



OFFICE OF THE HEAD OF MISSION

The Head of Mission

Belgrade, 11 August 2006

Re: OSCE Comments on the legislative Proposal on Amendments to the Broadcasting Law, which was adopted by the National Assembly of the Republic of Serbia on 19 July and returned to the National Assembly of the Republic of Serbia for repeated voting by the President of the Republic of Serbia on 27 July 2006.

Dear President Markovic,

the OSCE Mission to Serbia, which has been mandated by the 56 OSCE Participating States to assist and advise the state authorities and the media in Serbia on broadcasting issues, wishes to comment on the Amendments to the Broadcasting Law, which were adopted by the National Assembly on 19 July and were returned for repeated voting to the National Assembly by the President of the Republic of Serbia.

In a Press Release issued on 18 July, the OSCE Mission to Serbia expressed its concern with the manner these amendments had been put forward, namely without any consultation with the relevant and competent Ministry of Culture and Information, RATEL, the Serbian Telecommunication Agency and other domestic stakeholders and international institutions. Now, that these Amendments have been sent back to the National Assembly, Serbian lawmakers should take the opportunity to give due consideration to the comments of the OSCE and other organizations and stakeholders before they vote again on these Amendments.

Republic of Serbia
National Assembly
Attention: Mr. Predrag Markovic
President of the National Assembly

The first question which arises by reviewing these Amendments is:

Do the proposed Amendments require an urgent procedure?

As you, Mr. President, are well aware of, according to Article 161 of the RULES OF PROCEDURE OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF SERBIA a law may exceptionally be adopted in an urgent procedure if the following requirements are met:

1. *“ Urgent procedure may be resorted to only for the adoption of the law governing the issues and relations resulting from circumstances that could not be anticipated and when the failure to adopt the law in an urgent procedure could cause adverse effects to human life and health, national security and work of agencies and organizations.*
2. *The proposers of the law are obliged to specify, in the written explanatory note accompanying a draft law, the adverse effects that would result from the failure to adopt the law in an urgent procedure.”*

In the explanatory note to the Amendments it is alleged that the application of an urgent procedure in the legislative process is necessary since the prevailing legal framework is not appropriate for the “urgent” execution of decisions of the Council of the Republican Broadcasting Agency (RBA) and that:

“it is necessary to ensure that the Council’s decisions on revocation of operating licenses from these broadcasters or on prohibition of their work should be executed as a matter of urgency for the purpose of providing undisturbed program broadcasting to the broadcasters who have been issued program broadcasting licenses in keeping with the law.”

Apart from the fact that the adoption of a law under urgent procedure does not prevent a consultation process, the question arises whether the argument put forward in the explanatory note does indeed apply to all of the 17 Articles of the proposed Amendments.

To take as an example **Article 8** of the proposed Amendments, which suggests to make any change in the ownership structure of a broadcaster contingent upon the approval of the RBA Council. The issue of ownership in the media is a very delicate issue, which clearly requires a broad discussion with all stakeholders and relevant state authorities. It should therefore be dealt with under normal legislative procedure, since there is no apparent justification for any urgent procedure.

The Explanatory note on the proposed Amendments (“2. *Reasons for the Adoption*”) suggests that only those issues directly related to the **enforcement** of RBA decisions may justify urgent procedures in adopting these Amendments to the Broadcasting Law.

The proposed amendments directly related to the enforcement of the RBA decisions are only Articles 11 (amending Article 62) and 12 (adding another Article, i.e. Article 64 a).

The other 14 amendments to the material law do not justify any urgent parliamentary procedure.

Do Articles 11 and 12 of the proposed amendments to the Broadcasting Law require an urgent procedure?

Article 62 Paragraph 8 of the Broadcasting Law (de lege lata) reads as follows:

“Unless the court temporarily stays the execution of the decision during the administrative lawsuit on the filed charges, the broadcaster shall forthwith obey the final Council decision on license revocation, and if it fails to comply, the compulsory enforcement procedure shall be applied in keeping with the regulations of general administrative procedure.”

The proposed Amendment (de lege ferenda) reads as follows:

“A broadcaster shall be obliged to execute without delay the final Council’s decision on license revocation, and in the event he/she fails to comply, the compulsory enforcement procedure of the Council’s decision shall be executed, in keeping with this Law.”

The explanatory note argues that the decisions of the RBA Council should be executed **“as a matter of urgency for the purpose of providing undisturbed program broadcasting to the broadcasters, who have been issued program broadcasting licenses in keeping with the law.”**

This explanation fails to explain:

1. why the resort to legal remedies provided by the present Broadcasting Law to a broadcaster whose license has been revoked by the RBA Council would “*disturb*” other incumbent broadcasters and,
2. why the “*undisturbed*” transmissions of incumbent broadcasters is “*a matter of urgency*.”.

The RBA Council apparently only considers the position of those broadcasters which, according to the Council, comply with the rules, but does not consider the economic and constitutional rights of those broadcasters the licenses of which it wishes to revoke. The weighing up of the interests between these two groups of broadcasters has been assigned by the Broadcasting Law to the judiciary. It is for the Supreme Court to decide on a case by case basis whether it will allow to stay the execution of the decision of the RBA Council or not.

The proposed Amendment deprives a broadcaster of the only de facto legal remedy the Broadcasting Law provides in the case of a revocation of his license by the RBA Council, namely the right to ask the Supreme Court to stay the execution of the decision during the administrative lawsuit. De jure, the broadcaster may still appeal to the Supreme Court, but without the possibility of the Supreme Court to stay the execution of the RBA Council’s decision, the broadcaster has to stop broadcasting immediately and the RBA Council’s decision becomes de facto final, with all the irreparable damage ensuing there from. In this context it has to be recalled that even the appeal procedure provided by the

Broadcasting Law is only of very little value since the RBA Council is de facto acting as its own judge, by adjudicating its own decisions.

This proposed limitation of the legal remedies of a broadcaster gives rise to serious concerns, both with regard to the principle of the right to a fair trial, enshrined in Article 6 of the European Convention of Human Rights, to which Serbia is a party, and the relevant provisions under the Serbian Constitution. Article 22, paragraph 2 of the Serbian Constitution provides "*every individual the right to appeal or to apply other legal remedy against a decision concerning his right or interest founded on law.*"

Under Article 124, paragraph 2, 3 and 4 of the Serbian Constitution,

"By way of exception, in particular cases, an appeal may be disallowed by law if the right to legal remedy and protection of legality has been secured in some other way.

The legality of finally binding individual acts by which State agencies and organizations exercising public powers decide on rights and duties, shall be decided upon by the court of law in the administrative dispute proceedings, unless other kind of judicial protection has been provided for the specific matter.

By way of exception, the administrative dispute proceedings may be excluded by law in specific kinds of administrative matters."

Given the importance of the freedom of expression and the media for a democratic society and of the right to a fair trial and its legal protection under Articles 46 and 22 of the Serbian Constitution and Articles 10 and 6 of the European Convention of Human Rights, any restriction of these rights to the extent they are permissible under the law, require an in depth consultation and discussion process with all the relevant parties involved. These matters can, by their very nature, not be dealt with in extraordinary sessions and urgent procedures, sidelining even the competent and relevant Ministry of Culture.

The newly proposed Art. 64a reads as follows:

"The Council decision on license revocation, i.e. on program broadcasting prohibition shall be without delay delivered to the broadcaster, i.e. the natural or legal person broadcasting program without a program broadcasting license."

"The broadcaster, whose program broadcasting license has been temporarily or permanently revoked, as well as the legal or natural person broadcasting program without a program broadcasting license shall be obliged to cease broadcasting of program immediately after the Council decision on license revocation, i.e. the decision on program broadcasting prohibition has become final."

In the current paragraph 3, which shall become Paragraph 4, the words: "Paragraph 1" shall be replaced by the words: "Paragraph 3."

In the current paragraph 5, which shall become Paragraph 6, the words: "Paragraph 4" shall be replaced by the words: "Paragraph 5."

In the current paragraph 6, which shall become Paragraph 7, the words: “Paragraph 3” shall be replaced by the words: “Paragraph 4.”

The explanation of this new provision reads as follows:

“The amendment is aimed at clarifying that execution of the Council decision on license revocation, i.e. prohibition of program broadcasting shall be taken up upon its finalization, i.e. after the appeal procedure has been finalized.”

This Amendment extends the deletion of the suspensive effect of an administrative lawsuit against the RBA Council decisions introduced by Art. 11 of the proposed Amendments to other cases when broadcasters are instructed by the RBA Council to cease its operation. Therefore the comments made on Article 11 apply mutatis mutandis to Art. 12 as well.

The only other provision which would seem to justify an urgent procedure in the legislation process is Article 10 of the proposed Amendments, which suggests to extend the time frame for the broadcaster to commence broadcasting after the receipt of the broadcasting license from 60 days, as presently provided by Article 56 of the Broadcasting Law, to 120 days. However, in order to avoid retroactively any discrimination against potential applicants which, in the light of the legal deadline of 60 days, decided not to apply, the OSCE Mission to Serbia submits that any Amendment to Article 56 of the Broadcasting Law would only apply to new tender procedures. In other words, those applicants which obtained a license under the prevailing legal framework have to meet the deadline set out in Article 56 of the Broadcasting Law or face the consequence stipulated in Article 56 Paragraph 2, i.e. the revocation of its license.

Conclusion:

A critical review of the proposed Amendments to the Broadcasting Law reveals:

1. that the vast majority of the proposed Amendments do not meet the requirements set out in Art. 161 the RULES OF PROCEDURE OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF SERBIA.
2. The two proposed Amendments which broadly meet the formal requirements of Article 161 of the abovementioned rules of procedure by providing a written explanatory note accompanying the bill, are in the view of the OSCE Mission to Serbia, incompatible with fundamental rights protected by both, the Serbian Constitution (Articles 22, Paragraph 2 and Art. 46 and the European Convention of Human Rights (Articles 6 and 10).

Proposal:

The OSCE Mission to Serbia suggests to the proposer of the Amendments to the Broadcasting Law to withdraw the bill and to seek to combine their proposals, with those proposed by the Minister of Culture. This set of proposed Amendments could then, after a proper consultation process, with all interested parties, be put forward under normal parliamentary procedure during the regular session of the National Assembly in October.

[original signed]

Ambassador Hans Ola Urstad

Head of OSCE Mission to Serbia

cc:

Ms. Ivana Dulic Markovic,
Deputy Prime Minister
Government of Serbia

Mr. Aleksandar Lazarevic
Chairman
Parliamentary Board of Culture and information
National Assembly

Mr. Miroljub Radosavljevic,
Deputy Minister of Culture
Government of Serbia

Mr. Branko Radujko,
Secretary General
Office of the President of the Republic of Serbia