

Bosnia and Herzegovina: Legislative Framework on the Communications Regulatory Agency

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Executive summary

In January 2012, Barbora Bukovska, Senior Director for Law and Policy with *ARTICLE 19* analysed the legal framework pertaining to the Communications Regulatory Agency of Bosnia and Herzegovina (“the Agency”). The Agency is a convergent regulator of Bosnia and Herzegovina, operating at the national level. Specifically, the analysis focuses on the independence of the Agency in terms of its operations, composition and finances and the overall compliance of the respective legislation with international standards on freedom of expression.

International and European standards on freedom of expression set a number of requirements through which the independence of the regulatory bodies should be achieved. These include explicit legislative guarantees of political, operational and financial independence and institutional autonomy of the regulator, a participatory and transparent appointment process for its governance and managerial structures, the ability to employ its own qualified staff, and sufficient mandate and power of the regulator, as well as its public accountability and adequate funding. These standards are used to review the independence of the Agency and its structures.

This analysis concludes that although the independence of the Agency is proclaimed in the text of the Communication Law and there are many positive aspects elaborating on this issue, specific guarantees of such independence are lacking through other provisions. The analysis also makes a number of recommendations on how these shortcomings of the legislation should be amended.

Summary of recommendations

ARTICLE 19 recommends the Government of Bosnia and Herzegovina to consider the following:

- The legislation should stipulate the budgetary authority of the Agency in order to allow for independent financial operations.
- The appointment process for the governance and management structures of the Agency should be free from any political and economic interference. The Communication Law should explicitly prohibit the Council of Ministers from such interference when finalizing the Council membership nominations;
- The Communication Law should stipulate that the Director General is appointed by the Parliament, based on a specific nomination and selection procedure. Alternatively, the Law should, through an explicit set of provisions on the selection of nominees, prevent a situation where the Government can interfere with the selection by not acting on nominations.
- The Communication Law should be amended to provide that the membership in the Council of the Agency should be representative of the society as a whole and refer to the Law on Prevention of Discrimination as applicable in the nomination and appointment process.
- The Communication Law should include provisions on transparency of both nominations and appointments of the governance and management structures of the Agency.

- The Communication Law should provide possibility of public participation in the nomination process for the members of the Council and the Director General of the Agency.
- The accountability mechanism of the Agency can be strengthened through an obligation to submit the Agency's annual reports to the Parliamentary Assembly including an obligation to publish detailed financial reports and audited accounts directly in the Communication Law. The Communication Law should also mandate that the annual reports of the Agency shall be widely disseminated to the public.
- In order to avoid any problems in interpretation of the current provisions, the Communication Law should stipulate that the membership in the governance and management structures of the Agency is incompatible with having significant direct or indirect commercial interests in telecommunications or broadcasting.
- The Communication Law should explicitly stipulate that the dismissal of members of the Council or the Director General prior to the completion of their mandate should be a subject of judicial review.
- Membership should be excluded and dismissal from the mandate should be permitted for the Director General and for those members of the Council who have been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years have passed since the sentence was discharged.
- The Communication Law should clearly set the rules for reimbursement and payments of the members of the Council of the Agency and should stipulate that the members are prohibited from receiving any other funds in connection with their functions as members of the Council.
- The provisions of the Law on Salaries and the Law on Ministries that undermine the financial autonomy of the Communication Law should be abolished.
- The Law on Ministries should exclude the Communications Regulatory Agency from its scope, particularly from the category of a budgetary institution.
- The Communication Law should stipulate that the Agency staff is excluded from the category of civil servants; while ensuring simultaneously the budgetary independence of the Agency.
- The financial independence of the Agency should be provided through a set of safeguards pertaining to the Agency's budget in order to shield it from interference by the Council of Ministers. Namely, the Communication Law and the Law on Financing the Institutions of Bosnia and Herzegovina and other legislation should provide that the Government cannot limit the budget approved by the Council below a certain limit or percentage.

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Introduction

This brief provides the assessment of whether the current legislative framework of Bosnia and Herzegovina (“BiH”) related to the Communications Regulatory Agency (“Agency”), the broadcast regulator of BiH, meets international standards on freedom of expression. In particular, the brief focuses on the political, operational and financial independence and institutional autonomy of the broadcast regulator in terms of its financing system, rules related to staff and the payment and remuneration scheme, nomination and appointment procedures to the Council of the Agency (“Council”) and its General Director.

ARTICLE 19 has extensive experience in both analysing broadcasting laws and regulations around the world, including a relevant standard setting work. Specifically in BiH, in 2002, we analysed a draft of the Law on the Public Broadcasting System of Bosnia and Herzegovina. We welcome an opportunity to follow up on this initiative that took place almost a decade ago and hope that this brief will provide an impetus to legislators and other stakeholders to improve the legal framework on broadcasting regulation in the country.

This brief is based on the legislation¹ on the Agency as set by the Law on Communications of Bosnia and Herzegovina, published in Official Gazette of BiH under No. 31/03, adopted on 2 September 2003, As Subsequently Amended, in accordance with the Constitution of BiH (“Communication Law”). It is also based on the review of three related laws:

- The Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina, No. 5/03, adopted on 13 February 2003, As Subsequently Amended. This Law provides rules for establishing the Ministries as well as specific administrative organizations and institutions of BiH;
- The Law on Financing the Institutions of Bosnia and Herzegovina, No. 61/04, adopted on 2 December 2004, As Subsequently Amended. This law regulates the preparation, adoption, execution, accountancy, reporting and supervision of the budgetary institutions of BiH; and
- The Law on Salaries and Compensations in the Institutions of Bosnia and Herzegovina, No. 50/08, adopted on 7 June 2008, As Subsequently Amended.

ARTICLE 19 notes that alongside with this brief, we have also reviewed the legislative framework on broadcasting from the perspective of its coherence, links and discrepancies as well as analysed the role of the Agency in appointing the public service broadcasters boards.²

¹ ARTICLE 19 reviewed English translations of these laws, as provided to us by the OSCE. ARTICLE 19 takes no responsibility for the accuracy of these translations or for comments based on mistaken or misleading translation.

² Hence, in preparation of this brief, ARTICLE 19 also reviewed the following laws:

- Law on the Public Broadcasting System of Bosnia and Herzegovina, No. 78/05, adopted on 5 October 2005, As Subsequently Amended. The Law that establishes the Public Service Broadcasting System, its structure, governance, financing, management, and other responsibilities;
- Law on the Radio and Television of Republika Srpska, No. 49/06, As Subsequently Amended. The Law regulates the Public Broadcasting Service of Republika Srpska;
- Statute of the Radio and Television of Bosnia and Herzegovina, No. 104/06;
- Law on Public Broadcasting Service of the Federation of Bosnia and Herzegovina, No. 48/08. The Law regulates the Public Broadcasting Service of the Federation of BiH (*hereinafter* “RTV FBiH”).

Any concerns on these and other issues related to possible incompatibility of the BiH legislation with international law are therefore disregarded for the purposes of this analysis.

This analysis is based upon international and European standards regarding freedom of expression binding on BiH. The brief also refers to a key document, developed by *ARTICLE 19* and international experts in this subject area. Namely, it makes references to Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation (“the *ARTICLE 19* Principles”),³ a set of guidelines developed on the basis of international practice, comparative constitutional law and best practice in countries around the world. Although this document is not binding on BiH, it provides good evidence of generally accepted understandings of the nature and scope of the right to freedom of expression and broadcasting.

The conclusion made in this analysis is that although the independence of the Communications Regulatory Agency is proclaimed in the text of the Communication Law and there are many positive aspects elaborating on this independence, the guarantees of such independence are lacking through other provisions of the Law and other legislation. Namely, the Communication Law should also ensure transparency of the process of nominations and appointments of the Agency’s bodies. It is also suggested that the provisions on appointment of the governance and managerial structures of the Agency should be clarified to avoid any possibility for interference and the public participation in the process of the nomination of these functions should be improved. The rules on incompatibility for the members of the governance and managerial structures should also be improved and judicial review of dismissal decisions should be explicitly provided for. Further changes are needed in terms of the financial independence and budgetary autonomy of the Agency – both in terms of its budgetary rules and the payment and remuneration scheme of the appointed members and staff. It is also proposed that the accountability mechanism should be strengthened both in terms of the Agency’s reporting to the Parliament and in terms of the requirement of publishing detailed financial report.

The analysis is divided into two parts. The first part sets out the applicable international standards in this area that the Government of BiH is obliged to implement in its domestic legislation. The subsequent part examines the respective legislation in the light of these standards and provides recommendations on how the legislation should be amended or revised. The structure of the sub-chapters is based on the framework set in various international standards, and does not indicate that the more important and pressing issues are dealt with first. The priority of addressing the problems and shortcomings of the legislation on the Agency should be, therefore, viewed in the light of all recommendations and analysis made in this brief.

ARTICLE 19 also received a copy of the previous law governing the Public Broadcasting Service of BiH (the Law No. 92/05), adopted in 2005 and amended in 2006 and 2010 (No. 32/10); and took its provisions to consideration from the perspective of the legislative history of the subject area.

³ ARTICLE 19, Access to Airwaves, London, March 2002; available at <http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf>.

International Standards on Broadcasting Regulatory Bodies

The Universal Declaration of Human Rights (“UDHR”),⁴ generally regarded to be the flagship statement of international human rights and considered by many to be binding on all States as a matter of customary international law, guarantees the right to freedom of expression at *Article 19*, in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights (“ICCPR”),⁵ ratified by BiH in 1993, imposes legally binding obligations on States Parties to respect a number of the human rights set out in the UDHR. *Article 19* of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found at *Article 19* of the UDHR. Guarantees of freedom of expression are also found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”)⁶, ratified by Bosnia and Herzegovina on 12 July 2002.

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has referred to “the pre-eminent role of the press in a State governed by the rule of law”⁷ and has recognised that the press plays a vital role of ‘public watchdog’.⁸ The UN Human Rights Committee has stressed the importance of free media to the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.⁹

The Government of BiH is also bound by specific broadcast standards that are contained in recommendations and declarations by the Council of Europe. The latter are designed to serve as guidance for broadcast regulators and legislators and ensure that freedom of expression and media freedom are protected in the broadcasting field.

The need for independence of broadcasting regulatory bodies and their protection against political or commercial interference was specifically stressed in the 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media. The Joint Declaration specifically stipulates that:

⁴ UN General Assembly Resolution 217A(III), 10 December 1948.

⁵ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁶ Adopted 4 November 1950, in force 3 September 1953.

⁷ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63

⁸ *Ibid.*

⁹ UN Human Rights Committee General Comment No. 25, issued 12 July 1996.

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.¹⁰

In the Council of Europe, the key recommendation in this regard is the Council of Europe's Recommendation Rec(2000)23, on the independence and functions of regulatory authorities for the broadcasting sector ("Recommendation Rec(2000)23")¹¹ and its Explanatory Memorandum;¹² and the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector.¹³ Although the Recommendation and the Declaration do not have a binding legal force, they are important from the point of their interpretation of the meaning of Article 10 of the European Convention.

Both documents stress out that the regulatory authorities have to be protected from all forms of political and economic interference; the underlying principle being the fact that independence of regulatory agencies is interlinked with the independence of broadcasters and of media as such. They also emphasize that broadcasting regulators must be equipped with expert knowledge in order to fulfil their functions properly.

They stipulate that broadcasting regulatory bodies and supervisory bodies of public service broadcasters should be established in a manner that minimises the risk of interference in their operations – for example, through an open appointments process designed to promote pluralism, and which includes guarantees against dismissal and rules on conflict of interest. The Recommendation Rec(2000)23 specifically provides:

3. 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.
4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
 - regulatory authorities are under the influence of political power;

¹⁰ 2003 Joint Declaration on regulation of the media, restrictions on journalists and investigating corruption; available at <http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

¹¹ Council of Europe, Committee of Ministers, Recommendation (2000) 23 of the Committee of Ministers to the member states on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' Deputies; available at http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%282000%29023&expmem_EN.asp.

a. ¹² Explanatory Memorandum to Recommendation No. Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector; available at <https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec%2800%2923&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

¹³ Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies; available at <https://wcd.coe.int/ViewDoc.jsp?Ref=Decl%2826.03.2008%29&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
5. Furthermore, rules should guarantee that the members of these authorities:
 - are appointed in a democratic and transparent manner;
 - may not receive any mandate or take any instructions from any person or body;
 - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.
 6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
 7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.

Other standards relevant to the media, including the independence of the broadcast regulators, were adopted under the auspices of UNESCO. In Europe, the Declaration of Sofia provides a number of declaratory principles on media regulation, including the following,

If supervisory regulatory broadcasting authorities are established, they must be fully independent of government.¹⁴

While not possessing legal binding force, this declaration sets out important principles and has been endorsed by UNESCO's General Conference, lending it considerable political weight.

Additionally, *ARTICLE 19* Principles set up the following principles for the broadcast regulatory bodies:

Principle 10: Independence

All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;

¹⁴ Declaration of Sofia; adopted on 13 September 1997; available at http://www.unesco.org/webworld/fed/temp/communication_democracy/sofia_de.htm.

- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.¹⁵

ARTICLE 19 Principles further stipulate that safeguards for the independence of regulatory bodies also include:

- an explicit provision in the legislation that regulatory bodies are independent and the interference with their activities and members is prohibited;¹⁶
- a clear stipulation in the law of the policy objectives underpinning broadcast regulation;¹⁷
- setting out status and mandate of the members of the regulatory bodies including the manner of nomination and appointment of the members;¹⁸
- rules of incompatibility;¹⁹
- terms of office;²⁰
- the manner of termination of office;²¹
- payment and reimbursement of the members;²²
- a clear formulation of the remit and responsibility of regulatory bodies;²³
- detailed rules of accountability of regulatory bodies;²⁴
- a guarantee that all decisions of regulatory bodies affecting individuals are subject to judicial review;²⁵
- regulation of a funding scheme which ensures adequate funding in view of the mandate of the regulatory bodies.²⁶

The legal framework on the broadcasting regulator of BiH, the Communications Regulatory Agency is examined for the compliance with these principles in the next chapter.

¹⁵ *ARTICLE 19 Principles*, *supra* note 3.

¹⁶ *Ibid*, Principle 11.

¹⁷ *Ibid*, Principle 12.

¹⁸ *Ibid*, Principle 13.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*.

²² *Ibid*.

²³ *ARTICLE 19 Principles*, *supra* note 3, Principle 14.

²⁴ *Ibid*, Principle 15.

²⁵ *Ibid*, Principle 16.

²⁶ *Ibid*, Principle 17.

Analysis of the Legal Framework on Broadcasting Regulator of BiH

Guarantee of Independence of the Agency

Overview

The Constitution of BiH, adopted on 1 Dec 1995, does not contain any provisions on the Agency and does not provide for its independence. However, the independence of the Agency is stated in Article 36 para 1 of the Communication Law which stipulates that “the Agency is functionally independent and non-profit making institution.” Article 36 para 3 prohibits the Council of Ministers, individual Ministers and any other person from “interfering in the decision making of the Agency in individual cases.”

It is also noted that under Article 2 para 2 of the Constitution of BiH, the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. The European Convention and its Protocols have priority over all other law; hence, when the domestic law conflicts with the European Convention, the Convention prevails.

Analysis

The international standards on broadcast regulators mandate that these bodies should enjoy operational and administrative autonomy which shall be respected at all times. There is no particular wording prescribed as for this, however, explicitly stipulated guarantees of independence are recommended.

A positive feature of the Communication Law is a fact that it specifically declares “functional independence” of the Agency and prohibits the Government, its members and other individuals from interfering in the decision making. ARTICLE 19 notes that the formulation of the Communication Law could be more explicit; e.g. it could elaborate that functional independence means an independence in financial, operational and administrative matters and there should be no interference in individual cases as well as in the policy and regulations overall. Further, it would be useful to proclaim the independence from not just political, but from other powerful interests in the society as well as from the interests of the media it regulates.

Despite the declaration of functional independence, this independence is compromised by the provisions of the Law on Financing the Institutions of BiH, which makes the Agency a “budget institution” under the Law (Article 2 para 1 letter n). This aspect is addressed in more detail in the subsequent sections of this analysis.

However, the respective provisions of the Communication Law are overall satisfactory in their declaratory nature of the Agency’s independence. *ARTICLE 19* makes no recommendations as for the change of respective provisions.

Remit and Responsibility

Overview

Article 3 of the Communication Law stipulates the responsibilities of the Agency (as well as the Council of Ministers) in the field of communications, with the Agency being responsible for the regulation of broadcasting and telecommunications networks and services and planning, coordinating, allocating and assigning the use of the radio frequency spectrum.

Subsequent provisions of the Communication Law further establish the regulatory principles in detail, including the licensing processes.

Analysis

International standards require that regulatory bodies have their powers and responsibilities clearly set in the legislation.

These requirements are reflected in the provisions of the Communication Law that does not allow for assigning or limiting these powers. It is therefore assumed that any changes have to be adopted through legislative amendments.

ARTICLE 19 has no recommendations regarding these provisions.

Accountability

Overview

Article 44 of the Communication Law requires the Agency to produce a financial and activity report on annual basis that has to be submitted to the Council of Ministers. Upon its consideration, the Council of Ministers shall publish the report within four months after the end of each financial year.

Analysis

Public accountability is an important indicator of the broadcasting regulator's independence. The Recommendation Rec(2000)23 specifically states that regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or ad hoc reports relevant to their work or the exercise of their missions. Through its Principles, *ARTICLE 19* recommends that such accountability to public should be ensured through a multi-party body, such as the legislature or a committee, rather than a government or a minister. *ARTICLE 19* also recommends that detailed annual reports on activities and budgets, including audited accounts of regulatory bodies, are published and widely disseminated.

Provisions of the Communication Law meet these recommendations only partially. *ARTICLE 19* welcomes the fact that the Agency is obliged to produce an annual report. However, we note that this report is submitted to the Government (the Council of Ministers) rather than a multi-party body such as the Parliament (the Parliamentary Assembly of BiH). There is no obligation stipulated for the Government to lay the annual report before the Parliament. Further benefits of submitting the report to the Parliament would be that the elected representatives (not only the executive, that presupposes the majority in the Parliament) could request the Agency to provide further information on its policy decisions and actions. Possible hearings or presentation of the annual report in the Parliament would mean a higher accountability to the public. Equally, matter of dissemination of the annual report to public is not further explained.

Although the Law does not contain any provisions on the publication of reports on audited accounts, since the Agency is a budget institution under the Law on Financing the State Institutions, the financing audit is conducted by the Office for Auditing of Financial Operations of Institutions of Bosnia and Herzegovina on annual basis, in accordance with applicable Law on Auditing (Article 22 para 4 of the Law on Financing the State Institutions). The audit is conducted within 90 days after submission of annual reports of the Agency, prior to submission of the Annual report on budget execution by the Ministry of Finance and

Treasury. The Law on Financing the State Institutions also sets further requirements for this audit and stipulates that the report on annual audit on budget executions (including the one of the Agency) must be adopted by the Parliamentary Assembly of BiH before approving and adopting a new budget. For the sake of clarity, and in order to highlight the importance of the accountability and transparency of the Agency, it would be useful to stipulate the provisions on financial audit directly in the Law.

Recommendations:

- The accountability mechanism for the Agency should be strengthened based on *ARTICLE 19*'s recommendations.

Budgetary independence

Overview

As noted above, the Communication Law stipulates a functional independence of the Agency.

Further regulation on the budgetary operations is, however, set in the Law on Financing of the State Institutions which specifies the way in which the Agency shall set up its budget and the provisions for the budget execution. Article 12 of the Law on Financing of the State Institutions stipulates that the Ministry of Finance is responsible for the budget execution of budget institutions, including the Agency. This includes preparation of plans for cash flows and determination of plans for allocation of available budget funds of the Agency for a given period. The Ministry of Finance and Treasury also authorizes financial commitments and spending on a quarterly or other basis. The Agency is also obliged to prepare and submit proposals for its operational budget to the Ministry on a monthly basis. The Ministry subsequently informs the Agency about the approved operating budgets. Under the proscribed accounting system, the Agency then issues requests for payments and budget transactions that are processed by the Ministry.

Analysis

The status of the budget institution, with a close oversight and control of the Ministry of Finance over the execution of the budget compromises the financial independence and budgetary autonomy of the Agency. Under the current provisions, the Agency falls under the same regime as any governmental administration and is unable to execute its budget or to finance its operations without the threat of interference or undue delay.

It is therefore recommended to ensure the independence and budgetary autonomy of the Agency also through an exemption from the Law on Financing State Institutions.

Recommendations:

- The Communication Law should explicitly stipulate the budgetary authority of the Agency in order to allow for independent financial operations.
- In order to avoid any doubts as for the financial independence, the legislator should consider regulating all budgetary and financial issues related to the Agency in the Communication Law rather than disperse it in various pieces of the legislations. These issues should include the provisions on the budget and its review, including the annual audit and publication of audited accounts, determination of salaries of the Agency personal and other issues.

Membership

a. Nomination and appointment of the members of the Agency's bodies

Overview

Under Article 36 para 2 of the Communication Law, the bodies of the Agency are the Council of the Agency (the Council) and the Director General. Article 39 para 2 states that the Council shall consist of seven members.

Article 36 para 4 of the Communication Law stipulates that equal representation of “both sexes should be promoted in the selection and appointment of members of the Council of the Agency.” It also states that the Agency bodies shall, in general, reflect equal gender representation.

Under Article 39 para 2, the members of the Council are nominated by the Council of Ministers from the list of candidates submitted by the Council in a double number to the number of available posts. In preparation of the list of candidates, the Agency is, again, required to ensure gender equality, by ensuring equal gender representation on the list of candidates.

The members are then appointed by the Parliamentary Assembly of BiH, within thirty days after the submission of the nominations. The Communication Law also specifies the procedure should the Parliamentary Assembly reject the nominations from the Council.

Article 39 para 2 further states that members of the Council shall be appointed in their personal capacity as individuals with exceptional legal, economic, technical or other relevant expertise or experience in the fields of telecommunications and/or broadcasting.

Under Article 40 para 1 of the Communication Law, the Director General is nominated by the Council and is approved by the Council of Ministers within 30 days after submission of the nomination. The references are made to the requirement to ensure gender equality within the Council. Under Article 40 para 2, the nomination of the Director General should result from a public competition. Applicants for the position are required to have relevant experience in the fields of telecommunications and/or broadcasting as well as proven management skills. The Communication Law does envisage a procedure in case the Council of Ministers rejects the list of candidates provided by the Agency.

Analysis

As noted in the section on international standards, the independence of the broadcasting regulatory bodies should be also secured through open, democratic and transparent appointment process. Hence, the appointment of members and management structures of the regulator should be undertaken in a manner that is open and transparent.

Specific system for appointing members of the broadcasting regulatory bodies varies in different countries; however, the international standards require that this process is free from political interference and economic interests. Its appointment process should not be controlled completely by the ruling party as this could lead to the appointments being purely political rather than in the public interest. It is also recommended that such process should

have some elements of public participation, for example through hosting public hearings or through allowing the public to nominate suitable candidates.

Importantly, the governance and management structures of the broadcasting regulatory bodies should be reasonably representative of society as whole.

ARTICLE 19 notes that the provisions of the Communication Law only partially meet these requirements. In particular, *ARTICLE 19* observes the following issues.

The **appointment of both the Council and the Director General** is not completely immune from political pressures. As for the members of the Council, it appears that the Government (the Council of Ministers) takes an ultimate selection of those who shall be nominated to the post by the Parliament. Although the Parliamentary Assembly can reject these nominations and process can be returned to the original list of nominees, we believe that such possibility of political interference should be limited.

The Government has also ultimate decision in the appointments of the Director General. Here we observe that the Communication Law does not clearly specify the procedure in case the Government rejects the nominee of the Council. Therefore, it is possible that the Government does not automatically appoint the nominee for the post of Director General within 30 days of the submission. As has been the case in the past, the provisions of Article 40 para 1 have been applied in a way that the Government simply rejected the nomination leaving the status of the Director General and the legality of his decision in limbo for several years. This is an unacceptable state of affairs and creates an opportunity for paralyzing the Agency, for political interference and possibilities of delay in the appointment process.

In order to overcome the confusion of the implementation of the Communication Law and also to minimize political influence, it is recommended that the appointment of the Director General is carried out by Parliament. We note that the Bosnian legislators could extrapolate such procedure from the one propose by *ARTICLE 19* in the Model Law on Public Service Broadcasting: those who receive two thirds of the vote shall be elected.²⁷ Similarly, the Model Law suggests such procedure for the the position of a managing director (Article 12 of the Principles).

Based on this model, it is proposed that the Communication Law stipulates an obligation of the Parliament to carry out the election of the candidates for the post within 30 days of the nominations' submission. The candidate who receives two-thirds of the votes cast should be appointed. Alternatively, the Law should stipulate that in order to appoint a nominee within 30 days, the Government should ensure the appointment through secret voting and the candidate with the majority of votes cast should be appointed. The Law should also explicitly stipulate under which conditions the Government could reject the nomination list in its entirety and specify the appointments in the second round within explicit time limit.

ARTICLE 19 appreciates that the Communication Law requires a respect for **gender equality and parity in the governance and managerial structures** of the Agency. However, we note that these should also represent the society as whole since the role of the regulatory bodies

²⁷ See Model Public Service Broadcasting Law, Article 6 para 1; available at <http://www.article19.org/data/files/pdfs/standards/modelpsblaw.pdf>.

should be to represent a public interest at all times. Explicit guarantee against any discrimination in the nominations (on other grounds than only gender) would, thus, be preferable. This could be done by reference to the antidiscrimination legislation (the Law on Prohibition of Discrimination No. 405/09 of 23 July 2009). The Communication Law should explicitly stipulate that the provisions of this legislation also apply to the appointments of governance and management structures of the Agency.

ARTICLE 19 also notes that the Communication Law does not provide for a process of public participation in the nomination procedure of members of the Council. The Law only stipulates that the list of nominations is produced by the Council; however the Law does not mention how this list is compiled. Since public participation helps to secure democratic legitimacy of the broadcast regulator, *ARTICLE 19* recommends that professional and civil society organisations should have an opportunity to actively participate in the nomination process.

Also, the Communication Law is entirely silent on the **transparency of the nomination and appointment process** of both the members of the Council as well as the Director General. We assume that since the Parliamentary Assembly appoints the members of the Council, this is done within the regular functioning of the Parliament and that the upcoming voting and the results are made available to the public. The process of nominations, however, lacks any transparency; e.g. there are no mentions that such list should be made public within a certain timeframe or at all. In the light of what has been said previously about the lack of public participation, this obscurity does not seem to be conducive of transparent governance. The process of the appointment of the General Director is similarly obfuscated since no guarantees for openness are provided in the Communication Law. Under the current framework, it might appear that the appointment of the Director General can simply be announced to the public after the whole process has been completed.

Recommendations:

- The appointment process for the governance and management structures of the Agency should be free from any political and economic interference. The Communication Law should prohibit the Council of Ministers from such interference when finalizing the nominations for the Council members to the Parliamentary Assembly.
- The Communication Law should stipulate that the Director General is appointed by the Parliament, based on specific nomination of the Council of the Agency and with the candidate who receives two-thirds of the votes in the secret ballot being selected. The Communication Law should further specify the process in case no candidate receives required number of votes in the first vote and process for returning the nominations list to the Council for re-nomination. Alternatively, the Law should, through an explicit set of provisions on the selection of nominees, prevent a situation when the Government can interfere with the selection by not acting on nominations.
- The Communication Law should be amended to provide that the membership in the Council of the Agency should be representative of the society as a whole and refer to the Law on Prevention of Discrimination as applicable in the nomination and appointment process.
- The Communication Law should include provisions on transparency in both the nomination and appointment of the governance and management structures of the Agency.

- The Communication Law should also provide a possibility for public participation in the nomination process for the members of the Council and the Director General of the Agency.

b. Rules of incompatibility

Overview

As noted above, Article 39 para 2 of the Communication Law states that the members of the Council are to be appointed solely in their personal capacity. According to Article 39 para 3, officials in legislative or executive functions at any level of Government or members of political party organs are excluded from the membership of the Council. Under Article 40 para 3, the same provisions are provided for the nominations of the Director General.

According to Article 39 para 4, members of the Council must declare any interest in a telecommunications operator or a broadcaster and shall recuse themselves in cases that present a conflict of interest. Similarly, under Article 40 para 4, the Director General is prohibited from having any financial relations with a telecommunications operator or a broadcaster.

Analysis

International standards require that the membership of the broadcasting regulatory governance consists of people with proven expertise and suitably qualified to provide the regulator with the necessary knowledge to effectively regulate the various industries. They should also be required to be independent from government, political parties and the regulated industry so that independence of the body is not questioned. A member of an independent regulator may not be an employee of government or public service, an official of a political party or an employee of a broadcasting or telecommunications company. The members should also be persons with integrity that can be relied on and trusted. Therefore those that have been convicted of a serious crime may not serve in governance bodies of the regulator.

These requirements appear to be sufficiently met by the provisions of the Communication Law, although they could be explicit in terms of other interests than political, e.g. financial interests. Here, we note that the Article 39 para 4 of the Communication Law stipulates an obligation of a Council member to declare a conflict of interest and recuse himself/herself in such cases; and Article 42 para 1 states a conflict of interest (as defined in the Code of Ethics) as grounds for dismissal prior to the termination of the mandate. We assume that this is to be interpreted that any financial interest presents an automatic disqualification from membership in the Council and is not limited to a requirement to declare a conflict of interest by the Council member when voting on a specific matter. For the sake of clarity, it would be useful to specifically state that those holding positions in, receiving payments from or having directly or indirectly significant financial interest in telecommunications or broadcasting should not be appointed as members of the Council.

Recommendations:

- In order to avoid any ambiguity in the interpretation, the Communication Law should stipulate that the membership in the governance and management structures of the Agency is incompatible with having significant direct or indirect interests in telecommunications or broadcasting.

c. Terms of office

Overview

Both the members of the Council and the General Director's term in the office shall be 4 years and they can be re-appointed only once (Article 39 para 2 and Article 40 para 1 respectively).

Analysis

International standards require that members of the broadcasting regulatory bodies are appointed for a fixed term. This requirement is met in the Communication Law. *ARTICLE 19* has no recommendation on this matter.

d. Manner of termination of office

Overview

The provisions for the dismissal of the members of the Council are set in Article 42 of the Communication Law. The sole authority to dismiss the members of the Council prior to the completion of their mandate lies with the Parliamentary Assembly of BiH. The Council of Ministers can dismiss the Director General.

The dismissal prior to termination of the mandate is permitted only in specific circumstances, namely

- i. illness rendering the individual incapable of performing his/her duties;
- ii. conviction of a crime punishable by imprisonment; iii) conflict of interest, as defined in the Agency's Code of Ethics, including specific circumstances of a member of his/her household;
- iii. resignation;
- iv. failure to perform his/her duties – for the members of the Council this is to be understood as the failure to participate in three or more successive meetings and for the Director General it is to be understood as a failure to perform his/her duties as stipulated in the Law or in his/her Contract of Employment.

Analysis

International standards stipulate that the dismissal of the members of the governance and managerial structures of the regulator should be vested in the appointing body, should be subject to judicial review and should be permitted only in specific circumstances.

ARTICLE 19 observes that these conditions are largely met by the provisions of the Communication Law that allows the dismissal only by the appointing bodies (the Parliament Assembly for the members of the Council and by the Government for the Director General). The conditions for the dismissal are also satisfactory as those are limited to incapability to perform the duties due to illness or conflict of interest or violation of the code of ethics.

We have two observations as for the dismissal:

- The Communication Law is silent on **the possibility of a judicial review** of the dismissal of the members of the Council and the Director General. We note that judicial review should serve as an important guarantee against possible arbitrariness of such decisions.

- The possibility of dismissal based on the conviction of a crime “punishable by imprisonment” (in Article 42 para 1 b) appears to be significantly disproportionate. It is commendable that the Communication Law wishes to ensure that the members of the Council and the Director General are persons with integrity. However, possibility of dismissal based on any crime, despite of its nature, does not seem to be an assurance of such integrity; for example, it can include dismissal for negligent conduct. We note that the Recommendation Rec(2000)23 specifically states that dismissal of Council members or the Director General on the grounds of an offence connected or not with their functions should only be possible in serious instances. We recommend that this possibility should be limited to being convicted after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged, as recommended by *ARTICLE 19* Principles.

Recommendations:

- The Communication Law should explicitly stipulate that the dismissal of members of the Council and the Director General prior to the completion of their mandate should be a subject of judicial review.
- Membership should be excluded and dismissal from the mandate should be permitted for those members of the Council and the Director General who have been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.

e. Payment and reimbursement of the members of the Agency and the staff

Overview

Article 43 provides that the Agency should employ officers and staff for efficient performance of its functions. The staff should be recruited on the basis of professional merits and skills; requirement of ensuring gender equality in recruitment is specifically stipulated. Under Article 43, the Council shall also determine which positions fall under the scope of the Law on Civil Service under general principles of this Law.

The Communication Law contains no provisions on the remuneration of the members of the Council or of the Director General. Provisions on salary payments for appointed persons to institutions of BiH are stipulated in the Law on Salaries and Compensations in the Institutions of BiH. This Law does not explicitly mention any payments to members of the Council, however, the salary grades for “elected and appointed” persons are provided in Article 10 of the Law. Article 21 of the Law on Salaries also explicitly stipulates a salary grade and coefficient for the “Director of Communications Regulatory Agency” in Article 21 of the Law.

As for the salaries of the staff, the Communication Law stipulates that the pay structure for staff salaries should be established by the Council; however, these should be “harmonised” with the salary structure of the civil service institutions of BiH.

Analysis

In its Principles, *ARTICLE 19* recommends that rules on payment and reimbursement of members should be set out clearly in law in a manner that does not allow for discretion in relation to individual members. Members should be prohibited from receiving any funds, other than those provided for by law.

Broadcasting regulators should also be allowed to employ qualified staff that shall perform the duties the regulator is tasked with. Similar to the governance bodies, the personnel of broadcasting regulators should be independent from the government, political parties and the telecommunications and broadcasting industry.

The provisions on the remuneration of the Agency's personnel in the Communication Law do not meet these requirements and also seem to contradict its own provisions on "functional independence."

ARTICLE 19 makes especially the following observations:

- The Communication Law makes no mention on how the members of the Council of the Agency are remunerated for their service in the Agency, if at all. The Communication Law is silent on this matter. At the same time, the Law on Salaries provides salary grades and coefficients for "appointed persons" in the institutions of BiH, hence, it is assumed that some remuneration is possible under this Law.
- The grade and coefficient for the salary of the Director General is specifically set in the Law of Salaries and Compensations. These provisions appear to compromise the functional independence of the Agency since they indicate that the position is a part of the governmental structures from the point of finances.
- *ARTICLE 19* has not had an opportunity to review the Law on Civil Service in relation to the personnel of the Agency. Revision of this Law is necessary to determine whether there is a conflict with the functional independence of the Agency under such Law.

Mindful that discretion in relation to salaries creates tension and opportunities for influence, we consider that this regime is problematic from the standpoint of the broadcast regulator's independence. It is recommended that the rules relating to payment and reimbursement of members of the broadcast regulator are clearly specified in the law.

Moreover, it is recommended that the Communication Law stipulates that the personnel of the Agency are excluded from the category of civil servants. Such exclusion and possibility to set the remuneration scheme would also help to recruit more qualified staff and avoid a situation where individual ministries second civil servants to the Agency. All these provisions should be made in respect to making the Agency independent in the financial area and would require amendments to the Law on Financing of the State Institutions accordingly.

Recommendations:

- The Communication Law should clearly set the rules for reimbursement and payments of the members of the Council. The Law should stipulate that members are prohibited

from receiving any funds other than those connected with their functions as members of the Council.

- The provisions of the Law on Salaries and the Law on Ministries that undermine the independence of the Agency and its staff should be amended. The legislation should ensure that the Agency and its staff are exempted from the provisions of this Law, including the provisions on staff remunerations.
- The Communication Law should stipulate that the Agency staff are excluded from the category of civil servants; while ensuring simultaneously the budgetary independence of the Agency.

Funding

Overview

Funding of the broadcasting regulatory body is an important indicator of its independence. Under Article 44 of the Communication Law, the budget of the Agency relates “directly to the Council of Ministers’ sector policies.” For each fiscal year, the Director General submits the budget, as adopted by the Council, to the Council of Ministers for approval.

The Agency is funded from the recurrent technical license fees payable by telecommunications operators and broadcasters, as well as from grants and donations that have to be in conformity with general principles of the law. If grants or donations are received for specific tasks or projects which are in the public interest, these must be accounted for separately and should not be included in the regular budget. Under Article 44 para 3, fines collected by the Agency through the performance of its right to apply enforcement measures, and levies invoiced as directed by the Council of Ministers shall be remitted to the Council of Ministers for inclusion in the budget of the institutions of BiH.

Analysis

As noted above, under international law, independent funding has been recognised as being fundamental and key to the overall independence of broadcast regulators. In this regard, the Council of Europe Recommendation states:

Arrangements for the funding of regulatory authorities - another key element in their independence – should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities’ activities, so as to allow them to carry out their functions fully and independently.²⁸

ARTICLE 19 Principles also require that funding decisions should be clearly set by law and should not depend on ad hoc decision making; they should also be transparent and be made only after consultation with the regulator.

In the light of these requirements, *ARTICLE 19* observes that financial independence and budgetary autonomy of the Agency is insufficiently provided for in the Communication Law. Moreover, it is compromised by the Law on Ministries and the Law on Salaries. The Communication Law contains no provisions stipulating on what basis the Council of Minister can review, amend or reduce the budget of the Agency. Lack of such provisions allows the

²⁸ Recommendation Rec(2000)23, Section 9.

Government to make significant reductions or cuts without justifications and in an arbitrary manner.

ARTICLE 19 notes that such provisions might be contained in other legislation that has not been reviewed for the purposes of this analysis. However, in order to prevent any interference with the budgetary independence of the Agency through financial control, the Communication Law should explicitly stipulate if, when and how the Council of Ministers can amend the approved budget.

Recommendations:

- The financial independence of the Agency should be provided through a set of safeguards pertaining to the Agency's budget in order to shield it from interference by the Council of Ministers. Namely, the Communication Law and the Law on Financing the Institutions of Bosnia and Herzegovina and other legislation should provide that the Government cannot limit the budget approved by the Council below a certain limit or percentage.