



CENTRE FOR LAW
AND DEMOCRACY

Slovenia

Comments on the Radio and Television Corporation of Slovenia Act (ZRTVS-2)

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Introduction

These Comments contain a general analysis by the Centre for Law and Democracy of the Radio and Television Corporation of Slovenia Act (2010 Act),¹ adopted by the Slovenian National Assembly on 20 October 2010² and which, in accordance with Article 59, will come into force on 1 January 2011. There has been criticism of some aspects of the Act by the opposition and it will be the subject of a national referendum on 12 December 2010.

Article 58 of the 2010 Act repeals the previous law governing the Slovenian public broadcaster, which has the same name and was adopted in 2005 (2005 Act),³ when the government was under the control of the party which is now in opposition. That law was also the subject of a national referendum, which narrowly upheld the law. The current debate over the law should be seen in light of these previous developments.

The purpose of these Comments is to provide an international law perspective on the Act with a view to providing input into and informing the debate leading up to the referendum vote. The Comments also refer to better practice in other States.

These comments are in three parts. The first section outlines our two main concerns with the Act, which relate to the question of independence, in particular of the Supervisory Board, and the excessively complex and overlapping oversight mechanisms for the Radio and Television Corporation of Slovenia (RTV Slovenia). The second section discusses a number of issues which we understand are a matter of current debate in Slovenia. Finally, the third section identifies a number of more minor concerns and recommendations for improvement in relation to the 2010 Act.

In many respects, the 2010 Act is exemplary in terms of giving effect to international and European standards on public service broadcasting, almost a model law. Some of its particularly strong points are the very extensive provisions designed to secure the independence of the leading oversight body, the Council, the very detailed description of the public service mandate of RTV Slovenia, including a strong commitment to minority programming, and a set of rules designed to promote the accountability of RTV Slovenia, including strong requirements of transparency.

¹ The English translation of the 2010 Act is available on the website of the Ministry of Culture, at: http://www.mk.gov.si/fileadmin/mk.gov.si/pageuploads/Ministrstvo/Zakonodaja/Mediji/zakon_o_rtv/ZRTVS-2_AN.pdf.

² The reference to 20 November 2010 in the version of the law that we have is apparently a mistake.

³ An English translation of this law is also available on the website of the Ministry of Culture, at: http://www.mk.gov.si/fileadmin/mk.gov.si/pageuploads/min_eng/legislation/ZRTVS_1..pdf.

At the same time, it would still benefit from further improvements. Most of the recommendations in these Comments are a matter of tweaking the law, and perhaps some could even be addressed through regulations or working arrangements. The concerns with the independence and role of the Supervisory Board, which largely undercuts the power of the more independent Council, are more serious and, if left unaddressed, could cause serious problems for the success of RTV Slovenia as a public service broadcaster.

1. Two Main Concerns

Independence

As noted above, in some ways the 2010 Act is exemplary in terms of promoting the independence of RTV Slovenia. There are, however, two key areas where this independence is undermined. The first is in relation to appointments to the Supervisory Board which, as noted below, exercises very important oversight powers in relation to RTV Slovenia. Indeed, for many important decisions, the powers of the Supervisory Board effectively trump those of the Council. Pursuant to Article 31(1), the National Assembly appoints three of the seven members of the Supervisory Board, one of these on the proposal of the National Assembly Commission for Public Finance Control. Another member is appointed by the government, with two members being appointed by the Council and one by the Workers' Council.

It is very well established that, pursuant to international law, bodies which exercise regulatory powers over the media must be independent of both political and commercial control. Indeed, this is implicit in the very title of Council of Europe Recommendation R(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector.⁴

While appointment of members by the National Assembly is less problematical than direct appointment by government, it still fails to provide adequate protection against political interference. This is particularly the case given that no conditions are imposed on the power of appointment by the National Assembly (for example that civil society organisations might nominate candidates or that the process of appointment be open and consultative). Where the government controls the National Assembly, this effectively gives it control over the Supervisory Council, contrary to international and European standards.

Oversight Mechanisms

The 2010 Act establishes three main oversight bodies for RTV Slovenia: the Council, the Supervisory Board and the Board of Directors. In addition to this, the Court of

⁴ Adopted 20 December 2000.

Audit of the Republic of Slovenia, the government and various regulatory bodies have certain oversight powers over RTV Slovenia.

The Council, which, as noted above, is appointed in a manner that provides strong protection for its independence, is envisaged as the supreme oversight body for RTV Slovenia. Pursuant to Article 23, it adopts the annual “programme-business plan” and “programme schemes”, as well as the annual report on their implementation. However, all of these documents must be ‘consented to’ by the Supervisory Board, after being proposed by the Board of Directors, before being put to the Council. The Council also appoints, on the proposal of the Supervisory Board, the director-general, and upon the proposal of the director-general, the Board of Directors. Upon the proposal of the Board of Directors and Supervisory Board, the Council adopts RTV Slovenia’s Statute, and upon the proposal of the Board of Directors, it adopts ethical and professional standards, and the five-year development strategy.

For its part, the Supervisory Board proposes the director-general and is responsible for proposing the dismissal of members of the Board of Directors, including the director-general (Article 32). It is generally responsible for overseeing RTV Slovenia’s operations, which includes various financial oversight powers. The Supervisory Board also consents to the Board of Directors proposed annual “programme-business plan” and “programme schemes”, as well as the annual report on their implementation. In other words, the Supervisory Board exercises very substantial powers over RTV Slovenia, and often exercising control over important documents and decisions before they reach the Council.

The Board of Directors is generally responsible for running RTV Slovenia’s operations, and for preparing the various documents which must be consented to or approved by the Supervisory Board and Council (Article 26). The five members of the Board of Directors take decisions on a majority vote basis, which means that the wishes of the director-general may be overridden by the other members.⁵

Certain powers over RTV Slovenia are reserved for the government (Article 46(3)). The Court of Audit has wide powers to oversee “the accuracy and advisability of the operations, revision of the documents about operating and documents about planned operations of RTV Slovenia” (Article 46(2)). Finally, various regulatory bodies – for the media, for internal affairs and for the market – have various powers over RTV Slovenia (see Article 51).

Most public service broadcasters have either one governing body and a chief executive officer or one supreme body and another more executive body, usually led by the chief executive officer. The existence of three bodies in the case of RTV

⁵ The director-general does have the power to propose the dismissal of other members of the Board of Directors, but it is the Council that actually dismisses.

Slovenia is unnecessarily complex. More importantly, the overlap between the roles of the Council and Supervisory Board in relation to the key documents and decision-making processes for RTV Slovenia is highly problematical and seems very likely to create conflict or worse. It is unclear why the Council has not simply been granted the power to adopt these documents and decisions without the Supervisory Board playing an intermediary role. This is exacerbated by the fact that while the Council is independent and representative, the Supervisory Council is dominated by official appointees, as described above. Taken together, the oversight structure seems likely to create tension and conflict within RTV Slovenia, in addition to undermining its independence.

The structure of the Board of Directors is also problematical inasmuch as it appears to undermine the leadership role of the director-general. It is important in a major media outlet such as RTV Slovenia to have one person operating as the main executive decision-maker and providing overall leadership. There is nothing wrong with creating a wider body to share in these responsibilities, but the chief executive officer must have the power to provide central leadership. The structure of the Board of Directors does not promote this.

It is quite unclear what rationale underlies the allocation of such broad powers to the Court of Audit. It is common to require the accounts of public broadcasters to be audited by an accredited auditor; indeed, this is just good business and accountability practice (and this is provided for in Article 46 of the 2010 Act). But the powers of the Court of Audit go far beyond this and would appear to overlap with many of the powers exercised by the Council and Supervisory Board. This may undermine the independence of RTV Slovenia. And it is likely to cause further confusion and conflict.

Despite the extended system of oversight mechanisms, the 2010 Act does not provide for bodies responsible for collecting and reflecting the views of the audience. Such bodies, in the form of Programme Committees, are in place for the Italian, Hungarian and Roma content (Article 27) and for disabled persons (Article 28), but not for the general audience. An Ombudsman is appointed to secure the rights of views and listeners, but this is not the same thing.

Recommendations:

- The rules for appointing members to the Supervisory Board should ensure adequate protection against political interference. In particular, a political party or grouping which controls government and the National Assembly should not have the unfettered power to appoint the majority of the members of the Supervisory Board.
- The oversight structure for RTV Slovenia should be reconsidered. In particular, consideration should be given to simply doing away with the

- Supervisory Board, leaving the Council to exercise its powers directly.
- The structure of the Board of Directors should also be reconsidered in favour of a model that allows the chief executive officer to provide clear leadership to the organisation.
- The powers of the Court of Audit should either be removed entirely or should be narrowed substantially to focus only on financial oversight.
- Consideration should be given to putting in place a Programme Committee for general listeners and viewers.

2. Matters of Current Debate

We understand that a number of provisions in the 2010 Act are currently the subject of debate in Slovenia. This section provides an international perspective on these issues, inasmuch as they have not already been dealt with above.

Concern has apparently been raised about the legal status of RTV Slovenia under the 2010 Law (see Article 2), which is a hybrid between a public body and a corporation, in particular because this is feared to be a first step towards privatising the public broadcaster. Internationally, incorporation as a public company is a common form for public service broadcasters. This form is often chosen because it allows for substantial independence, while allowing for the efficient operation of the entity, and also protecting its public service mandate.

There would appear to be nothing in the 2010 Act that suggests a move towards privatising RTV Slovenia. Pursuant to Article 2(8), the powers of the founder are exercised by the Council, which is an independent and representative body. Should such a move start to take form, it would have to be addressed on its merits at that time.

There also appears to be some debate about whether or not it is appropriate to provide for special programming obligations for RTV Slovenia for various minorities in Slovenia, in particular those coming from the former Yugoslav republics. Given their important presence in Slovenia (our sources suggest that they comprise some ten percent of the overall population), it is quite appropriate to require the public service broadcaster to provide programming for and about them. Indeed, this is arguably an obligation of Slovenia under international law.⁶

Another concern is in relation to the express provision in the 2010 Act (Article 2(17)) that the employees of RTV Slovenia are not public employees. This is the case for most public service broadcasters globally and it is an important means of protecting the independence of the broadcaster. It may be noted that the 2010 Act contains numerous

⁶ See Article 11 of the European Charter for Regional or Minority Languages, ETC 148, in force 1 March 1998. See also Article 9 of the Framework Convention for the Protection of National Minorities, ETS 157, in force 1 February 1998. Both of these treaties have been ratified by Slovenia.

provisions protecting the status of employees, including, importantly, Article 47, which provides that payment shall be pursuant to a collective agreement (but also provisions on training, on participation in management and regarding editorial matters).

Another controversial rule is Article 12, which provides that all parties represented in the National Assembly (and, respectively, the European Parliament) shall have the same free time on RTV Slovenia to present their platforms and candidates for elections to these bodies, while parties that are not represented shall have at their disposal two-thirds of the time allocated to parties with representation. This is problematical. Although different countries use different formulae for calculating the time to be allocated to parties, giving all parties with representation equal time can be misleading, inasmuch as it suggests to the electorate that they somehow have equal support. Allocating two-thirds of this time to parties which have not even managed to secure a seat is even more distortive, although these parties should at least be guaranteed some access.

Another controversial provision is Article 47, providing for the allocation of bonuses to staff, management and members of the oversight bodies, to be taken from surplus revenues over expenses. It is important that public service broadcasters be able to pay their employees competitive salaries, since they operate in competition with private broadcasters, at least in respect of audience shares. In many countries, this has been a problem, with overly rigid rules constraining the ability of public broadcasters to compete effectively.

At the same time, this particular system for addressing this does create a risk of some problems. Most corporations, whether public or private, compete openly on the market and within a framework which encourages them to maximise their profits. Public service broadcasters, on the other hand, are usually specifically required to engage in uncompetitive behaviour, by producing programming that may not be produced, or produced to such an extent, by commercial broadcasters due to its cost, such as documentaries, investigative stories and educational material. Furthermore, maximising advertising profits is in tension with the goals of public service broadcasting. By encouraging cost cutting, the bonus system as envisaged runs counter to key public service goals.

Recommendations:

- The system for allocating free time on RTV Slovenia for political parties – both represented and not represented – should be reconsidered in favour of a system which somehow recognises the base of popular support for different parties.
- The system for providing bonuses to RTV Slovenia staff and management should be reconsidered in favour of a system that is better aligned with the public service mandate of the organisation.

3. Other Concerns

This section provides a number of comments on more minor concerns with the 2010 Act.

Article 5(2) provides that new services may be approved, but appears to limit this to services which make “innovative use of technical mechanisms”. While such services may well form an important part of the new services provided by RTV Slovenia, the broadcaster should not be formally limited to such new services, as there may still be a need for new services which are otherwise traditional in nature.

Article 6(2) requires RTV Slovenia to ensure that a majority of its programming consists of “cultural, artistic, informational, documentary and educational content”. This is welcome but Article 6(3) provides that in case of a failure to achieve this, the Council **shall** initiate the procedure for removal of the members of the Board of Directors. This is too rigid, and fails to for less drastic measures to address such a failure.

Article 7 provides for the reuse of RTV Slovenia’s archives, upon payment, for both commercial and non-commercial purposes. While there are some limitations on this, and while there are clear public interest reasons for making these archives accessible, the rules set out appear to give third parties very broad access to RTV Slovenia’s archives. This may undermine the ability of RTV Slovenia to maximise its own use of these archives.

Article 18(3) requires members of the Council to be persons who have promoted democracy, the rule of law, civil society, fundamental human rights or other fundamental constitutional principles and values. Article 19(8) describes an extremely technical set of rules governing the timing and process for appointments to the Council by the National Assembly. Article 20(1) prohibits any official of a State body, or anyone who has shares in the media, from being appointed to the Council.

While it is understood that these rules are designed to promote the independence of the Council, at the same time they appear to be overly restrictive. For example, Article 18(3) would appear to exclude potentially worthy candidates, such as individuals who had promoted culture and the arts. There are various ways in which the scheme in Article 19(8) could still fail; at the end of the day, some commitment to making the system work, even if every detail is not spelt out, is needed. It seems unduly harsh to exclude all officials from the Council, as long as individuals with strong political connections are excluded. And in the modern world, it is possible to have a small number of shares in a media enterprise, as part of a larger stock ownership portfolio, which would hardly warrant exclusion from the Council.

In contrast to these very protective rules, Article 21(3) allows for members of the Council to be removed on grounds of incapacity, as determined by the Council, without appearing

to provide any protections against abuse. In this case, the appointing body has to agree to remove the member, but he or she is suspended from voting until this happens. It might be preferable to at least require a super-majority vote by the Council to find someone to be incapable.

Article 48(1) provides for RTV Slovenia to be fined between Euro 4,000 and 25,000 for various ‘misdemeanours’ including publishing political or religious propaganda. This seems an extremely low maximum fine for what could potentially be quite a serious offence.

Recommendations:

- Article 5(2) should be amended to allow for new services which do not make innovative use of new technologies.
- Consideration should be given to simply allowing, rather than requiring, the Council to remove the Board of Directors in case of a failure to meet the obligations of Article 6(2).
- Consideration should be given to introducing further limitations on the right of third parties to use RTV Slovenia’s archives, particularly for commercial purposes.
- The provisions in Articles 18(3), 19(8) and 20(1) should be reconsidered in favour of less rigid, stringent rules.
- Consideration should be given to providing additional protection against removal of a member of the Council pursuant to Article 21(3) on grounds of incapacity, for example by requiring a super-majority vote by the Council to find someone incapable.
- Consideration should be given to increasing the maximum fines that may be imposed on RTV Slovenia for the various wrongs listed in Article 48(1).