Comparative Survey of the Media Legislation in the South-Eastern European Countries

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Part A

Comparison

Comparative Survey of the Regulatory Framework of the Broadcast Media in South Eastern Europe

1. Introduction

The regulation of broadcasting within Europe is framed by the rules and guidelines of two main bodies: the European Union and the Council of Europe. The main function of the laws and regulations enacted by the Union is to ensure the creation of the internal market in audiovisual services, albeit within a framework read in the light of respect for democracy, the rule of law, and fundamental rights, especially freedom of expression. The main instrument for securing this goal is the Television without Frontiers Directive, although broadcasting, and the infrastructure necessary for receipt and transmission of programming benefits from the freedom to provide services (article 49 EC). The Television without Frontiers Directive essentially deals with content, assuming that the appropriate regulatory frameworks are in place within the Member States. Other directives deal with technical standards. The Communications Review, when the directives come into force next year, will have an impact on the freedom of member States and the regulatory structures they have in place. This, however, relates more to ensuring that all electronic communications networks are dealt with in a similar manner, content being dealt with separately. As the position currently stands, the only requirement on national regulators is that they do not discriminate on grounds of nationality, nor impose restrictions on transfrontier broadcasting, effectively ruling out a national monopoly broadcaster. Instead, it is the recommendations of the Council of Europe which give specific guidance on appropriate regulatory frameworks, particularly as regards regulatory authorities (see particularly, Rec (2000) 23 of the Council of Europe on the Independence and Functions of Regulatory Authorities). As examples of the current EU Member States show, however, even within this framework there are different ways in which the concerns identified may be protected. Although there have been some steps forward in this area for the SEE states in this survey, many problems and weaknesses remain.

2. Recommendations for the Operation of an Independent Regulatory Structure

2.1 Outline of Rec (2000) 23

Contained in the Annex to the Recommendation were a number of principles providing guidance as to how to ensure the independence and effectiveness of the regulatory authorities for the broadcasting sector. These relate to;

- general legislative framework;
- appointment, composition and functioning;
- financial independence;
- powers and competence; and
- accountability.

2.2 General Legislative Framework

2.2.1 Council of Europe Recommendation

The preamble to the Recommendation states that broadcasting regulation should take place through the appointment of expert independent regulatory authorities which operate within and through the law. The appendix therefore states that Member States are under an obligation to put in place an appropriate legislative framework, which define the powers and independence of the authorities in law. The enactment of the regulatory authorities as having independent status helps protect the bodies from financial and political interference.

2.2.2 Position in the EU

The three EU states have broadcasting laws which establish a regulatory body, although all three states show a period of review as changes were made to the regulatory structures (see e.g. France). Further, the British regulatory body does not as yet have competence to regulate content on the BBC; issues relating to the BBC are dealt with the Board. These points are dealt with the by the BBC Charter, not the broadcasting laws. The position is likely to change with the enactment of the Communications Bill (introduced in part to implement the EC communications review). The German system is idiosyncratic, reflecting its federal structure: broadcasting lies within the competence of the Länder, and therefore there is no one broadcasting law through out Germany. Although certain common elements can be identified throughout the laws made by the Länder. Telecommunications, by contrast, is the

responsibility of the Bund, leading sometimes to disputes as to where the boundary lies.

2.2.3 Position in SEE

Most of the SEE states have laws relating to broadcasting, though there are some difficulties, notably in bringing into force (either in part or in their entirety) the new laws drafted to take into account Council of Europe/EU requirements. Failure to bring new laws into place means that the 'old' situation continues. Thus the 'model regulatory authority' contained in the draft Serbian broadcasting laws noted in last year's report remained in limbo for a significant period and was only with amendments enacted in July 2002. Difficulties were also encountered enacting the Montenegrin law, although this was eventually enacted autumn 2002. The Romanian report also details difficulties in introducing the new system into practice. It is also questionable whether excessively frequent amendments to laws are helpful in establishing and maintaining a healthy and democratic media. Although most states show that their media laws have been refined over a period of time (e.g. Romanian law 48/1992 was replaced by law 504/2002), the Bulgarian report shows successive amendments over a short period of time: the relevant legislation was enacted in 1998 and substantially amended in November 2001 and August 2002. The position in Hungary is also problematic: the legal survey notes: 'the Act is sometimes unfortunately unreadable (with phrases having been left incomplete or phrases that are "not Hungarian" and so on).'

2.3 |Appointment, Composition and Funding

2.3.1 Council of Europe Recommendation

Many of the concerns underlying the need for a legal structure also justify the guidelines relating to the appointment, composition and funding: that is, the need to ensure that the authorities' independence is maintained and that there is no interference by political forces or by economic interests. This point is especially important given the authorities' role: they are likely to be subjected to a certain amount of pressure, whether intentionally or not, from various interest groups. Thus the Recommendation suggests that safeguards should be introduced to ensure that the regulators are protected

from political, economic or financial pressures. Measures taken should identify both the means of appointment and the mechanisms for dismissal. The Recommendation particularly notes that 'dismissal should only be possible in the case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted' and there must be a right of appeal. Further, the regulatory authorities should include experts in the field which fall within the competence of the regulatory authority.

2.3.2 Position in EU Member States

All the EU member states at least accept the principle that the regulatory bodies should be independent, as the position of the UK shows. Thus the ITC is a public body established by the Broadcasting Act 1990 as amended by the Broadcasting Act 1996[1], which sets down its functions, composition and income. The ITC consists of two elements the full time staff, who are paid a salary and appointed through standard job application procedures and the Commissioners themselves. Although they are appointed by the Government, Codes of Practice limit the level of governmental influence. In particular, this code requires the Committee, *inter alia*, to act with independently and with due impartiality; rules also exist regarding conflicts of interest. The ITC is responsible to the Minister for Culture, Media and Sport and thence to parliament. The British systems reflects the idea that the members of the regulatory authorities should be regarded as independent 'judges', who are subject to some level of democratic control but not appointed by reference to particular constitutencies.

The French also now have an independent regulator, although its history in this regard has been much more troubled. Political difficulties ensued for both the 'Haute Autorité de la communication audiovisuelle' (1982) and the later 'Commission nationale de la communication et des libertés' (1986) (CNCL) and the current system, detailed in the French report, was seen as a 'new start' for media regulation. The system used in France is effectively one by the political institutions rather than civil society, but with measures to try to

[1] See Broadcasting Act 1990 sections 1 and 2 and Schedule 1 and Schedule 7, part 1 and Broadcasting Act 1996 parts I and IV - VIII

ensure political balance. Provisions also apply which seek to prevent conflicts of interest.

In Germany steps are taken to ensure distance between the council and the state. Thus, the council is composed of representatives of the public. Statutes set down rules as to which societal groups are represented and by how many representatives. As the Explanatory memorandum notes, representatives of public or governmental bodies are limited to no more than 25% of the total membership. The Explanatory Memorandum to the Recommendation further comments that 'the organisational and financial framework of the Land regulatory authorities guarantees that they are independent and free from governmental influence, and therefore fully complies with the principles laid down in the Recommendation'.

2.3.3 Position in SEE

Although many of the SEE states have developed some form of regulatory body which is claimed to be independent, there are weaknesses in existing practice. As noted in last year's report, 'In Macedonia, for example, there is a Broadcasting Council which is defined by the Macedonian law on Broadcasting as an independent body but, unfortunately, that is not the case in practice.' The law has not been changed. Particular problems here are that there are no provisions to prevent conflicts of interest and the initial difficulties relating to the funding of the authority still casts a shadow.

By contrast, the Serbian law makes a significant attempt to identify different constituencies which should be represented in the election process. Under the enacted version of the law, the nominations are split amongst nine groups, eight of which are mainly political and the ninth member of the RBA is nominated by the previously appointed RBA members whereby the nominee must fulfill criteria for RBA membership set forth in the BA and must be a person residing and employed in the territory of the Autonomous Province of Kosovo The resultant institution is stated to be independent. All nominees are supposed to be experts in the field and not take instructions from their nominees. Provision for conflicts of interest through economic

connections with the media industry are also included in the law. As the legal survey notes, however,

> 'All of the drafts preceding the final version of the BA had less politically dependant bodies, and more of the various represents of the civil society as the authorised nominators. Government officials insisted that the addition of the National Assembly of the Republic of Serbia, the Assembly and the Executive Council of the Autonomous Province of Vojvodina to the detriment of the represents of the civil society was necessary in order to ensure the majority support in the Parliament.'

Further, although the law has been enacted, the BRA had not at the time the survey was prepared come into being[2] and it is in any event too soon to identify how it will operate in practice.

In Romania, the Council is made up of 11 members proposed by: a) Senate: 3 members; b) Chamber of Deputies: 3 members; c) President of Romania: 2 members; d) Government: 3 members. This system is therefore one based on political appointments, although with some attempt to divide the membership between the different political institutions. Theoretically, the Council is independent, although the Council of Europe advisers did raise questions on this point during the drafting of the law; the law now reflects that only *post factum* control, to ensure some level of accountability, is possible. The law did not take up the proposal put forward whereby it would not be possible to dismiss a member of council. It should be noted in passing that the explanatory memorandum suggests that the threat of dismissal can be used to undermine regulators' independence, and that at the least clearly defined terms on which individuals may be dismissed must be identified, with the possibility of a right of appeal.

Last year's report on Bulgaria noted that the appointment of members to the regulatory body, NRTC, was highly politicised. This year, the situation is different; the NRTC was dismissed as a result of amendments to the Bulgarian broadcasting laws and a successor body introduced, the Council for Electronic Media (CEM). It con-

[2] The BRA was officially inaugurated on 17th December 2002

sists of nine members - five are elected by the National Assembly and four are appointed by the President of the Republic. The appointment procedures raises questions about whether the CEM will be able to maintain its political independence: discussions prior to the enactment of the current system had raised the possibility of including nominations from NGOs or media experts; another that the acceptance of the parliamentary candidates had to be the subject of a qualified majority vote. Nonetheless, once the members of CEM have been chosen, they can be dismissed only with a decision by CEM itself, which provides some protection from political influence. Given, however, that CEM's predecessor was dismissed before its term had expired through the changing of the legislative framework, one might question the effectiveness of this provision in real terms. Indeed, this sidestepping of the law raises real questions about respect for the rule of law and has been censured[3]. Furthermore, there are further proposals for change, according to which the Council of Electronic Media, constituted only a year ago, should be dismissed and replaced by two new regulatory bodies - one for public and one for private media. Full details of this proposal have not yet been made public. Some positive changes have been introduced in the Bulgarian media law though: notably, the requirements for expertise and the conflict of interest rules.

Last year's report also noted the system for appointment to the regulatory authority in Hungary: members are nominated on the basis of party parity, elected by the Parliament. There is additionally a long list of persons who are excluded from office for reasons of potential conflict, as are their family member. Similarly the possession of a criminal record precludes an individual from being nominated. This has led to problems recently concerning one member, Judit Körmendy-Ékes, the chairperson. She had become unpopular with the various political parties, although for a variety of reasons, and has come under attack and asked to resign as her husband was found guilty of a criminal offence. It has yet to be seen how this matter will be dealt with. The Council Recommendation in this area specifies that 'dismissal on the grounds of an offence connected or

[3] See the Recommendation of the assembly of the Council of Europe of 13 December 2002 on Freedom of Expression in the Media in Europe, Doc 9640

not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court'.

Under the new Montenegrin law, the regulatory authority is to be nominated by authorised persons. The authorised nominators, each one member, of the Agency Council are:

- The Government of the Republic of Montenegro;
- the University of Montenegro/ Electro-technical Faculty;
- associations of broadcasters in Montenegro - with the exception of associations of public broadcasters;
- non-governmental organisations from the broadcasting area.

There are further provisions outlining in detail the circumstances in which a member of the Council may be dismissed. It seems that the Monenegrin law has paid very close attention to the guidelines established in Council of Europe recommendations and the advice of NGOs in this field, although it remains to be seen how the body will work in practice.

2.4 Financial Independence

2.4.1 Council of Europe Recommendation

It is clear that regulatory authorities need financial independence; lack of independence would mean that those with control over finance could exert pressure on the regulatory authority. Funding should be set at a level which takes account of the costs of the authority carrying out its tasks and should avoid mechanisms that depend on ad hoc decision making of public or private bodies. The two main possibilities for such funding are through licence or concession fees; or from the state budget. In the latter case, it seems some sorts of safeguards should be in place so that governments do not exert pressure on the regulator. Further, the funding levels should take account of the estimated costs of the regulatory authorities' costs.

2.4.2 Position within the EU

As noted above, the funding of the ITC is set down in statute. The ITC is funded by payments made by the licensees. It has a responsibility under Schedule 1 to the Broadcasting Act 1990 to keep proper accounts, which

are available to the public. The ITC is further required to ensure that it runs as a going concern. In Germany, the Councils are funded by 2% of the licence revenue, a system which has received approval from the Council of Europe.

2.4.3 Position in SEE

Within the SEE states, we see examples of both options. For example, the budget of the Hungarian regulatory authority, ORTT, is approved by way of Act of Parliament, whereas Albania envisages funding through licence fees and other similar mechanisms.

The systems in some of the states have given rise to concern. As noted last year, in Macedonia the relevant Law did not determine the funding of the regulatory authority. The main and fundamental source of funds is the broadcasting tax and the Council's funding is determined by a decision of the government of the Republic of Macedonia, which predetermines the financial dependence of the regulator. The position in Bulgaria, the subject of criticism in last year's report, remains problematic. CEM is financed from the state budget and from January 1, 2003 - from the Radio and Television fund. Since there are no returns to the fund, the state financing of CEM will most probably continue in the course of next year and this will not contribute to its financial independence. The legal survey also notes that there have been difficulties in collecting contributions to the fund, which increases dependency on the state for financing.

In Serbia, it seems that a hybrid approach has been adopted: the first source of income is from licence fees. It is only if the fees do not generate the planned income that the shortfall shall be provided from the budget of the Republic of Serbia. The provision of lacking funds is stated not to influence the independence and autonomy of the RBA. As the legal survey notes, however, 'These statutory guarantees of RBA independence, however, must be proven in practice before one might reach a conclusion on their effectiveness.'

In Romania the regulatory authority is financed from the state budget, a proposal to finance the authority through a percentage of fines on infringements having been dropped. Whatever the difficulties with state

finance, there would have been obvious difficulties with the proposed alternative.

The Albanian law is also interesting. As noted above, in the main, it provides for funds from a variety of sources: Sources of funding for the NCRT are:

- income from the payments for receiving and renewing the licence;
- income from annual fees for the licensing of the radio-television broadcasting, defined in the fiscal laws;
- 5 per cent of the annual income of the radio-television licensees

Additionally, it also allows for donations to be made, although these must be made unconditionally. Crucially, initial funding is made via the Council of Ministers. The NCRT keeps accounts of income and expenses in compliance with the Albanian accountancy legislation.

The new law in Montenegro establishes in some detail the sources of funding for the regulatory authority. It seems that the authority will not be reliant on the state for funding, which is in compliance with Rec (2000) 23. As also suggested by the Council of Europe, when determining the source and amount of income, regard was had to the agencies likely expenses. Further, the agency's accounts are to be audited annually and the agency is expected, in the interests of transparency, to make this available to interested persons. As with the Serbian position, it is still too soon to tell how this will work in practice, although the legislative framework seems good.

2.5 Powers and Competence

2.5.1 Recommendation from the Council of Europe

The Council of Europe notes that there is a significant degree of variation between countries as to how to regulate and, in particular, whether to have separate bodies responsible for separate issues - for example the split between broadcasting and telecommunications, or the allocation of frequencies versus content regulation. The level of power granted to the authorities various considerable also. Many countries leave the technical aspects of regulation with the governmental departments. As noted in the survey last year, the regulator should be empowered to make policy and enforcement decisions.

In this respect the regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities, as well as internal rules for their own activities. Should a regulator have this degree of authority, then it is also important that decision making be transparent and fair. It should be noted that there is a fine line here between ensuring accountability whilst maintaining the authorities' independence. The Recommendation in this regard suggests that regulators

> 'should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. With respect to the legality of their activities, this supervision should be exercised *a posteriori* only'.

Regulators should, of course, give reasons for their decisions and their decisions should be public and open to review.

2.5.2 Position within the EU

Within the three states selected it can be seen that currently each divides responsibility for electronic communications between various regulatory bodies, although the United Kingdom is in the processing of amending its regulatory system. It is proposed in the United Kingdom to introduce one regulator, Ofcom, to deal with all aspects of regulation in the field of electronic communications. Thus, not only will OFTEL, the BSC, and the ITC be merged, but also the Radiocommunications Agency. The ITC has clear powers to regulate the commercial television sector: it is empowered to draft rules with which the sector must comply and it has a range of monitoring and enforcement powers, which it has used. Decisions are reasoned, published and subject to review.

The French position was less clear cut, partly it seems as a result of the French view of what regulation entailed: it was with the introduction of the CSA that we see the introduction of regulation in the English sense. The earlier versions of the broadcasting regulatory body were criticised for their relative lack of resources and power. Given the weakness of the Haute Autorité in terms of finances and sanctions, it proved difficult to eliminate pirate radio stations and for it to take action against unlawful increases in transmission strength. The CNCL, the successor body to the Haute Autorité had greater

powers. One weakness in that system was the reliance on criminal sanctions, as the Public Prosecutor's office did not always give CNCL the necessary support, thus highlighting the importance of co-operation between different public bodies. The CSA has greater powers than its predecessors although it is still limited in its ability to produce general rules. It still has, however, the power to issue licences and has some powers of sanction.

2.5.3 Position in SEE

It seems that there are a wide variety of approaches regarding the scope of responsibilities to be awarded to anyone regulator. For example, in Albania there are two regulatory bodies: one relating to television (NCRT) and one to telecommunications (RTE) and the responsibility for broadcasting and telecommunications is similarly split in Bulgaria with a specific regulatory body, the Communications Regulation Commission, for telecommunications. There are separate laws to deal with broadcasting and telecommunications in Macedonia. By contrast, in Bosnia Herzogovina, the CRE has responsibility for both broadcasting and telecommunications licences. The NAC in Romania has responsibility for broadcasting and also is involved in the frequency planning process, but it is the Ministry of Communications that deals with technical aspects of broadcasting. The new Montenegrin law requires the telecommunications authority and the authority responsible for broadcasting to cooperate as far as the issuing of licences is concerned.

One further issue relates to new technologies and the extent to which services such as interactive television and the internet fall within the purview of broadcasting regulation. As such services spread and, in particular, as digital television develops, the regulatory systems will have to deal with this issue, a point that was noted in the legal surveys - for example Hungary.

Clearly regulators need some power over the industry that they regulate. Most of the SEE states seem to have provided in principle, at least, for this possibility. The report from Bosnia Herzogovina notes, 'Since its inception, the IMC - now CRA - has created a number of codes and rules that are binding for the BiH broadcasters.' Thus it is the responsibility of the regulator to draw up these codes and to enforce them. Similarly, the

report in respect of Romania notes: 'NAC can issue regulatory normative decisions' in order to carry out its responsibilities, although there have been some conflicts in its relationship with the government, discussed at 2.6.3. The new Montenegrin authority also has a broad competence, as does the CEM in Bulgaria.

By contrast, in Macedonia, the Broadcasting Council has no power itself: all decisions are taken by the relevant ministries or by the government; the Broadcasting Councils may, however, make decisions on which other bodies act. It further has no separate powers of enforcement: any action that is taken against broadcasters, is taken by the Government. The position of the Broadcasting Council would seem to be a significant weakness in the regulatory system in Macedonia: other problems are raised below.

Last year's conclusions noted 'It seems that the decision - making process concerning the broadcasting activities in the South-eastern European countries is highly politicised, lacking almost any transparency.' The position of Macedonia was cited as an example of this problem; the laws in Macedonia have not changed since then. This year's survey for Macedonia notes that the decision making process lacks transparency because:

- there is no right of appeal;
- the names of the commission members are not made public;
- the project documentation is weak; and
- there is no feedback on applications.

By contrast, last year the draft Serbian law was given as an example of good practice: the regulatory authority has been given a wide competence, so that it assumes almost all powers over broadcasters and broadcasting in Serbia. Further, it must publicise its decisions in an appropriate way and its decisions are subject to appeal in the court system. The new law and Montenegro seems also to take into account the need to ensure transparency and fairness. In particular, decision making procedures of the regulatory body are to give a broadcaster the chance to defend itself and decisions are subject to administrative review.

Mechanisms are also set up in the Albanian system to provide for accountability. The formal mechanisms are accountability to Parliament backed up by an advisory committee to which complaints may be addressed. Additionally the report notes, 'the fact that initial funding is done by the Council of Ministers and it is the government that defines the salaries means that each authority is accountable before the highest executive institution for them.' As noted by the Council of Europe there is sometimes a fine line between accountability and a lack of independence.

2.6 Granting of Broadcasting Licences

2.6.1 Recommendation from the Council of Europe

The Council of Europe Committee of Ministers recommends that:

- the basic conditions and criteria for granting and renewal of broadcasting licenses should be clearly defined in the law and the regulations should be clear and precise, and should be applied in an open, transparent and impartial manner as well as adequately publicized;

- the regulatory authorities in the broadcasting sector should be involved in the process of planning the range of national frequencies allocated to broadcasting services and should have the power to authorize broadcasters to provide programme services on frequencies allocated to broadcasting; and

- a call for tender should be made public and 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 as well as specification of the content of the licence application and the documents to be submitted by candidates; candidates should indicate their companies' structure, owners and capital, and the content and duration of programs they are proposing.

2.6.2 Position in the EU

In France statute identifies the terms of the bid procedure as follows:

- the CSA publishes an invitation to bid for candidacy stipulating what geographical zones and what categories of radio stations are concerned;
- **when the bidding period ends, the list of admis-**

sible candidates is decided upon and then a short list is drawn up;

- in relation to the bids made, the CSA establishes a list of frequencies that can be attributed;
- finally, the CSA accords the licences for a maximum of five years.

The precise terms of the licence are set out in a 'convention' which cover content issues (production quotas, advertising etc) and can be compared with the sorts of issues in the licences issued, for example, by the ITC in the UK. In the UK the Broadcasting Act sets out procedures for licence competitions; the ITC liasing with other relevant bodies so that relevant transmission capacity is available (though this does not remove the obligation on the licensee to obtain the relevant Telecommunications Act licence). In Germany, licensing is the responsibility of the regulatory authorities. They also have responsibility for frequency allocation. It should be noted that the award of a broadcasting licence does not bring with it automatically an award of frequency.

2.6.3 Position in the SEE

One of the major concerns noted last year was the significant number of pirate/unlicensed radio stations: in a number of states this position continues unchanged. Similarly the problems in Macedonia, whereby the formal, legal framework and the practical reality differ to the point where private broadcasters have access to capacity only if that capacity is not being utilized by the Macedonian Radio and Television company, remain unchanged. The regulatory authority in Bosnia Herzogovina had also to deal with a 'chaotic' situation and it instituted a two-phase process to identify first of all those who were broadcasting and then to identify the most successful broadcasters who should be awarded the licences under the new system and be allowed to continue broadcasting. This process was carried out in accordance with general criteria and also 'on the basis of points scored in four criteria: programme quality, financial information and viability, technical operations, and prior compliance with the IMC Regulations'. Article 3 (c) of the Rule sets down clear criteria by which the applications are assessed. It seems, however, that some difficulties still remain in Bosnia Herzogovina with the planning of frequencies.

A key difficulty is ensuring that the different aspects of broadcasting regulation are co-ordinated, so that when a broadcasting licence is granted there is a possibility of the content being transmitted. In some jurisdictions coordinating the different aspects required for broadcasting to take place. Thus, in Macedonia there are separate licences for programme broadcasting, the transmission of programming and for the purchasing and installation of stations, as well as the individual transmitters, involving in each different permutations of actors.

Access to transmission frequencies gave rise to some difficulties in Romania. According to the report, the NAC is to be involved with the formulation of frequency plan, via an independent Commission, although the Ministry is responsible for the actual decision. The report raises questions about the level of cooperation between the NAC and the Ministry, which may have adverse consequences for the development of the media in Romania. The report gives the example of an earlier conflict on the issue of frequencies. Two years ago, after consultation with interested bodies, the Council issued a decision to organize an auction for important high power frequencies in order to complete the existing networks of low power frequencies. The government suddenly issued an emergency order stating that only the government could organize auctions for the high power frequencies. Finally the conflict ended by compromise, the government giving up its initiative on condition that NAC should also withdrew its decision for auction.

The amendments to the Bulgarian law seem to have brought about a significant improvement in this area, however. Under the previous system, two licences would have been required: one relating to the transmission network (telecommunications licence); and the other regarding the programming (broadcasting licence). Whereas the telecommunications licences were awarded after a competitive procedure, the broadcasting licences were not subject to a comparable procedure and in practice priority was given to those already holding telecommunications licences. Not only did this system lead to inconsistent award of licences, but also the telecommunications licensing system was under the close control of the Government. Last year's report commented 'The licensing process is highly politicised and the decision making

process, especially in the state Telecommunications Commission and the Government lacks almost any transparency.' The amendments to the law introduce a universal licensing system. Although it remains necessary to have two licences, issued by the CEM and the telecommunications regulator respectively, a single contest procedure for issuing the licences has been introduced. The competition focuses on both the proposed programming and relevant technical issues. Once a broadcasting licence has been awarded, a telecommunications licence will follow. Thus broadcasting is no longer ancillary to the telecommunications regime.

The Serbian laws were also singled out for comment last year, as the proposed draft law would introduce significant improvements to the existing system, dating from the Milosevic era. Under the previous regime, two licences were required, one each for granting the use of frequencies and for issuing licenses for transmitters and links. There were a multiplicity of laws governing the use of frequencies leading to a lack of coordination of legal regulations and a lack of clarity as to whether federal or republican organs would be competent to award frequencies. There are various problems in the terms of the laws themselves which are exacerbated by the practice, described in this year's survey as 'full of anarchy and arbitrariness'. Effectively, since the Serbian government did not exercise its powers to launch a bid process, RTS, which was the only entity which did not require a public bid system to acquire frequencies and which was empowered to dispose of its own frequencies, *de facto* acquired the power to award frequencies through the disposal of its excess capacity. As a result, many broadcasters in Serbia are pirate broadcasters. Although new rules are under preparation, these have not yet come into force. As regards the second licence, the Law on Systems of Communications, did foresee a licensing procedure, setting down information to be provided to the awarding body. Practice has resulted, however, in that body illegally extending the list of requirements with the result that it is very difficult, if not impossible, to obtain the licence. The position in Serbia was therefore very undesirable. As noted in last year's conclusions and this year's survey 'The situation in earlier regulations referring to the

allocation of frequencies and issuing of licences for transmitters in Serbia clearly shows that the best way out from a very bad situation was adopting a completely new and coherent set of regulations.'

The new regime will be a significant improvement: the new Broadcasting Act is a significant improvement. It provides for the RBA to issue the relevant licences, which comprise two elements: the first is the licence for a proposed programme, and the other is the license for proposed transmitting equipment. The act also provides for public procedures for the grant of the licences, thus introducing much greater transparency into the system. Programme content is central to the process, and to counter the power of the media moguls who were backed by the Milosevic regime in the past, the Act also obliges the authority, where there is more than one applicant competing for a licence, to take into consideration the importance of the applicant for development of democratic processes in the previous period. Crucially, RBA is also responsible for the overall broadcasting strategy: it is according to this strategy that the telecommunications authorities plan the frequency use. This approach introduces coherence between programming and transmission. Although this system is an improvement, the old system has not yet been replaced in effect: public tenders for broadcasting licences according to the BA are yet to be called, most likely not before Spring or Autumn 2003.

The old Montegrin system was, according to this year's survey, 'unnecessarily complicated' and the new law therefore introduces a principle of a 'one stop shop', so that broadcasters may obtain all the requisite licences from one place. Further, Article 37 of the Law regulates the manner of announcement, the content and the terms of the Broadcasting Agency's open competition for issuing new licences for transmission and broadcasting, all of that in accordance with the Strategy of broadcasting development, and based on the Plan of allocation of broadcasting frequencies. The Law also regulates the cases when the licence for transmission and broadcasting may cease to be valid before the expiration of the period of time for which it was issued.

As noted last year, within the Hungarian system, in 1996 the ORTT determined the General Terms and Conditions of Tender in such a way so that the regulations included in it are applicable to the acquisition of both the national, both the regional and local broadcast providing licenses. This important document of the process of media transformation was published in Muvelodési Közlöny (Cultural Gazette) on August 31, 1996.

2.7 Monitoring Broadcasters' Compliance with their Obligations

2.7.1 Council of Europe Recommendation

Monitoring is noted by the Recommendation as being of great significance, though regulatory authorities should not exercise a priori control over content of programmes. Regulatory authorities should therefore be given the powers to carry out this function by, for example, requesting necessary information from broadcasters; considering complaints; and imposing sanctions where necessary. It is suggested that in the interests of transparency and legal certainty, regulatory authorities should regularly publish their conclusions in respect of complaints and investigations. Different forms of monitoring exist, depending to a significant degree on the resources available to the authority. Continuous monitoring requires significant resource and given the increase in number of channels being broadcast, is likely to become impracticable. Sample monitoring is one solution to this problem. Further, regulatory authorities might introduce self-monitoring systems. This, of course, is less reliable than regulator monitoring. Complaints procedures may be used to back up both types of system.

2.7.2 Position within the EU

All the regulatory authorities in the three EU Member States under discussion have monitoring responsibilities, as the case of the ITC in the United Kingdom shows. It has the power to monitor broadcasts, to request information (and broadcasters are under certain duties to keep records and recordings); and to hear complaints. Given the increased number of broadcasters under its jurisdiction, it comes as no surprise to find that the majority of cases are the result of viewer complaints. It should be noted that the ITC does bring some cases of its own motion, however. Complaints may also

be made to the BSC in respect of a more limited range of issues in respect of both the commercial television companies and the BBC, which has the power to request that the broadcaster broadcasts an apology. It too publishes its findings. Complaints may also brought to the BBC, although it is more difficult to find reports of its findings. The ITC has the power to impose a range of sanctions on commercial broadcasters (and the commercial arm of the BBC in respect of some aspects of digital television). As noted, it has imposed sanctions for a range of infractions and has even, after several warnings, revoked a satellite company's licence.

2.7.3 Position within SEE

Most of the systems provide for some form of monitoring on the part of the regulatory authority and the imposition of some sanctions should the broadcasters fail to comply with their obligations. Thus, for example, the Bulgarian report for this year summarises the position in Bulgaria thus: 'The Council for Electronic Media issues an information bulletin that includes the text of the decisions and up-to-date articles on the problems of the audio-visual culture, the results of the monitoring of radio and television operators, as well as the results of the surveys of the public opinion conducted at the request of the Council for Electronic Media.'

In Hungary, the ORTT has also a monitoring function. The Hungarian system also provides for a complaints committee which hears individual grievances alleging legal infringements. The means for submitting grievances are regulated by the Act, while the ORTT has determined statutes with regard to the actual procedure to be used. Importantly, the complaints committee is empowered to demand the broadcaster in question to promptly provide it with the disputed programme item and any other pertinent information requested. The ORTT has specified powers to impose sanctions on the recommendation of the complaints committee. There is also provision which gives a right of appeal against the decision of the complaints committee, which would seem to link to the need to ensure transparency and fairness of decision-making.

The Albanian authority also has the responsibility for monitoring broadcasters' compliance and decides of the application of sanctions provided by the broadcasting law, against the parties that have violated its provisions. It may also demand the intervention of other bodies according to their competencies. The sanctions are: warning, fine of up to three percent of the annual turnover of income; temporary suspension of the licence; reduction of the duration of the licence; revocation of the licence. A right of appeal exists and time limits within which the authority must bring the action are specified. As in Hungary, there is also a Complaints Council for the Radio and Television, but the function of this committee 'is to sensitize the public to ensure that public and private radio-television entities implement moral and ethical norms in their progress in a responsible way.' As such, it is concerned programmes that display abuse of violence, sex, and dignity and might be considered analogous is some ways to the British BSC.

Close attention seems to have been paid to the Council of Europe Recommendation when drafting the new Montenegrin law on broadcasting. According to that law, in cases of violation of the law, or secondary legislation based on the law, or of licence conditions, the Agency is authorised to impose upon the broadcaster some of the penalties prescribed by the law: a warning; a fine; suspension of a licence; revocation of a licence. All such decisions are made by the Agency only after a conducted procedure which gives the broadcaster the possibility of defending its case. The decisions will then be published in the Agency Operation Bulletin or in another form according to this law and the Statute of the Agency. The law gives the broadcaster the possibility to challenge any decision of the Agency imposing penalties by an administrative procedure.

There are sanctions included within the Macedonian system: sending a written warning stating that if the violation continues, a proposals would be submitted to the Government for taking away the licence and to the Ministry of Culture for starting offence procedure; sending a written warning with a request to be published by the broadcaster to which it refers; requesting the Ministry of Culture to undertaking the measures

envisaged by the supervision procedure; proposing to the Government of the Republic of Macedonia to take away the licence. Thus a range a possible measures are available to reflect the severity of the infraction and an appeal against the decision is possible. As such, the system is in line with the Council of Europe Recommendations. It should be noted, however, that the regulator has now power to impose the sanctions itself, but may only make recommendations to the relevant ministry. This is a potential weakness in the system, as this makes the regulator dependent on the cooperation (and enthusiasm) of that ministry.

3. Content

Regulation of content has a number of different aspects. At one level we can be talking about specific content requirements, such as a requirement that a certain percentage of productions be of a certain type, or more general provisions such as rules regarding plurality and diversity of opinions are represented. At a fundamental level, these types of rules are of limited value if freedom of speech itself is not protected. Rules and guidance on these issues have been produced by the Council of Europe and the European Union.

3.1 Freedom of Speech

3.1.1 Council of Europe/European Union

The European Convention on Human Rights provides, in Article 10, for the freedom of expression. Broadly speaking this means that there should be no prior censorship and that penalties imposed should comply with certain requirements, both substantively and procedurally (see Article 10(2) ECHR). Journalists and broadcasters should be free from intimidation and threats relating to their activities. It is interesting to note the European Union Charter of Fundamental Rights also provides for a right to freedom of expression and the ECJ's case law in the field of broadcasting has been expressed to be in the light of the principles contained in Article 10 ECHR. Of particular relevance in this context are those rules relating to defamation, libel and slander but also the rules which allow journalists access to information and the freedom not to disclose their sources.

3.1.2 Position in EU States

The position within the EU is not as clear cut, as one might think. The UK's position has traditionally been somewhat anomalous as the UK has no written constitution and there was therefore no express guarantee of rights; freedom of expression was stated by the courts to underlie the principles of the common law. Recently, a the Human Rights Act incorporated the terms of the ECHR into the domestic legal system, though it is too soon to determine what impact it will have. There are general rules concerning the reputations of others and limitations on the broadcast of obscene material. The problematic aspect within the UK seems not in general to be prior censorship, but rather the circumstances in which journalists are required to reveal their sources.

Article 5(1)(2) of the German Basic Law specifically guarantees the freedom of reporting through audio-visual media; this protection extends not only to the free expression of ideas and information but also includes broadcasters' institutional independence, irrespective of whether the broadcaster is a public or private body. Germany is also a signatory to the ECHR. Although there are constitutional guarantees for freedom of expression, there are specific limitations in relation to hate speech and holocaust denial, which have given rise to some disputes. Additionally, national rules provide for the prohibition of material that is harmful to young people. In the specific context of broadcasting, the Rundfunkstaatsvertrag also prohibits the distribution of certain types of content which includes: hatred; war and racial propaganda; and pornography.

France has signed up to the European Convention of Human Rights, which has direct effect within the French legal system. Rights contained in convention may thus be relied on in disputes between private parties in the French national courts. This is backed up certain constitutional values. Based on the Declaration of the Rights of Man, the Conseil Constitutionnel has held that pluralism in the media was a constitutional value constituting a precondition for democracy.

3.1.3 Position in SEE States

Most of the countries surveyed provide at the least for freedom of expression as a constitutional guarantee.

Despite this the area is problematic. As the Macedonian report noted

> 'There are examples of violations of the rights to free expression in the broadcast media especially during the election campaigns and most often they are carried out by cutting off electrical power, physical attacks on journalists, attempts to confiscate video cameras and taped materials, etc.'

Macedonia is not alone; the Serbian report notes that there have been numerous instances of the infringement of freedom of expression, to the extent that 'mentioning only the most important ones would require more space than this legal survey has at its disposal'. The Albanian report notes that those violations that occur in Albania tend to be as a consequence of the economic circumstances operating in that country.

In Romania, the report states that are no notorious cases of violations of the right to free expression in broadcast media, although there are some in the printed press, evaluated as such by decisions of the ECHR (*Dalaban* and *Constantinescu*). There has additionally been some concern expressed about the decision of the NAC to withdraw the licence of a private broadcaster on the basis that the broadcaster promoted xenophobic, racist and antisemitic opinions shortly after the broadcaster in question broadcast harsh criticism of the way Romania is currently governed[4]. There has been some discussion as to whether positive statements about freedom of expression should be incorporated in the law, so as to make certain points (such as the journalists' right to criticise the government) absolutely clear. It should be noted that there are some improvements in the Romanian provision; the criminal sanction in Bulgaria for slander and libel disseminated by the mass media has been removed and replaced with financial sanctions. It should be noted that fines in this area can still be quite high and so further amendments would be desirable.

3.2 Plurality, Diversity and Impartiality

3.2.1 Council of Europe

Recommendation R (99) 1 deals with the issue of ensuring diversity in the media. Amongst other struc-

[4] CoE Assembly Resolution, (Doc 9595 revised)

tural measures, as regards content, it proposes:

> 'Member States should consider, where appropriate and practicable, introducing measures to promote the production and broadcasting of diverse content by broadcasting organisations. Such measures could for instance be to require in broadcasting licences that a certain volume of original programmes, in particular as regards news and current affairs, is produced or commissioned by broadcasters.'

The Recommendation also notes the importance of freedom expression generally and the importance of recognising the different groups in society. Impartiality is also significant. This is not to be understood that all programmes have to put both sides of an argument equally, but that the programming strands as a whole are balanced. Further, there are limitations of the absolute freedom of speech in the interests of tolerance.

3.2.2 Position in EU States

The three states under review all provide some mechanisms to safeguard plurality and diversity; this, it generally seems, comprises part of the regulators' functions. Thus, one of the functions of the French CSA is expressed to be the safeguarding the pluralist political expression on TV and radio. There are also, for example, specific rules regarding election broadcasts to ensure fairness.

In Germany, the Federal Constitutional Court has insisted that, in operating a dual system, the state must ensure that the 'constitutional requirements of pluralistic reporting are fulfilled by the totality of programmes offered' and these requirements apply to both public and private broadcasters. Sections 31 and 32 Rundfunkstaatsvertrag imposes on the regulatory authority the obligation to ensure that there is proper diversity and balance in what the broadcasters within their jurisdiction offer. To ensure plurality, as part of the rules on the limitation on ownership, the Rundfunkstaatsvertrag requires 'dominant' companies to reserve a certain amount of times per week (including some prime time slots) for third parties; and to establish a 'programme council' to advise the broadcaster on programming.

The Broadcasting Acts in the UK impose general duties on broadcasters to be fair and impartial, which codes are give further support by the codes drafted by the ITC with which commercial broadcasters must comply. In addition to conditions requiring the ITV companies to broadcast a certain percentage of independent productions, the licence conditions require the companies to ensure a diverse mix of programming which appeal to a wide diversity of taste. It should be noted that different conditions apply to the licences awarded to broadcasters using different delivery platforms, though all are subject to the impartiality and fairness conditions. The BBC is subject to certain conditions in its charter about diversity of programming and use of stereotypes, which then reflected in the BBC producer guidelines.

3.2.3 Position in SEE States

The countries under review tend to have statements reflecting the need for plurality of opinions within their constitutions of broadcasting laws. The Serbian report, for example, stated the broadcasting act requires that, 'the regulation of relations in the broadcasting sector shall be based, among others, on the principle of full affirmation of civil rights and freedoms and especially the freedom of expression and plurality of opinion'. This statement is backed up by the obligation on the regulatory authority, when more than one party applies for a given licence, to take into consideration and give advantage to the applicant which provides stronger guarantees that it shall contribute to programming of better quality and greater diversity.

The Bulgarian report noted that the relevant broadcasting laws in that country assume that the public broadcasters will be services providing the greatest diversity and pluralism, an assumption that the report criticises going as far as to say

> 'in a number of cases, commercial operators perform their public service functions much better than public operators because the state public radio and television are still not free from political and economic pressure in creating and presenting their programs and in broadcasting news.'

[4] CoE Assembly Resolution, (Doc 9595 revised)

Nonetheless, the public broadcasters are subject to a number of obligations relating to the protection of minorities. As a general point, it should also be noted that journalists, who have signed contracts with radio and television operators, have the right to refuse to work on an assigned task if it is not related to the implementation of the provisions of the broadcasting law or of the respective contracts and if it goes against their personal beliefs. No information is given on the frequency with which journalists avail themselves of this right, if at all. The recent amendments to the Bulgarian broadcasting regulatory system also have given rise to concerns regarding the regulator's right to issue orders regarding programming content: the report noted that this in contrary to the principle of non-involvement in programme content and of dubious compliance with the Bulgarian constitution.

The CRA in BiH has developed a number of codes that are relevant in this area, such as the *Guidelines on Reporting Provocative Statements*, adopted 9 June 1999. The general Broadcasting Code of Conduct further states that 'programmes shall meet generally accepted community standards of civility and respect for the ethnic, cultural and religious diversity of Bosnia and Herzegovina' and contains provisions defining fair and impartial programming and false and deceptive material. The report notes that some broadcasters had difficulty in determining the precise requirements of the code. The CRA therefore issued guidelines to clarify their obligations. According to the report, the CRA and its guidance has developed over several years and seems to have stood up well to the tests imposed by the sensitive post war situations. In this context, it is also worthy of note that the CRA received relatively few complaints against broadcasters in the run up to the recent elections. The report concludes that, with a few notable exceptions, most of the broadcasters approached this question in accordance with the CRA rules.

There are, however, a couple of worrying signs. Despite the fact that the Hungarian constitution specifies that public service broadcasters should be independent from all political movements, recently a Hungarian politician

suggested that Hungarian Television should be divided into two parts: one left wing public service broadcaster television and a right wing one. This would seem contrary to the terms of the constitution and to the requirements of plurality and diversity. It is to be hoped that this suggestion is not taken up.

3.3 Content Requirements

3.3.1 European Union

The Convention on Transfrontier Television and the Television without Frontiers Directive are very similar as to their terms; a provision of the Convention provides that parties to the EU need not apply the Convention to avoid overlap with the Directive. The Television without Frontiers Directive establishes certain positive content requirements. There are certain general requirements, contained in Articles 22 and 22a, which put each Member State under an obligation to ensure that broadcasters under its jurisdiction do not broadcast programming which contains:

- material which might seriously impair the physical, mental or moral development of minors, in particular pornography or programming containing gratuitous violence; or
- any incitement to hatred on the grounds of race, sex, religion or nationality.

Further, Directive states that, as far as practicable, Member States must ensure that a majority of a broadcaster's transmission time must be devoted to 'European works' as defined in the Directive and that a further 10% should, again where practicable, be reserved for European independent works. It should be noted that the Directive is a minimum harmonisation directive and therefore Member States are permitted to impose higher standards on broadcasters within their respective jurisdictions.

Additionally, the Convention states at Article 10 that 'The Parties, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism.'

3.3.2 Position in EU States

All three states under review are members of the European Union and it therefore should come as no surprise that there is a significant degree of similarity between the rules in these Member States as each country has sought to implement the Television without Frontiers Directive.

3.3.3 Position in SEE

As with the EU, there is a high degree of standardisation among the states as a result of their attempts to come into line with the Television without Frontiers Directive. Hungary, for example, will be in the first wave of new countries joining the EU in 2004 and has undertaken a significant work to ensure that its legislation across the board is broadly in line with EU requirements in preparation for accession. In general the obligations have been transposed into the relevant national laws, although in some countries such as Macedonia, there is only partial transposition. With other countries, their laws have recently been amended (e.g. Montenegro and Serbia) to bring their laws into force. Some SEE states have introduced different levels of regulation depending on the transmission method or the programming. Thus, in Bulgaria the latest amendment to the broadcasting laws their means cable and satellite broadcasters are subject to a less burdensome regime. The result, according to the report, has been that there has been a decrease in quality[5].

3.4 Advertising

3.4.1 European Union

The Television without Frontiers Directive likewise contains rules relating to the content of advertising and rules regulating the frequency, timing and placement of advertisements, including teleshopping. There are rules to protect human dignity as well as rules prohibiting the advertising of certain products, such as tobacco. The Directive also puts an upper limit on the amount of advertising that may be broadcast.

3.4.2 Position in EU

As with the other content requirements, the UK, France and Germany have implemented the requirements of

[5] The UK also imposes a less stringent regime on the basis of transmission methods and differences in standards are to be seen there too: for example, Sky 1 has rarely (if ever) satisfied European quota requirements.

the directive, in some instances imposing more strict requirements than those set down in the Directive itself (see ITC rules on advertising for commercial, terrestrial broadcasters and the position of the BBC; in France see 60% quota requirement including obligation to broadcast at peak time).

3.4.3 Position in SEE

Again, the countries under review have broadly standardised their rules in the light of the television without Frontiers Directive, some countries imposing slightly stricter standards than required by the directive. The Bulgarian report suggests that the Bulgarian laws are less flexible than strictly required under the terms of the directive. As noted, since the directive is a minimum harmonisation directive, stricter standards are permissible although they may have consequences for broadcasters dependent on advertising revenue.

The Albanian report noted practical problems in the operation of the rules on sponsorship: that the broadcasters are dependent for sponsorship revenue on a small number of commercial operators dominant in the Albanian market. This leads to an 'unwritten pact' between the broadcasters and sponsoring companies.

The Serbian report also identifies problems. Prior to the new Broadcasting Act, advertising in Serbia was not well regulated and those rules that did exist seem to have been flouted in practice. The new act traces the requirements of the European laws, but is not yet in force. It is also proposed that a new act dealing with advertising as a sector be introduced which may replace the relevant sections in the Broadcasting Act. Certain issues regarding the interpretation of the directive's requirements (and also those of the underlying Treaty freedoms) are the subject of discussion in Romania, as the Broadcasting Council has sought to limit the amount of time which may be used for advertising distilled alcohol.

4 Restrictions on Media Ownership

There are two main issues in this context deriving from the idea that ownership may affect the programme content broadcast. There are therefore links to issues such

as diversity and plurality as well as impartiality and quality of content. The first of these issues relates to categories of persons who should be restricted from owning broadcast media in the first place; the second concerns the accumulation of ownership. Both the Council of Europe and the European Union have concerns in this area.

4.1 Restrictions on Ownership

4.1.1 European Standards

One of the general concerns addressed by the Council of Europe is the need to ensure media pluralism. Although the Council Recommendations do not specify any particular restrictions on ownership, Recommendation (99) 1 suggests that steps should be taken to ensure that public sector broadcasters are truly independent: this goes beyond reconstituting the legal entity as a private company and looks to questions of funding and editorial independence. The EU is also silent on specific restrictions on ownership. It should be noted, however, that one of the underlying principles of the EU is that of non-discrimination on grounds of nationality: thus state monopolies and national ownership rules will have to be justified on public interest grounds and are likely to be found contrary to the EC Treaty.

4.1.2 Member States of the EU

Most of the Member States have restrictions on who may own broadcasters and also provisions to ensure the independence of public broadcasters. Looking at the first point, the Broadcasting Acts in the UK contain a list of prohibited persons, such as advertising agencies and religious bodies. Currently companies established outside the EU may not hold a broadcasting licence, but there are proposals to remove this limitation. In Germany there are private and public broadcasters. To ensure the independence of the public broadcasters from the state, they are each headed by a director and guided and supervised by a broadcasting board and an administrative board. The broadcasting board is made up of representatives of groups with social relevance such as political parties, trades unions, and churches, which are supposedly representative of the public at large. As a final point it should be noted that in order to enforce limitations on ownership, it is important to have some system control-

ling transfers of licences and making it clear who owns what. The French system was at one stage criticised in this regard because the operating company could be purchased without the ownership of the company, or the relationships between shareholders being made clear.

4.1.3 Position in SEE

Many of the countries under survey impose restrictions on who may hold licences, including some nationality requirements. In Bulgaria, Article 138 of the broadcasting law sets out the categories of prohibited persons: people carrying out advertising activities; people who cannot prove the source of their finances or people who have been given bank credits and have failed to return them; monopolists on the telecommunications market; as well as people involved in security or insurance companies. The last restriction has a historic basis as in the beginning of the 90s, people with a criminal background performed security and insurance activities. Significantly, the Bulgarian does not impose a nationality requirement. Albanian law also identifies excluded categories of persons. This list seems designed to ensure that there is no political or religious pressure via the ownership of the media.

It should be noted that the Albania rules also require that the licence holder be registered in Albania. This is a form of nationality requirement that would seem to conflict with EU standards. This is not problematic for Albania, as it is not going to join the EU in 2004. Hungary by contrast is and Section 122 of the Media Law provides that Hungarian natural or legal persons are required by to hold at least 26 per cent of the votes in a limited company licensed for national broadcasting. Despite the fact that Hungary has completed negotiation agreements with the EU, this would seem prima facie incompatible with the requirements of Article 43/49 EC. The requirement may be capable of justification under the EC Treaty.

There are some difficulties in this area relating to the independence of state broadcasters. Thus, the Bulgarian report notes that the public broadcasters, which are supposedly financed through a separate fund, are in practice entirely dependent on state subsidy, which raises questions about their independence. Further,

there have been some adverse comments about the involvement of the government in the appointment and dismissal of the Director of Bulgarian National Television: certainly it seems as though there are insufficient safeguards in the current legislation[6].

The Hungarian report noted that there have been problems relating to the transfer of the public broadcasters into stock companies and, despite the fact that they are expressed to be independent and secure in finance, have in practice been the subject of political attack. The 1996 Act established a board of trustees for each of the public broadcasters. The intention was that these boards would exercise civil control. Thus civil organizations, as provisioned for by the Act, are entitled to delegate members into the Board of Trustees of these Endowments, while their presidiums consist of members nominated by the parliamentary parties and elected by the National Assembly. There are, however, a number of questions about the appointment of members onto the board which might undermine the whole process. There are questions relating to the length of appointment: is one year a sufficient period of time for members to acquaint themselves with their responsibilities? Further, the representatives may not be sufficiently knowledgeable or come from a really small organisation that is not representative of civil society. Further, some political parties have been attempting to subvert this process by using a civil organisation to get a political candidate on to the board. Furthermore, the current composition of the Board does not comply with the terms of the Act, a state of affairs which arose through the opportunist use of a small 'gap' in the legislation by some politicians, and neither the current government nor the constitutional court have taken any steps to improve the position.

The Montenegrin legislation provides that there should be sufficient state support whilst including structural provisions to ensure the editorial independence of public broadcasters (which are also subject to special content requirements). Thus, public broadcasts are governed via the following organs: the Council, the Administrative Committee and the Director. The Council represents the interests of the citizens of the

[6] Supra n. 3

Republic and is made up of distinguished and independent experts in the areas relevant for performing functions of public broadcaster, such as journalists, sociologists, lawyers, economists, engineers, media analysts, marketing experts. Again, it seems that great efforts have been taken with the preparation of the new broadcasting laws in Montengro.

4.2 Concentration of Ownership

4.2.1 European Standards

The Council of Europe's concern to ensure plurality has resulted in the suggestion in Recommendation (99) 1 that Member States should consider the introduction of legislation designed to prevent or counteract concentrations that might endanger media pluralism at the national, regional or local levels and to limit the influence which a single commercial company or group may have in one or more media sectors. As well as problems with horizontal concentrations of ownership, the Council of Europe has also noted possible problems relating to access to distribution systems and the difficulties caused by bottlenecks. Some aspects of these issues will be dealt with by the mechanisms according to which relevant licences are awarded. Specific content requirements in licences may help mitigate the effects on content of their being a highly concentrated market, as may 'frequency sharing' or the requirement to broadcast certain percentages of independent products (see content quotas above). Nonetheless, the Recommendation of the Council of Europe Assembly[7] notes that media concentration is a serious problem across the continent: it should be noted that this is not just a problem for the states in SEE but also in western Europe, with the situation in Italy being seen as particularly problematic.

The EU has no specific rules on concentration of ownership in the media although its general competition rules will apply. The EU does accept the problems of vertical integration as well as horizontal concentrations. Additionally, the EU new communications regime deals with access to communications systems: access is to be made available on fair and non-discriminatory terms.

[7] Supra n. 3

4.2.2 Member States of the EU

The concentration of media ownership is a matter of some concern in Germany, despite the high number of channels available, as two companies own the vast majority of channels. In addition to the content based rules noted earlier, the Rundfunkstaatsvertrag imposes certain limitations on accumulation of media interests, based on an audience share test. This test is applied more stringently in the context of information-related programmes.

In France, the CSA may make recommendations in the field of competition rules so as to safeguard quality and diversity of programming. The responsibility for monitoring competition in the media sector was transferred, by the 1989 Act, to the 'Conseil de la Concurrence' (Competition Council). The CSA therefore only has the competence to apply the sector specific competition rules contained in the Media Act.

The UK, in addition to the general competition regime, also has a complicated set of rules limiting the amount of licences that may be held by one company (including group companies and relatives of shareholders). There are specific provisions relating to cross media ownership. Again, the current proposal is to make these rules less stringent: the regional ITV companies, in particular, have complained that the restrictive rules disadvantage them when it comes to the global market place.

4.2.3 Position in SEE

Last year the comparative analysis noted that regulations preventing concentration of ownership was an area in which more work needed to be done. A number of the states in issue have rules concerning the accumulation of media interest: Montenegro, Hungary and Serbia. It should be noted that the Serbian rules against accumulation of media interests are new, as are Montenegro's. As regards the position in Serbia, prior to the introduction of the new media law, the general provisions of competition law were applicable to the media although never used in practice. The new act introduces a sophisticated set of rules, which provide also for notification requirements, so that the authority

can keep track of the ownership. It is yet to see how they will operate in practice.

5. Conclusions

It can be seen that there have been some steps forward in this area, with the introduction of new laws in a number of the states. There are still some serious weaknesses in many states relating to political influence and the independence of regulators and public broadcasters at a number of levels. It is important to ensure that practice reflects the terms and spirit of the relevant laws.

Specifically, those involved in the regulation of the media should be both independent and informed and that economic and financial independence of the authority is ensured. This must be more than a paper statement that the authority shall be independent: funds must be put in place to ensure that regulators are not *de facto* dependent on *ad hoc* state payments. The regulators must be put in a position where they can carry out their tasks, in terms of legal powers, finance and co-operation with other branches of government. They must be accountable at a general level, and specific decisions should be capable of being reviewed by independent bodies, such as the courts. Transparency must be ensured in all decision-making, whether this relates to the issuing or revoking of licences, or the planning of frequencies. In identifying these points, this report is re-iterating issues identified in Council of Europe Recommendation (2000) 23 and identifying that, in general terms, more work seems to be done in this area. As with last year's report, perhaps one particular area which needs emphasising is the issue of restrictions on ownership and particularly rules relating to concentration of media ownership. Despite the seeming lack of attention it has received, this area is of crucial significance to ensure diversity and plurality and the healthy functioning of the private sector broadcasting.