# LEGAL OPINION

**concerning**

**the Decisions of the Republican Broadcasting Agency Council of Serbia**
**on the allocation of broadcasting licenses**
**for Radio and Television stations for the territory of**
**the Republic and for the territory of the Autonomous Province**

**by**

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## INTRODUCTION

The present legal opinion was commissioned by the Media Department of the OSCE Mission to Serbia and Montenegro on May 17, 2006, in acknowledgment of serious concerns expressed by several interested parties and independent analysts following the publication by the Republican Broadcasting Agency (hereinafter "RBA") Council of the Decisions on the allocation of national broadcasting licenses for Radio and Television stations.[1]

The present consultant [2] was instructed to write a legal assessment of:

- the Decision on Issuing Broadcasting Licenses for TV Programmes for the Territory of the Republic, and of
- the Decision on Issuing Broadcasting Licenses for Radio Programmes for the Territory of the Republic
- the Decision on Issuing Broadcasting Licenses for TV Programmes for the Territory of the Autonomous Province

The Decisions were to be assessed in terms of their compliance with the Broadcasting Law of the Republic of Serbia, the Broadcasting Development Strategy, the Regulation on Issuing Broadcasting License, Criteria for Issuing Broadcasting Licenses, RBA Statute, as well as with the European Convention on Human Rights, European standards, recommendations and best practices.

The Media Department provided the consultant with the following documentation on the basis of which to prepare the opinion and assessment:

1. Broadcasting Act (hereinafter "BA") of 2002;
2. Statute of the Republic Broadcasting Agency ("Statute");
3. Regulation on Issuing Broadcasting Licenses ("Regulation");
4. Strategy of Broadcasting Development in the Republic of Serbia until 2013 ("Strategy");
5. Public Tender for Issuing Broadcasting Licences for Television and Radio Programmes ("Tender");
6. Criteria for Broadcasting License Issuance ("Criteria");
7. Decision on Issuing Broadcasting Licenses for Television Programmes for the Territory of the Republic ("Decision 1");
8. Decision on Issuing Broadcasting Licenses for Radio Programmes for the Territory of the Republic ("Decision 2");
9. Decision on Issuing Broadcasting Licenses for TV Programmes for the Territory of the Autonomous Province ("Decision 3");
10. Complaint Against the Decision on Issuing TV Program Broadcasting Licenses for the Republic territory no. 239/06 dated 25 April 2006. Submitter of complaint: D.O.O. RTV 5 from Nis ("Complaint");

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[1] This independent legal opinion was commissioned by the OSCE Mission to Serbia and Montenegro and prepared by the distinguished broadcast legal expert Dr Karol Jakubowicz and sent to the members of the Council of the Republican Broadcasting Agency of the Republic of Serbia.
The OSCE is commissioning such legal reviews on a regular basis for many of its participating states. However, the responsibility for the content rests with the author.

[2] Karol Jakubowicz is also Chairman, Steering Committee on the Media and New Communication Services, Council of Europe. In 2001-2002 he was involved, as a Council of Europe expert, in advising the drafters of the Broadcasting Act.

11. Catalogue of RBA Tender Breaches Affecting all Applicants by RTL TV d.o.o. ("Catalogue");
12. Translation of Article 199 para. 2 of the General Administrative Procedure Act;
13. Selection of press cuttings on the issue of RBA licensing.

Given that the consultant did not have access to the applications themselves, nor obviously to any minutes of Council meetings, or other internal RBA documentation, the present opinion can only concentrate on legal and procedural issues and on a general policy assessment of the Decisions, without any ability to formulate a judgment on the quality of the applications themselves.

It must also be stated that analysis based on potentially imprecise or incorrect unofficial translations of various documents can conceivably involve a misunderstanding of the real meaning of particular legal provisions.

Another reservation that must be made concerns the fact that the consultant may not be aware of the entire legal framework bearing on the process of licensing in the Republic of Serbia.

## EXECUTIVE SUMMARY

1. It is the conclusion of the present consultant that the process of arriving at Decisions 1, 2 and 3 was plagued by fundamental weaknesses.
2. Publication of criteria for assessing licence applications after the closing date for their submission constitutes a violation of accepted standards governing public tenders. More fundamentally, it must be stated that the RBA had no legal basis for issuing a separate set of criteria. Their use in the process of deciding who should be awarded a licence, and who should not, was also without legal basis. Accordingly, if any decisions were taken on their basis, they are legally questionable.
3. The BA and the Regulation are not clear on the exact procedure for dealing with applications that the applicant fails to correct or complete within the 7-day period. This oversight should be corrected – first in the Regulation, and subsequently in the Act itself, when it is amended.
4. The procedural approach adopted by the RBA involves: disregard of the BA; confusion of refusal and revocation of licence; lack of any, let alone duly reasoned, decisions to deny licence applications; a discrepancy between the Statute (which does not provide for a formal decision on rejecting a licence application) and the BA (which requires that such a decision be taken). As a result, strictly speaking, applicants whose applications have been rejected have no formal decision to appeal against. This will make any recourse to the courts, as provided by Article 54 of the BA, very difficult. The Decisions fail to explain the reason why some applicants were chosen over others. The RBA Council failed to provide evidence that it acted in the public interest, as defined by the BA, in granting licences; that its refusal of licences was more than a case of arbitrary, unsubstantiated decision-making; or that the likely subsequent closure of existing stations met the test of Article 10 and the case-law of the Court as regards interference with the freedom of expression.
5. The RBA Council's deliberate refusal to assess applications on the basis of the most important criterion listed by the BA for deciding on the award of licenses – i.e. the applicant's future contribution to better quality and more diverse programming –amounts to arbitrary rejection of licence applications, which is an infringement of Article 10 of ECHR.

6. All this provides cause for very serious concern and for considerable uncertainty whether the public interest was the guiding principle behind these licensing decisions.

## EUROPEAN STANDARDS. POLICIES AND PROCEDURES

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states in Article 10, para. 1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

Under Article 10 a state may interfere with this freedom (and licensing is a form of interference): to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals); to protect other individual rights (protection of the reputation or rights of others, prevention of the disclosure of information received in confidence); and to maintain the authority and impartiality of the judiciary.

As is clear from the commitments compiled in Freedom of Expression, Free Flow of Information, Freedom of Media, published by the OSCE Representative on Freedom of the Media in 2000, freedom of expression principles and standards enshrined in the European Convention on Human Rights are shared and espoused by all OSCE participating states. This is also stated emphatically in OSCE Human Dimension Commitments. A Reference Guide, published by ODIHR in 2001.

The European Court of Human Rights (also operating within CoE) holds that the necessity for restricting freedom of expression must be convincingly established; the national margin of appreciation in assessing the need for that must be circumscribed by the interest of democratic society in ensuring and maintaining a free press. Any limitation of, or interference with, such freedom must be provided for by law, which must be narrowly interpreted; must have a legitimate purpose; and must be necessary in a democratic society, i.e. must respond to a pressing social need and be proportionate to the legitimate purpose it pursues.

In interpreting the third sentence of Article 10, the European Court of Human Rights (the Court) found in the case of *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel:*

> *States do not have an unlimited margin of appreciation concerning licensing systems. Although broadcasting enterprises have no guarantee of any right to a licence under the Convention, it is nevertheless the case that the rejection by a State of a licence application must not be manifestly arbitrary or discriminatory, and thereby contrary to the principles in the preamble to the Convention and the rights secured therein. For this reason, a licensing system not respecting the requirements of pluralism, tolerance and broadmindedness without which there is no democratic society would thereby infringe Article 10, para. 1, of the Convention (emphasis added – K.J.).*

In the *Informationsverein Lentia and others* judgment of 24 November 1993, the Court further stated that the purpose of the third sentence is:

*to make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects... Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at a national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments (emphasis added – K.J.).*

Recommendation Rec (2000) 23 of the Council of Europe Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector recalled "*the importance for democratic societies of the existence of a wide range of independent and autonomous means of communication, making it possible to reflect the diversity of ideas and opinions, as set out in the Declaration on freedom of expression and information of 29 April 1982*" and emphasized that, "*to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector, in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests*".

According to the Explanatory Memorandum, "*the Recommendation deems the granting of broadcast licences to be one of the essential tasks of regulatory authorities … It entails a heavy burden of responsibility, given that the choice of operators entitled to establish broadcasting services would determine the degree of balance and pluralism in the broadcasting sector*".

The Appendix to the Recommendation contains a section on the granting of licences, which is reproduced below:

*13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.*

*14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity.*

*15. Regulatory authorities in the broadcasting sector should 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. This does not have a bearing on the allocation of frequencies to transmission network operators under telecommunications legislation.*

*16. Once a list of frequencies has been drawn up, a call for tenders should be made public in appropriate ways by regulatory authorities. Calls for tender should define a number of specifications, such as type of service, minimum duration of programmes, geographical coverage, type of funding, any licensing fees and, as far as necessary for those tenders, technical parameters to be met by the applicants. Given the general*

*interest involved, member States may follow different procedures for allocating broadcasting frequencies to public service broadcasters.*

*17. Calls for tender should also specify the content of the licence application and the documents to be submitted by candidates. In particular, candidates should indicate their company's structure, owners and capital, and the content and duration of the programmes they are proposing (emphases added – K.J.).*

The Recommendation also says that all decisions taken and regulations adopted by the regulatory authorities should be:

- duly reasoned, in accordance with national law;
- open to review by the competent jurisdictions according to national law;
- made available to the public.

The Tbilisi Declaration on Public Service Broadcasting and the Internet, adopted at the Second OSCE South Caucasus Media Conference "Public Service Broadcasting and the Internet" (Tbilisi 17-18 November 2005) states in part that the independence of broadcasting regulatory bodies should be guaranteed by law and respected in practice, and that their "members should serve in their individual capacity and exercise their functions at all times and in the public interest" (emphasis added).

Much more extensive regulation of tender procedures can be found in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Though it concerns primarily public procurement, it provides an excellent introduction into EU standards on public tenders. Two standards laid down in the Directive seem to be of particular importance in the present context. Recital (4) of the preamble states that *Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers (emphasis added – K.J.).* Mention should also be made of recital (46) which states:

*To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders (emphases added – K.J.).*

Regarding the question of pluralism, mentioned both by the Court and by the CoE Recommendation, we might note that speaking at the 13th meeting of the European Platform of Regulatory Authorities – EPRA (Barcelona, Spain, 19-20 April 2001), Matjaž Gerl of the Slovenian Broadcasting Council recognized the question of pluralism as the core question in the process of granting licences and media regulation and listed three basic models of ensuring pluralism:

- The market model is the oldest one and it says that the market competition itself is guaranteeing plurality of content and consequently, the socio-political diversity of media;

- The new media model says that pluralism is a "natural" consequence of economic growth and technical development, and thus no state regulation is needed;
- The public policy model which favours state intervention to ensure the internal pluralism (equal access to the media for everybody) and external pluralism (equal possibilities to access the market, protecting smaller broadcasters, ensuring transparency)

It is obvious, according to Gerl, that "*new established democracies are counting on market to ensure media pluralism (Bulgaria, Estonia, Hungary, Lithuania, Romania, Slovakia, Slovenia). Some of them are practicing almost pure market model (Slovakia, Romania, Slovenia), while others exercise the combination of market and public policy model (Hungary, Poland). Some of them even see the concept of controlling the number of broadcasters in certain area as violation of the freedom of speech (Estonia, Lithuania)*".

On the other hand, the author continues, "*there is a group of countries with democratic tradition, where control of the market is practiced without prejudice (Germany, Ireland, UK-Radio Authority and Spain, Holland and Norway to certain extent). Their arguments are based on safeguarding the economic viability of broadcasters*".

Different licensing methods correspond to these policy approaches. The market model finds its equivalent in licensing by **auction**, whereas the public policy model is complemented by licensing by **tender** (a merit-based process, also known as a "beauty contest").

In an auction, applicants send in bids, signifying how much they are willing to pay for the licence, and the licence is awarded to the highest bidder. A tender consists of inviting licence applications which are then judged on merit (this requires that applicants provide extensive information about their proposed service), and the licence is awarded to the applicant who best meets the criteria adopted by the licensing authority.

It is possible to combine the two methods: to hold a "beauty contest" first in order to admit to the auction only applicants whose applications meet basic criteria, creating an assurance that whoever wins the auction will provide a programme service of required quality.

The whole procedure can be preceded by inviting existing and potential licence-holders in a published advertisement to send in expressions of interest in obtaining or renewing licences and to specify what type of programme service they wish to provide [3]. The results of such a consultation should be made public. This adds transparency to the whole process and helps the licensing authority draw up its plan of broadcasting services on the basis of additional knowledge of the plans of existing or potential broadcasters.

## BACKGROUND

Upon its creation following the adoption of the BA in 2002, the RBA faced a different situation than newly established broadcasting regulatory authorities in other post-Communist countries: not the aftermath of a Communist broadcasting monopoly, but a very chaotic situation which was the result of the following process:

[3] Such a procedure is provided for in the Canadian Broadcasting Act. It is also applied by the Nation Broadcasting Council of Poland.

*In the previous socialist system, founding radio and TV stations was the jurisdiction of the Socialist Alliance organisation, which also took care of appointing the editor-in-chief and determining the station's program plan. During the 1990s a large number of radio and TV stations were founded in towns throughout Serbia, but they were all part of the RTS family, thus component parts of the 'united radio broadcasting system of the Republic'. With the collapse of this 'family concept', local stations scattered like baby crabs from under their 'mother's' skirt. Starting in 1992, they all began to receive their own channels and build their own, new studios. A real boom ensued in Serbia's electronic media. An average of one new RTV was founded every week. By mid 1994, the number of private radio and TV stations, with temporary permits from the Federal Administration of Radio Communications, has grown to 80."* [4]

Roland Brunner (see footnote 3) adds that the mere number of stations did not express any development towards pluralism, as the regime did its best to keep the control over the spreading number of outlets: "Most of stations outside the direct RTS-control were established by people close to the ruling elites, as TV Politika, TV Pink and TV Palma (politically affiliated to the Yugoslav United Left JUL, run by Mira Markovic, the wife of Serbian President Slobodan Milosevic), TV Kosava (established and run by Marjia Milosevic, the daugther of the Mira Markovic and Slobodan Milosevic) or BK TV (established as commercial enterprise by the brothers Karic, as international traders always depending on a good understanding with the authorities)".

A similarly tumultuous situation developed in Radio-Television Serbia (RTS) [5].

Thus, the RBA faced a particularly difficult situation, a broadcasting market shaped by politics, intense political infighting and war. The result has been described as follows:

*The media scene in Serbia reflects a chaotic and suspended society. Media functions have been mixed up and the rules of operation of electronic media, along with the yardsticks for the justifiability of their existence completely disregarded and trampled on. Absolute abuse of state RTV on the part of the former regime equated this house with inconceivable fascist propaganda* [6].

Though the adoption of the Serbian Broadcasting Act in July 2002 was meant to turn a page in Serbian broadcasting history, this has not been problem-free. The law has had to be amended, for the first time in August 2004, in order to solve the huge controversy over the disputed appointments of three members of the RBA Council, and a year later, when the deadline for privatization of local public broadcasters was extended, state-controlled RTS was allowed to collect subscription prior to its transformation into a public service broadcaster, and the current Council members' term of office extended.

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[4] Dragos Ivanovic, "Plot against the Public", Republika, Belgrade 1999, p. 8, cited after Roland Brunner, How to build Public Broadcast in Post-Socialist Countries. Experiences and Lessons learned in the former Yugoslav Area. Zurich: medienhilfe, June 2002. See also Ulf Brunnbauer, Hannes Grandits, Siegfried Gruber, Karl Kaser, Robert Pichler, Christian Promitzer (eds) Education and Media in Southeast Europe: Country Reports. Graz: Centre for the Study of Balkan Societies and Cultures, 1999.

[5] See Mila Turajlic Challenges For Public Service Broadcasting In Serbia, MSc in Media and Communications MC499 Dissertation, London: London School of Economics and Political Sciences. Department o Media and Communications, August 2004.

[6] Transition Process in the Media. Completion Of Stage 1 - Working Group For Media Transition. Public Broadcasting Service Project. Belgrade: Media Center and the Independent Journalist Association of Serbia, June 2001; cited after Roland Brunner, How to build Public Broadcast in Post-Socialist Countries. Experiences and Lessons learned in the former Yugoslav Area. Zurich: medienhilfe, June 2002.

The new RBA Council, appointed in 2005, adopted the Broadcasting Development Strategy and other regulations required for the public tenders for broadcasting licenses in the second half of the year [7].

All this put a heavy burden of responsibility on the current RBA Council, in that its licensing procedures involved not only potential, but also existing broadcasters. Accordingly, pursuant to Article 57 of the Regulation on Issuing Broadcasting Licenses, a decision to deny a licence may mean the closure of an existing station and its programming. In other words, these licensing decisions have clear and direct freedom of expression implications.

Let us recall in this context the test that the European Court of Human Rights applies to forms to interference with freedom of expression: the reason for it must be convincingly established; the national margin of appreciation in assessing the need for it must be circumscribed by the interest of democratic society in ensuring and maintaining a free press; it must be provided for by law, which must be narrowly interpreted; must have a legitimate purpose; and must be necessary in a democratic society, i.e. must respond to a pressing social need and be proportionate to the legitimate purpose it pursues.

This test must also be applied when assessing the licensing decisions of RBA.

## THE LEGAL AND POLICY FRAMEWORK AND ITS APPLICATION BY THE RBA. ANALYSIS AND DISCUSSION OF THE MAIN ISSUES

When launching into the licensing process, the RBA could rely on an extensive legal and policy framework, largely developed by itself on the basis of the BA and the General Administrative Procedure Act, and encompassing its own Statute, the Strategy; the Regulation and Criteria.

Despite the existence of these legal and policy documents, licensing procedures are not fully and comprehensively regulated, with remaining areas of legal uncertainty on important issues.

As is well known, the licensing decisions have provoked many controversies and complaints. Below, we will deal with each of the major issues separately.

### 1. Criteria for Broadcasting License Issuance and the Time of Their Publication

It is alleged that this document was published 10 days after the closing date for submission of applications. This violates the internationally accepted principle that it is the responsibility of the authorities to indicate the criteria and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. More importantly, it is not clear whether these criteria, published as a separate document, have any legal standing and could lawfully have been used in assessing licence applications.

[7] See Overview of Media Legislation in South Eastern Europe - From November 2003 to October 2005. Belgrade: ANEM and IREX, 2006.

Under Article 53 para. 5 of the BA, the RBA has the obligation to "*Set and publicise non-discriminatory, impartial and measurable decision-making criteria, corresponding to the activities for the performance of which the licence is awarded*".

Article 20 of the RBA Statute states that *a qualified majority of five votes is required for the Council's decisions to: adopt the regulations on the programme, technical, organizational-personnel and financial requirements and criteria related to the licensing of broadcasters.*

The requirements of both provisions are fulfilled by the RBA's adoption of the Regulation. The Regulation states in Article 1 that "*This Regulation stipulates the manner of issuing licences, requirements which must be fulfilled by the applicant for the issuance of broadcasting licence, as well as the criteria based on which the Council of the Republic Broadcasting Agency decides on the issuance of licences to broadcast radio and/or television programmes to the applicants (emphasis added – K.J).*.

Article 2 of the Regulation then states: "*The Republic Broadcasting Agency shall be competent for the issuance of licences for broadcasting programmes via terrestrial, cable and satellite transmission, analogue or digital, in a procedure and according to criteria laid down by the Broadcasting Law and this Regulation (emphasis added – K.J.).*These criteria are then fully formulated in Articles 39-53 of the Regulation.

Thus, the Regulation implements the requirement of Article 53, para. 5 of the BA, and neither in the Broadcasting Act, nor in the Regulation is there any mention of a separate set of criteria to be published by the RBA. The development and publication of the Criteria, or the timing of their publication, have no basis in law.

CONCLUSION

Publication of criteria for assessing licence applications after the closing date for their submission violated the internationally accepted principle that such criteria should be published in good time for applicants to prepare their applications. More fundamentally, it must be stated that the RBA had no legal basis for issuing a separate set of criteria. Secondary regulation can only be introduced on the basis of a clear delegation contained in legislation. Therefore, this additional document has no legal standing.

**2. Failure to provide individual applicants with written notification of the RBA's decision to exclude participants from the Tender**

The Catalogue invokes Article 53(1) of the BA and Article 37(3) of the Regulation on the Issuing of Broadcasting Licenses in arguing that the RBA contravened the law by temporarily disqualifying some applicants and failing to provide them with written notification of the decision to do so. It states that the RBA further breached Article 53(1) of the BA and Article 37 of the Regulation by failing to allow applicants the allotted time to provide additional information, or an opportunity to address the reason for their exclusion from the tender.

The factual basis for this can be found in Decision 1 (the only decision to provide information that an application was not considered), which states: "*The application of TV*

*Politika was not taken into consideration because of the untimely submitted and incomplete documentation (Article 53, paragraph 1, item 1)*".

Such situations are regulated in Article 37 of the Regulation, according to which the technical staff of the RBA should return an application containing incomplete or false data, or incomplete documentation, to the applicant for the purpose of application completion or submission of correct data or complete documentation within the subsequently determined seven-day period, and inform the RBA Council accordingly. If the applicant completes the application or submits correct or complete documentation within the seven-day period, it shall be deemed that the application has been properly submitted (from the beginning).

There is no information in Decision 1 that this procedure was followed, only a list of the deficiencies of TV Politika's application.

Moreover, the Regulation does not prescribe a procedure concerning the rejection of an application if it was not returned in the 7-day period, or was returned still in an incomplete or incorrect form, except that, as laid down in Article 38, the RBA should ultimately publish a list of applicants whose applications were not complete or submitted in a timely manner.

The consultant has no information on whether this information about TV Politika was published separately from what is contained in Decision 1. Nevertheless, the RBA Council does not act "by default" (e.g. rejection of an application cannot merely be surmised from the fact that it was not considered). Under Articles 18-24 of the Statute, it is clear that the Council must take a separate formal decision in a voting procedure on every issue it considers. As regulated by Article 22 of the Regulation, a vote is taken after the discussion on a specific topic has been completed and the chairperson has formulated the proposed decision in a way which unambiguously allows for a vote or non-vote.

CONCLUSION

Unless this is regulated in the General Administrative Procedure Act, the BA and the Regulation are not clear on the exact procedure for dealing with applications that the applicant fails to correct or complete within the 7-day period, and especially on whether that applicant should receive written notice of the decision not to consider the application. This oversight should be corrected – first in the Regulation, and subsequently in the Act itself, when it is amended.

### 3. Failure to consider applications based on the criterion of contribution to better quality and more diverse programming

Under Article 53 para. 5, the RBA must "*Reach a decision [on submitted licence applications] in keeping with the set criteria and prescribed conditions and standards for programme production and broadcasting, and, in the event that more than one person fulfilling the terms has applied for the same radio frequency, give advantage to the one which, on the basis of the submitted documentation, provides stronger guarantees that it shall contribute to better quality and more diverse programme i.e. programme contents in the area in which the programme is to be broadcast. If the applicant is broadcasting a radio and/or TV programme at the time of application submission, the Council shall, while making a decision, take into consideration the applicant's previous broadcasting period contribution to*

*the implementation of principles regulating relations in the broadcasting sector"(emphasis added – K.J.).*

Thus, there is no question that the licensing procedure in force in Serbia is that of a "beauty contest", with programme criteria uppermost among all other criteria to be used in determining who should be awarded a licence to broadcast. In other words, Serbian legislation clearly favours the public policy model of promoting pluralism and in general of determining the shape of the broadcasting landscape.

Let us recall in this context that the OSCE Tbilisi Declaration on Public Service Broadcasting and the Internet calls on members of broadcasting regulatory bodies to be guided by public interest considerations at all times. Article 53 para. 5 clearly specifies what the public interest considerations in this case are: making sure that licences are awarded to applicants guaranteeing "better quality and more diverse programme".

Decisions 1 and 2 show that the clear legal duty to assess licence applications from this point of view was not fulfilled by the RBA Council. They contain the following sentence: "*The RBA Council did not enter into the substantial evaluation of the quality of the existing programmes because it would bring the applicants currently not broadcasting programmes into an unequal position, but the RBA Council perceived the whole range of needs of the TV audience in the Republic of Serbia".* The same is clear from Decision 3: *"The RBA Council did not evaluate the quality of the existing programmes, but the RBA Council perceived the needs of the TV audience in the Autonomous Province".*

Thus, the RBA deliberately acted in a way incompatible with the BA. Its reasons for doing so have no basis in law. It was not called upon to compare existing programme services with programme concepts of future would-be broadcasters, but to assess "submitted documentation" (Article 53 para. 5 of the BA and Article 48 of the Regulation) concerning the applicants' programme concepts and plans.

Article 53 para. 4 instructs the RBA to "*Set and publicise non-discriminatory, impartial and measurable decision-making criteria, corresponding to the activities for the performance of which the licence is awarded" (emphasis added – K.J.).* Articles 68-74 of the BA, Articles 48-50 of the Regulation and para 2.3 of the Tender taken together provide the RBA with enough information on the programme concept and with sufficiently clear guidance on the measurable criteria and methods of their application, to make possible precisely such an assessment of programme concepts with a view to establishing which licence applicant would most contribute to better quality and more diverse programming.

CONCLUSION

Deliberate refusal to assess applications on the basis of the most important criterion listed by the BA for deciding on the award of licenses constitutes exactly what the European Court of Human Rights warned against, i.e. manifestly arbitrary rejection of licence applications. By the same token, such action is contrary to the principles in the preamble to the Convention and the rights secured therein, thus violating Article 10 of ECHR.

## 4. Failure to adopt the proper procedure for decision-making on licence applications

### A. One collective licensing decision vs. individual decisions to award or refuse a licence

We have already mentioned that the RBA Council cannot take decisions "by default", or implied decisions which can be inferred from its other actions. A clue as to whether there should be one "collective" licensing decision, or separate "decisions" (whether positive or negative) on each licence application is offered by Article 53 para. 8 of the BA which reads: *"Deliver the applicants, whose applications have been rejected, duly reasoned decisions thereof within eight days after the day the decision on the public tender has been reached"*. This is reinforced by 54, para 1. which reads: "*A person, which has applied at the public tender and is dissatisfied with the Council decision, has the right to file a complaint to the Council within 15 (fifteen) days after the day of receipt of the decision on application rejection"*. In turn, Article 57 of the Regulation states that "*The applicant at the public tender which is dissatisfied with the RBA Council decision, shall be entitled to file a complaint to the RBA Council within 15 days after the day of decision receipt, in accordance with Article 54 of the Law" (emphases added – K.J.)*

This indicates that there should be two kinds of decisions [8]: on the acceptance of the application (and awarding a licence), and on the rejection of an application (and refusal of a licence). Given that Article 22 of the Statute states that "*The result of the vote is established on the basis of the number of votes cast "in favour" of the proposal*" this means that there should be two kinds of motions in considering licence applications: for accepting an application and awarding a licence, and – conversely – for rejecting an application and refusal of a licence.

An additional and serious procedural failure is that in reality Decisions 1, 2 and 3 do not contain any formal decisions concerning the refusal of licences to rejected applicants, only announcements that they will not receive licences: "*The RBA Council can not issue licenses to the following applicants: "RTV BK Telekom" d.o.o., Belgrade; "Multimedia Ethnology System" d.o.o., Belgrade; "AST" d.o.o., Belgrade; "RTL TV" d.o.o., Belgrade; "Sigma Media International" d.o.o., Belgrade; "RTV 5" d.o.o., Nis and "CME SR" d.o.o., Belgrade, because the tender, on the basis of the Broadcasting Law, the Telecommunications Law, Radio Frequency Assignment Plan and the Strategy of Broadcasting Development in Serbia until 2013, was called* ***for a total of five networks,*** *for which* ***a total of 13 candidates applied*** *with the complete and timely documentation*" (Decision 1).

Let us recall once again that the European Court of Human Rights held in *Informationsverein Lentia and others* in relation to just such a situation that "*Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station,*

[8] However, Art. 199 paragraph 2 of the General Administrative Procedure Act could be construed as suggesting one collective decision: "In other matters [other than single-party proceedings, which are dealt with in paragraph 1 of the same article-remark E.O.], the reasoning of the decision contains: short summary of the parties' requests, ascertained factual findings, if required reasons which have been taken into account in evaluating evidence, reasons for not granting requests of the parties, legal provisions and reasons which have guided the deciding administrative body to resolving the matter, taking into account the factual findings. In the event that the appeal does not suspend enforcement of a decision, the reasoning must invoke such provision of the law. The reasoning of a decision must include the interim decisions of the administrative body which may have not been separately appealed against" (emphasis added – K.J.).

*its potential audience at a national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments*". The BA states unequivocally in Article 53 para. 5 that – in the language of the Court – "the nature and [programme] objectives of a proposed station" should be precisely the determining consideration in granting or denying a licence. This was disregarded, however.

It is true that the closed catalogue of decisions that the RBA Council can take, specified in Articles 18-24 of the Statute, does not include a decision on the rejection of a licence application, only a "decision to grant the licence for the broadcasting of radio and TV programmes, following the completion of a tender" (Article 20 item 3). However, the RBA does not invoke this fact as a legal reason for not adopting decisions on the rejection of licence applications. Instead, it provides the following explanation:

> *According to the Law and the Statute, the Council shall decide by vote, and not by consensus, so that the explanation of the decision may quote only the relevant criteria, facts and the results of the vote, but not the reasons for the individual Council member to give its vote to a certain applicant. The only legally valid reason why some applicants were awarded a license lies in the fact that they fulfilled prescribed requirements and that they received a sufficient number of votes of the Council members, who while deciding (voting), were governed by the criteria and the established factual state of affairs. Also, the Council was not deciding on revocation, but on issuing of licenses to broadcast programmes, so that the real reason for some of the applicants not to obtain a license was the lack of available resources defined by the Radio Frequency Assignment Plan. Given the fact that this decision is not punishing anybody, the Council has neither legal, nor logical possibilities to further elaborate why some of the applicants did not obtain a license. Revocation of licenses was not a subject of the public tender for issuing broadcasting licenses (emphases added ( K.J.).*

Thus, despite the BA's insistence on "measurable decision-making criteria" and "reasoned decisions", as well as on clear decisions to award or deny licenses, the RBA – deliberately and in full knowledge of what it was doing – decided to ignore all these provisions.

The argument that "this decision [i.e. the inferred decision to refuse a licence – K.J.] is not punishing anybody" seems divorced from reality, since existing broadcasters who were denied a licence may subsequently be closed down.

The RBA also confuses two procedures: rejection of a licence application and revocation of an existing licence. This confusion may perhaps be explained by the fact that, as noted above, in many cases licence applicants are functioning broadcasting stations. However, existing stations would not apply for licences if they already had valid licences on the basis of which they could go on broadcasting and which could be revoked. Legally speaking, refusal to award a licence and revocation of an existing licence are quite separate procedures, as is clear from Article 17 of the BA.

Complainants against the RBA's decision-making have pointed out that applicants whose licence applications were rejected did not receive duly reasoned decisions.

CONCLUSION

The procedural approach adopted by the RBA involves:

- deliberate disregard of the BA
- unexplainable confusion of refusal and revocation of licence;
- lack of any, let alone duly reasoned, decisions to deny licence applications;
- a discrepancy between the Statute (which does not provide for a formal decision on rejecting a licence application) and the BA (which requires that such a decision be taken).

As a result, strictly speaking, applicants whose applications have been rejected have no decision to appeal against. This, for reasons explained below, will make any recourse to the courts, as provided by Article 54 of the BA, very difficult.

All this reinforces the impression that the procedure involved arbitrary decision-making, in contravention of the law and of European standards.

Incidentally, provisions of Articles 18-24 of the Statute constitute a straight-jacket, preventing the RBA Council from adopting any decisions not specifically mentioned in the closed catalogue. There is no legal reason for this and the Statute should be amended, both by specifying what majority is required to reject a licence application, and by adding item 12 ("other") to the list in Article 21.

**B. Failure to analyse applications and justify the reasons for awarding licences applications**

The list of complaints and observations in this field is very long, including that the RBA:

- failed to compare the Tender applications according to the criteria defined both in the law and established by the RBA itself,
- failed to provide an overview of the fact contained in the Tender applications and to reach conclusions on the basis of ascertained facts by way of measurable comparison of the Tender applications and to provide comprehensive reasoning of such conclusions;
- failed to cite which facts contained in the Tender applications have been decisive in determining the advantaged applicants;
- failed to establish the ranking of the Tender applicants with the most experience in broadcasting (a requirement of the criteria defined by Article 53(4) of the BA and the RBA itself).

It is also pointed out that the RBA released Decisions 1, 2 and 3 to award a total of 10 national, and one provincial broadcasting licenses within a very short time, only a small part of the 90 days which it could have taken to consider the applications and reach its decisions.

Article 37 of the Regulation lays down the following procedure for analysing licence applications:

*The RBA Technical service shall examine all applications with the enclosed documentation submitted in a timely manner.(…)*

*After examining the submitted applications and documentation, the RBA Technical service shall prepare a report on the established factual situation and submit it to the RBA Council.*

*For the purpose of better examination of the submitted documentation regarding the requirements referred to in Articles 13 through 27 of this Regulation, the RBA Council may engage independent experts of adequate profiles not employed by the RBA (engineers, lawyers, economists, media experts, marketing experts, as well as members of the Ethics Committee), pursuant to Article 46 of the Statute.*

*The RBA shall retain the right to request additional documentation and explanations from the applicants if it deems necessary to do so. The applicants shall respond to the RBA's request and submit the requested documentation and explanation.*

*The RBA Council shall consider all complete applications submitted in a timely manner (emphasis added – K.J.).*

There is no evidence in Decisions 1, 2 and 3 that independent experts were engaged to help with the analysis of the licence applications. There is no mention of an internal report (however, the RBA Council did not have to mention it in its Decisions and this does not mean that such a report may not have been submitted by the Technical Service).

While Decisions 1 and 3 do rate applicants on the basis of their experience (*Among the applicants currently broadcasting programmes TV Pink and TV B 92 have the greatest experience in broadcasting* and *Super TV, which exists in the air as a "Regional TV Center Subotica" since 1996, has undoubtedly the greatest experience in broadcasting*), most of the observations cited above are confirmed by reading the Decisions themselves. Instead of evidence of careful analysis and comparison of applications, one often finds reasons offered by the RBA Council for NOT doing so. For example, Decision 1 contains i.a. the following statements:

- *In this Explanation, it is not possible to mention all the important facts obtained by RBA. However, during the tender procedure, the Council members had access to all relevant documents.*
- *It is impossible to consider each criterion separately from the others; in the same way the relevant facts relating to each criterion are inter-linked and must be seen in the round.*
- *The remaining applicants have either exceptionally low ratings, or it is impossible to establish their ratings objectively.*
- *The RBA Council did not enter into the substantial evaluation of the quality of the existing programmes because it would bring the applicants currently not broadcasting programmes into an unequal position.*

In some cases, explanation of the reasons for awarding and refusing a licence indicates arbitrary decision-making. This is shown by the explanation in Decision 1 of the way how the RBA Council sought to stimulate the development of domestic broadcasting.

*The RBA Council could issue licenses to legal entities backed by foreign capital up to the rate stipulated by the Law (49%). However, different legal interpretations opened the possibility for the provision of Article 41 of the Law to be reinterpreted or by-*

*passed, so the Council had to take this into consideration. Seven legal entities with exclusively domestic capital and six with mixed capital applied in the tender process, and the RBA members made the appropriate balance among them (emphasis added – K.J.).*

Very little is clear in this explanation and certainly the notion of "appropriate balance" suggests that the RBA Council's decision as to what it considered "appropriate" in this context was clearly arbitrary and had no basis in law.

It has to be admitted that the RBA Council did not receive sufficient support from other authorities when it needed such support. This is indicated by the explanation in Decision 1 regarding the transparency of ownership structure and origin of capital.

Nevertheless, the totality of Decision 1 may suggest a bias against foreign investors, indeed, a desire to discriminate against them. It contains the following sentence: „In the strictest sense, only the applicants currently broadcasting in the territory of the Republic of Serbia have experience in broadcasting". This is rather surprising, since it means that experience obtained by applicants outside Serbian territory was not taken into consideration, or regarded as broadcasting experience as such. It could theoretically be that no member of RBA Council and no member of the staff has had opportunity to observe at first hand the broadcasting activities of applicants outside Serbian territory, but the possibility, provided for in Article 37 of the Regulation, of engaging independent experts (pursuant to this provision, they need not only be Serbian experts) could have been used to gather information about applicants with broadcasting experience outside Serbia.

While there are no direct contractual relations between Serbia and Montenegro and the EU regarding freedom of the movement of capital, and a desire to promote domestic broadcasters cannot be criticized as a matter of principle, any perception of such a bias will work against Serbia and Montenegro in the area of international integration. In any case, once international integration progresses, unequal treatment of domestic and foreign broadcasters and investors will become illegal.

CONCLUSION

As noted above, lack of a formal decision to reject licence applications from some existing or potential broadcasters and also lack of sufficient reasoning and explanation in Decisions 1, 2 and 3 for awarding licenses to some applicants and denying them to others, may make any consideration of an appeal against these decisions in court very difficult. The Decisions fail to provide sufficient evidence of why some applicants were chosen over others. The RBA Council failed to provide evidence that it acted in the public interest, as defined by the BA, in granting licences; that its refusal of licences was more than a case of arbitrary, unsubstantiated decision-making; or that the likely subsequent closure of existing stations met the test of Article 10 and the case-law of the Court as regards interference with the freedom of expression.

### 5. Refusal of a National TV Licence to a Regional Broadcaster

This matter is raised in the Complaint, filed by the interested party, RTV 5 from Nis. This Complaint also makes many allegations of a factual nature (claiming that Decision 1 cites incorrect information on the situation and activity of particular broadcasters or applicants) which the consultant is unable to verify. It also challenges allegations made against RTV 5 itself, but again this has to be assessed on the basis of information which is not available to the consultant.

On the main question, it is true that the Strategy contains the following statement in item 3.4:

> *The RBA will support the demetropolisation of broadcasting. In practice, it implies strengthening the positions of local and regional stations and a possibility that national commercial broadcasters are not obliged to have their head office in Belgrade, which is in accordance with the RBA's policy of uniform development of broadcasting in the Republic.*

However, in itself, it does not give any broadcaster an automatic claim to a national licence. On the other hand, the fact that the RBA failed to provide sufficient reasons in Decision 1 for rejecting licence applications or evidence of a careful analysis of their programme concepts, denies its decision not to award a national licence to RTV 5 the authority and credibility due to a well-reasoned and substantiated administrative action.

## FINAL COMMENT

This analysis could be continued to deal with other alleged irregularities in the process of licensing recently completed by the RBA. However, already the evidence collected above suffices to show that the process was plagued by fundamental weaknesses, deliberate disregard of the law and arbitrary decision-making.