate means necessary for the fulfilment of their missions". See also Recommendation No. R (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector

2. On the general progress of transformation, including development of democratic institutions and civil society; development of a democratic political culture; respect for the rule of law, etc.

This last element - respect for the rule of law - is very important. Even the best law cannot operate efficiently if it is disregarded by those who are meant to apply it. When the law leaves a lot of room for interpretation and deliberate obstruction, lack of respect for the rule of law becomes an even greater obstacle to the implementation of a piece of legislation.

The media should be an extension of the civil society, or at least autonomous professional organizations, operating in conditions enabling them to serve society in general, rather than to speak on behalf of any segment of it. At the time of a lop-sided development of the social and political system, with political parties and movements temporarily predominating in public life (pending the full development of civil society), separation of the media from the political system, and from public authorities, may be difficult. This is why it is so important to design media legislation in such a way as to promote this process.

In these conditions, the practical implementation of even the best designed legal and institutional solutions is bound to be difficult, due to a high level of politicisation of all aspects of social life.

In such a situation, many actions and decisions will be blocked to make life difficult for political opponents, irrespective of the general public interest. This is already clear in the aftermath of the adoption of the Law on the Croatian Radio-Television. This is one more reason why politicians should be kept out of broadcasting.

GENERAL COMMENTS

As shown by ratification of the European Convention for Transfrontier Television, Croatia is signalling its willingness to accept European standards in broadcasting.

The Law on The Croatian Radio-Television (2001) is an important step on the road towards creating a proper legal framework for public service broadcasting in Croatia. Its general structure appears to be correct. However, in adopting it, the advice of international organizations was disregarded in many instances. The institutional solutions applied in it create the possibility of undue influence by public authorities and political forces upon the operation of Croatian Radio-Television. When such a possibility exists, it will be used, sooner or later. An Act of Parliament should be designed so as to exclude the possibility of undesirable developments.

Institutional solutions applied in the Law on The Croatian Radio-Television and the Law on Telecommunications are typical of post-Communist countries where State bodies intend to maintain direct control over broadcasting. The present system is no doubt in line with existing Croatian law (Law on Concessions, Law on Public Institutions, etc.), but it has to be remembered that the law was inherited from a time when Croatia was not a democratic country. Any law can be changed by Parliament, or special provisions can be introduced, derogating in particular instances from the existing law (*lex generalis*) to create a legal solution suited for a particular purpose or field (*lex specialis*). Organization of the media system along democratic lines to serve the principle of freedom of speech, requires precisely such an approach.

The two laws create all the institutions known from democratic media systems. However, when one examines the details, it becomes clear that they are designed to operate differently from their counterparts in other countries, leaving the door wide open for public authorities and political forces to influence decision-making.

The approach to the broadcasting media adopted in these laws can be seen from the following:

1. The Council for Radio and Television has the power to award licences to broadcast, but contracts with licence-holders are concluded by the Institute for Telecommunications, and the Council has no oversight powers. It may revoke a licence, but only on a proposal from the Institute.
2. The Council for Radio and Television was created to deal only with private broadcasters and has no competence as regards public service broadcasting. Therefore, it cannot perform the role of many other broadcasting regulatory bodies, i.e. of cushioning the public service broadcaster from direct government or parliamentary supervision and interference.
3. Both Parliament and government are directly involved in the appointment of the main bodies of HRT and in the oversight of its activities. Government ministers are given extensive and in fact unlimited scope to question or interfere with everything HRT does in the form of “supervising the legality of the HRT operation” (Article 45).
4. HRT Council whose ostensible role is to represent society in overseeing and guiding the work of HRT has no real powers. Real power in the organization has been given to the Board of Management which is appointed directly by Parliament and will therefore be an extension of the current parliamentary majority, and therefore also of the government.

All this is in direct contradiction to international standards, as expressed for example by Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting.

In addition, the law creates an unworkable managerial structure of HRT which may slow down decision-making, breed many conflicts and prevent HRT from utilizing its potential.

GENERAL RECOMMENDATIONS

To improve the system of broadcasting and of public service broadcasting, the following fundamental changes should be considered:

1. Development of a separate broadcasting law which would establish a full-fledged, independent broadcasting regulatory body responsible in part for overseeing all broadcasting stations, including HRT;
2. Redefinition of HRT Council into a true organ of HRT, with requisite strategic decision-making powers, such as appointment of the Board of Management;
3. Inclusion of the Director of HRT into the Board of Management as its Chairman;
4. Removal of all possibilities for state bodies (Parliament, President and government) to interfere directly into the operation of private or public broadcasters;
5. The term of office of HRT Council should be different from that of Parliament.

LAW ON THE CROATIAN RADIO-TELEVISION (2001)

INDEPENDENCE AND ACCOUNTABILITY OF HRT

Relations with the Government of the Republic of Croatia

The status of HRT as a public institution (art. 1), operating in accordance with the provisions of the Law on Institutions subordinates it to control by State bodies (Parliament and government), as for example in Art. 45 which says that "competent ministries shall perform the supervision of the legality of the HRT operation and the general acts".

This is reinforced by the provision that the Republic of Croatia is the founder of HRT, and that this gives the State an unspecified "general role" in ensuring public accountability of HRT (Art. 13.2).

Under Article 16.3 and 16.5 it is the Minister of Culture who shall (1) establish, on the basis of advice from other ministers, the procedure of appointing members of HRT Council designated by two or more associations from the same category and (2) verify the procedure if appointing members of HRT Council.

Art. 27.2 defines the Government of the Republic of Croatia as the arbiter in a dispute between the Director and the Board of Management of HRT. The provision is imprecise and thereby presumably gives the government the power to resolve such a dispute.

Article 39 empowers the government to determine privileges and exemptions from the payment of fees.

Art. 42 requires the agreement of the founder, or a body determined by the founder, for HRT to burden or sell immovable property or property above a certain value. This could be justified by the fact that HRT is 100% owned by the Republic of Croatia. However, the Republic is in law represented in HRT by the HRT Council.

Art. 14.1 states that "The HRT shall be independent in its activity". However, as shown above, the law gives the government a direct role in:

1. Supervising every aspect of HRT's activities (with wide open possibilities for ministers to give HRT instructions, practically whenever they wish);
2. Deciding on procedural matters concerning appointment of members of HRT Council;
3. Controlling programming and implementation of programme obligations;
4. Affecting the financing of HRT by determining exemptions from the obligation to pay the licence fee;
5. Controlling use of property.

RECOMMENDATIONS

1. The status of HRT should be changed, or the present law should derogate from the Law on Institutions in all cases when this law would give state bodies any degree of influence on, or control of, HRT.
2. Procedures specified in Article 16.3 and 16.5 should be defined in the law, and not by a government minister.
3. The reference to the "founder's general role" (Art. 13.2) should be deleted.
4. If the present supervisory and managerial structure is maintained, any dispute between the Director and the Board of Management should be resolved by the HRT Council. Art. 27.2 should be changed accordingly.
5. Decisions concerning privileges and exemptions as concerns the licence fee should be taken by the Council for Radio and Television, not the government.
6. Art. 45 should be deleted.

Relations with Parliament

The Speaker of Parliament appoints one member of HRT Council (Art. 16.4). The House of Representatives appoints and dismisses the HRT Board of Management (Art. 25). The House of Representatives receives reports from HRT Council (Art. 19.2) and Board of Management (Art. 24.1) and approves HRT Statute adopted by the Board of Management (Art. 35). It must also give its consent to the conduct of possible bankruptcy proceedings regarding HRT (Art. 44).

This again introduces a direct political element into many decisions concerning HRT, especially the appointment of the Board of Management. As noted above, this directly contradicts Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting, which says in part:

The rules governing the status of the boards of management of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference. These rules should, in particular, stipulate that the members of boards of management or persons assuming such functions in an individual capacity:

- *exercise their functions strictly in the interests of the public service broadcasting organisation which they represent and manage (...);*
- *may not receive any mandate or take instructions from any person or body whatsoever other than the bodies or individuals responsible for the supervision of the public service broadcasting organisation in question, subject to exceptional cases provided for by law.*

COMMENTS AND RECOMMENDATIONS

1. Only two of the powers given to the House of Representatives do not raise any objections: that of appointing its own representative(s) to HRT Council (as long as members appointed by state bodies constitute a clear minority of its members), and of giving its consent to possible bankruptcy proceedings.
2. The House of Representatives should not have the power to appoint and dismiss at any time members of the Board of Management. HRT Council should have this competence.
3. There is no reason for the House of Representatives to approve the Statute of HRT. This should be the job of HRT Council.
4. In the present configuration, HRT Council may have the obligation to present a regular report to the House of Representatives (though there should be no such obligation on the Board of Management), but the law should be clear on the consequences of a possible rejection of such a report by the House of Representatives. This should not give the House of Representatives any possibility of interfering directly into the work of HRT.

OVERSIGHT AND MANAGEMENT

The present law creates a highly unusual oversight and management structure which has no precedent in other public service broadcasting organizations. This shows that while the institutional framework appears at first sight to be correct, in reality it was designed in a way contrary to the models which it ostensibly applies. This is shown by the following:

1. HRT Council, with a democratic membership, should be the highest oversight body within HRT, capable of taking strategic decisions on behalf of the civil society it represents. However, its areas of competence and decision-making powers are limited. It appoints and dismisses Chief Programme Managers of Croatian Radio and Croatian Television (Art. 19), but only on the basis of prior consent of the Board of Management. It also appoints and dismisses duty programme managers, upon the proposal of the Chief Programme Manager.
2. Politically appointed HRT Board of Management, ostensibly second in importance within HRT, is the real decision-making body which only asks HRT Council for its opinion, but does not seem to have to take that opinion into consideration;
3. The Director has no powers of his/her own, but is responsible for the “lawfulness and successfulness of HRT work”. He/she may “suspend from execution the acts of the HRT Board of Management” and must inform the government of this within 24 hours.
4. Very few decisions of importance are taken by one body. Usually, they must be proposed by one body, gain the opinion of another, and be taken by a third. This may disrupt the decision-making process and create many deadlocks and stalemates, much to the detriment of HRT ².

COMMENT AND RECOMMENDATIONS

1. The present oversight and management structure gives real power within HRT to political appointees of the current ruling party or majority, i.e. of the government.
2. Procedures for decision-making are not suited to the fast-moving world of the media. They will slow down the work of HRT and may create many problems and conflicts.

² According to available information, this is already extending the transitional period far beyond the deadlines foreseen in HRT Law for the appointment of the new authorities of HRT. Similar difficulties may appear in the operation of HRT, once the institutional transformation has taken place.

3. HRT Council should be redefined as the highest body of HRT, with the powers to (1) approve the Statute; (2) appoint and (in extreme, carefully defined circumstances) dismiss members of the Board of Management; (3) approve the annual financial plan; (4) approve the annual programme plan.
4. The Board of Management should be solely responsible for the management of HRT. There should be no separate Director. The Board of Management should be responsible for all staff appointments and for running the organization, within parameters set out by HRT Council in the decisions listed above.
5. An alternative, and perhaps preferable, solution would be to have just the Director, without a collective Board of Management. This would simplify daily decision-making and management.

LAW ON TELECOMMUNICATIONS

THE COUNCIL FOR RADIO AND TELEVISION

The Council is appointed by the House of Representatives upon the proposal of the Government of the Republic of Croatia (Art. 74.3). Council members may be dismissed at will and at any time "if it has been evaluated that they are incapable of an ordinary performance of the business within the framework of the Council" (Art. 74.7).

This is in direct violation of Recommendation REC (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, which says in part:

The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

The manner of appointment of Council members and the threat of their removal at any time directly contradict this principle.

The Council awards licences to broadcast and may revoke a licence on a proposal from the Institute. It cannot monitor the performance of broadcasters (as this is left to an Inspector for Telecommunications).

Such narrow definition of the Council's powers is not in line with the above Recommendation which says in an appendix that regulatory authorities should:

- *have the power to adopt regulations and guidelines concerning broadcasting activities.*
- *be involved in the process of planning the range of national frequencies allocated to broadcasting services. They should have the power to authorise broadcasters to provide programme services on frequencies allocated to broadcasting.*
- *be monitoring compliance with the conditions laid down in law and in the licences granted to broadcasters.*
- *be given the right to request and receive information from broadcasters in so far as this is necessary for the performance of their tasks.*
- *have the power to consider complaints, within their field of competence, concerning the broadcasters' activity and to publish their conclusions regularly.*
- *have the power to impose sanctions, in accordance with the law.*

According to the Recommendation, regulatory authorities may also be given the mission to carry out tasks often incumbent on specific supervisory bodies of public service broadcasting organisations, while at the same time respecting their editorial independence and their institutional autonomy.

RECOMMENDATIONS

1. The Council's composition and the manner of its appointment should be changed, so that it should become a pluralistic and truly independent body, free from the threat of dismissal at any time, based on an arbitrary evaluation of their ability to carry out their functions conducted by the House of Representatives.
2. The Council should have all the powers listed in Recommendation REC (2000) 23, and should be given oversight powers over HRT.

LICENSING PROCEDURES

The Council has powers to grant and revoke licences to private broadcasters (the latter upon a proposal by the Institute of Telecommunications).

The frequency plan and the plan for radio and television licences is developed by the Institute, a government body, and published "with the consent" of the Council. (Art. 76.1). Once the Council has awarded the licence, the contract on the licence is concluded with the broadcaster by the Institute.

Supervision, monitoring compliance of broadcasters with the law and sanctioning powers are entrusted to a "State Inspector for Telecommunications" who is responsible for the overall implementation of the law.

All this means that the Council has been created for one purpose only: to conduct the public tender procedure and award licences, in accordance with frequency and licence plans developed by the Institute.

RECOMMENDATIONS

1. As noted in the Recommendation cited above, the Council should be involved in the process of planning the range of national frequencies allocated to broadcasting services.
2. It should itself conclude the contract with the broadcaster.
3. It should, based on its own monitoring and evaluation of the broadcaster's performance, be free to decide, in justified circumstances provided for by law, to apply sanctions or revoke the licence.

GENERAL CONCLUSION

Though prospects for early revision of the two laws appear slight, sooner or later this will probably be necessary. At present, a great deal of good will and willingness to cooperate on the part of all participants in the process is required to implement the Law on Croatian Radio-Television.

