Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

LEGAL ANALYSIS OF THE DRAFT LAW ON ELECTRONIC COMMUNICATIONS OF BOSNIA AND HERZEGOVINA

Commissioned by the Office of the OSCE Representative on Freedom of the Media from Prof. Dr. Katrin Nyman-Metcalf, Chair of Law and Technology of the Tallinn University of Technology, Expert on Communications Law

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Conclusions and Recommendations 3

Executive Summary 6

Detailed Analysis 10

Introduction 10

International standards 11

Scope of the Law and Definitions (Part I) 13

Competences, role and tasks of the Council of Ministers, Ministry and Regulatory Agency (Part II, Chapters I and II) 14

Electronic Communications Infrastructure and Other Related Equipment (Part II, Chapter III) 20

Electronic Communications Network and Services and Universal Service (Part II, Chapter IV and V) 22

Protection of Rights of End-Users (Part II, Chapter VI) 23

Provisions on Competition and on Addressing and Numbering (Part II, Chapter VII and VIII) 24

Management of the Radio Frequency Spectrum and Digital Radio and Television (Part II, Chapter IX and X) 25

Security and Integrity, Confidentiality and Data Retention (Part II, Chapter XI and XII) 27

Supervisory Inspection and Penalty Provisions (Part II, Chapter XIII and XIV) 28

Transitional Provisions (Part III) 29

Conclusions and Recommendations

- A key issue is the independence of the Communications Regulatory Agency (CRA/RAK). As there is a functioning such Agency, it is essential to safeguard and strengthen its independence. Concretely this includes the need for Article 5 and Article 6 to be reformulated to make the tasks of the Council of Ministers and the Ministry more strictly defined, so that there is no risk of reduction of the independence of the Regulatory Agency.
- The relationship between regulation of electronic communications and that of audiovisual media (broadcasting) has to be clear so that there is no danger of issues being unregulated or doubly regulated. This draft Law should be clearer on this and/or be supplemented with guidelines or other instruments. As an independent development, a new law on audiovisual media services will be needed if the existing law will no longer be in force.
- The appointment process for Council members should be reconsidered, to make it clearer which NGOs can participate in the process and how these are selected as well as clarify what happens in case of a deadlock of the intended procedure. The rules for the decision in the Parliamentary Assembly should also be clarified, as it should not depend on the majority in Parliament but also ensure opposition representation.
- Regarding rules on how the Council members can be dismissed, as the relationship between the Council of Ministers and the Regulatory Agency is a very important matter and there should be no hidden ways to compromise the independence of the Agency, it should be clearer how and on what grounds dismissal can take place (with less possibility for a subjective and/or wide interpretation of grounds for dismissal).
- For dismissal of the Director by the Agency Council, there should be a requirement to set out the reasons publicly.
- Salaries and other conditions of Agency staff should not be the same as for all civil servants, with no possibility for special exceptions.
- A provision should be added on additional financing (from the state budget), should the mentioned sources of revenue not be enough.

- Parties directly concerned by decisions of the Agency should have the possibility to comment and be involved in the process to the greatest possible extent, as such any exceptions must be interpreted narrowly.
- Concerning what information should be excluded from public access, there is a need to clarify and make the provisions clear and consistent, so that there can be no ambiguity about what information is regarded as confidential and excluded from public access.
- The idea of a Rulebook to be issued by the Agency with more detail on a wide variety of technical issues is a very good concept for how regulation in a complex and technical field should be made, but it should be re-evaluated why in certain circumstances the Rulebook shall have the approval of the ministries of the Entities. Approval should not be needed, but consultations with the ministries (and the Department of Brcko authority) can be stipulated so that the relevant authorities have a chance to discuss and influence but they cannot block the work of the Agency.
- There are very many mentions of different rulebooks to be issued by the Agency Council and although this is a good method of regulation, it could be a bit confusing which rulebook is applicable when, so the Agency needs to think about this aspect when drafting or – most probably in most cases, as it already has many rules on most relevant matters – updating its rules. Each set of rules could clearly refer to relevant Articles in the Law and as most people will consult the rulebooks electronically, some effort should go into the electronic search-methods to be used for finding information in the rulebooks.
- Regarding frequency matters, the overall impression is that the division between the Council of Ministers´ decision (made on the suggestion of the Ministry) and the competence of the Agency to make decisions is not clear. It is advisable to add an Article at the start of the section where the respective roles are clearly set out.
- The section on digital radio and television is very short and does not cover all necessary issues, while not showing where in other legislation necessary matters may be regulated. If many of these issues are in fact already regulated in other legislation, this should be indicated here.

- The data protection commissioner and the Agency should work together to the extent possible, but still maintain the possibility to work independently in case they cannot agree on common action, as they fulfil different roles and have different mandates.
- Breaches of rules in the rulebooks referred to in different places in the Law should not be sanctioned by this Law, as these rulebooks are not yet in existence so this is a breach of legal certainty and the principle that any sanctions must have a clear basis in law setting out what obligation is breached. This is the wrong order in which to adopt rules. It should either be done by a general allowing provision based on which the rulebooks can set out sanctions or by restricting the formulation in Article 144 to violations of the Law – even if in practice the exact extent and nature of the violation will be determined with the help of the various rulebooks.
- In the transitory provisions it is important that rules stay in force until replaced and that reasonable time is given to replace them.

Executive Summary

It is positive that a more comprehensive communications law is proposed for Bosnia and Herzegovina and most aspects of the draft Law are in line with international and European standards. The Law is quite long and detailed, which - as it concerns technical matters as well as important consumer protection issues - is mostly unavoidable to achieve legal certainty. The Law will be supplemented with instruments adopted by the Regulatory Agency, called rulebooks. It is presumed that to a large extent these rulebooks can consist of secondary legislation that already exist.

A key issue to highlight in the draft Law is the role of the Regulatory Agency and its independence. Political organs make and monitor policy, but should not get involved in regulatory matters – neither in the decision-making nor the rule-making activity of the Agency. It is of utmost importance that the Law safeguards and strengthens the role of the independent regulator.

The Law does not cover content issues and the extent to which any broadcasting matters (including digitalisation) may be covered is somewhat unclear as it is not always obvious what is linked to "content". The link between this Law and a number of other laws on issues such as competition and consumer protection may also need additional clarification

Among provisions that are positive and in line with best international practice is that universal service obligations shall be reviewed regularly, and possible disputes on various matters are primarily to be resolved by the parties, with the Regulatory Agency assisting if needed. Style issues to mention include that definitions exist in different places and that the Law contains some Articles that are not normative but just programme statements.

The existing, well-functioning, independent Communication Regulatory Agency (CRA/RAK) is preserved in the Law, which underlines its independence in decision-making but the actual division of competence between the Agency and the Council of Ministers (and the Ministry of Communications and Transport) is not always clear. While explicit recognition of non-interference in decision-making is positive, the guidelines for implementation mentioned give raise to some concern if these – or monitoring and coordination by the Ministry – are too detailed. The enumeration of competencies of the Agency and provisions on its work (to

be supplemented by rulebooks) are generally good. Principles such as work being public need to be clarified in secondary legal instruments. Salaries and conditions should not necessarily be those of other civil servants, so it needs to be considered exactly what references to other laws entail in this respect. It is positive that no ethnic or other quotas are made for staff, provided that no such requirements follow from legislation referred to.

A key issue is appointment of Council members with a need to think about independence and professionalism as well as the perception of this. The procedure proposed may not meet these high requirements. One flaw is the mention of the NGO sector for designating members, with no explanation of what this means more specifically. Other members of the Ad Hoc Committee may be politically one-sided, as the process does not offer sufficient guarantees of plurality. Another concern in relation to the appointment process is what happens if there is no agreement. Additionally, officials must be able to operate without fear of dismissal it is not good that some possible dismissal reasons leave room for subjective interpretation. For dismissal of the Director there should be a requirement to set out the reasons publicly.

The fact that the Agency can use revenue from fees administered by it is good, but additional provisions are needed for the case these revenues are not sufficient. The decision-making of the Agency is generally well described, with a possibility for parties to make declarations, but possible exceptions to this as well as the formulation on appeals should be clearer.

On public consultations there is a good balance between making it compulsory to have consultations and take proposals into account, but not to necessarily implement the proposals. For public consultations, publicity and data gathering it is a key issue that requires careful consideration in law and practice (with additional internal rules) how to deal with confidential information while at the same time maintaining maximum transparency.

The section on electronic communication infrastructure and other related equipment is technical, quite detailed and generally in line with international standards. For this and other sections, an issue of potential concern is the independence of the Regulatory Agency, for example if the rulebook requires outside approval. There are many mentions of different

rulebooks to be issued by the Agency Council and although this is a good method of regulation, it could be a bit confusing which rulebook is applicable when, so the Agency needs to think about this aspect when drafting or updating its rules. Each set of rules could clearly refer to relevant Articles in the Law and as most people will consult the rulebooks electronically, some effort should go into the electronic search-methods.

Licensing provisions with the distinction between general authorisations and licences are in line with best European and international practice. This is also the case for provisions on priority for defence forces (and similar) and the section on universal services (although it is not necessary to enable the connection at a fixed location). The section on protection of rights of end-users meets international standards, for instance by providing for written agreements with certain conditions to protect users. Some unclear provisions are highlighted in the detailed analysis (like on malicious and harassing calls and messages).

The provisions on competition are in line with international standards but very close and careful harmonisation with general competition law and competition authorities is essential. Addressing and numbering as well as frequency management rules are in line with international standards, but a more explicit division of competencies for frequency matters should be shown. As a general remark relevant to different Articles on rejecting applications, the agency should have the possibility to ask for additional information and give the applicant the chance to improve the application.

The chapter on digital radio and television is surprisingly short and general, for such an important issue.

Chapters on security, integrity and confidentiality of communications as well as on data retention and interception of communications need constant attention for their compatibility with data protection legislation. For the supervisory inspection to be performed by the Agency the rulebook is important as the tasks of the inspector need to be exercised in a reasonable, proportional manner as the potential interference in the rights of operators is great. The provisions on fines are good in that they stipulate a range of the applicable fine, which allows for discretion and taking all relevant circumstances into account. A principally problematic matter is that some provisions set out fines for breaches

of rules in the rulebooks referred to in different places in the Law even if these rulebooks are not yet in existence. This is an incorrect order in which to adopt rules.

Transitional provisions are essential as there is a functioning Agency so it is important that nothing in this Law will disrupt their work. Provisions on validity of existing rules, decisions and licences need more clarity and any requirement for operators to undertake something while they have a valid licence or permit should be at a minimum.

Detailed Analysis

Introduction

The current Communications Law of Bosnia and Herzegovina (BiH) is very short and includes audiovisual media as well as information and communication technology related matters. The short law has functioned thanks to additional regulations and decisions passed by the Communications Regulatory Agency (CRA/RAK). It is positive that a more comprehensive law is now proposed. Most aspects of the draft Law on Electronic Communications (the Law) are in line with international and European standards and the Law resembles communications legislation in various EU Member States.

The Law is quite long and detailed. As it concerns technical matters as well as important consumer protection issues, such detail is often unavoidable if legal certainty is to be ensured in the rather specific matters covered by the Law. The Law will be supplemented with instruments adopted by the Regulatory Agency, called rulebooks. It is presumed to a large extent these rulebooks can consist of the rules that already exist in the form of various secondary legal acts adopted by the Agency, which can be included in a new format of rules, if necessary.

The most important issue to highlight in the draft Law is the role of the Regulatory Agency. In societies with liberalised communications sectors and freedom of expression, the regulator must be independent. It should be independent both from the industry that it regulates and from political organs. The board, director and staff of the regulator should be selected based on their personal qualifications and should work for the good of the sector, irrespective of political decisions. The political organs like the government and parliament make and monitor policy, but should not get involved in regulatory matters – neither in the decision-making nor the rule-making activity of the regulator. In BiH there is a well-functioning Regulatory Agency (CRA/RAK), created with respect for modern standards of a converged communications environment. Thus it is of utmost importance that the Law safeguards and strengthens the role of the independent regulator.

Many provisions of the Law are positive and in line with best international practice. This includes that matters such as universal service obligations shall be reviewed regularly and

that various matters in the Law are primarily to be resolved by the parties, with the regulator acting to resolve disputes in case of need.

This analysis of the Law is based on English translations of the draft Law provided by the office of the OSCE Representative on Freedom of the Media in October 2013. Other legal acts referred to in the draft Law are not analysed (as mentioned where relevant).

International standards

The basis for this analysis is the promotion by the OSCE of freedom of expression as protected by international instruments like the Universal Declaration of Human Rights to which OSCE participating States have declared their commitment.[1] Article 19 of the Universal Declaration says:
"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[2]

This right is further specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights. The right is also expressed in Article 10 of the European Declaration on Human Rights:
"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity

[1] For example in the Helsinki Final Act (1975), Part VII. The commitment to freedom of expression has been reiterated by participating States for example in the Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension (1990) and later statements.
[2] Resolution 217A (III) of the General Assembly of the United Nations, adopted on 10 December 1948. A/64, page 39-42. See the full official text in English at: http://www.un.org/Overview/rights.html.

or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[3]

BiH is a party to the instruments mentioned here and bound by these provisions, something reinforced by its role as a participating State of the OSCE.

In a modern, converged and interrelated communications environment, these rights and freedoms do not only affect media legislation but also the more technical side of communications, to enable a diverse and pluralistic media landscape to develop, making use of modern information and communications technologies that have become such an essential part of everyday life all over the world.

In the 1999 OSCE Charter for European Security the role of free and independent media an essential component of any democratic, free and open society was stressed.[4] The Mandate of the OSCE Representative on Freedom of the Media, states:
"Based on OSCE principles and commitments, the OSCE Representative on Freedom of the Media will observe relevant media developments in all participating States and will, on this basis, advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media. In this respect he or she will assume an early-warning function. He or she will address serious problems caused by, inter alia, obstruction of media activities and unfavourable working conditions for journalists."[5]

The draft Law analysed here is examined from the viewpoints of general principles of communications regulation including for example regulatory agencies.[6] The Council of

[3] Convention for the Protection of Human Rights and Fundamental Freedoms , Rome 4.XI.1950. www.echr.coe.int/NR/...DC13.../Convention_ENG.pdf
[4] See point 26 of the Charter for European Security, adopted at the Istanbul Summit of the OSCE, 1999. http://www.osce.org/documents/mcs/1999/11/17497_en.pdf
[5] Mandate of the OSCE Representative on Freedom of the Media, 1997, see Point 2. http://www.osce.org/pc/40131
[6] Council of Europe Recommendation Rec(2000)23 to member states on the independence and functions of regulatory authorities for the broadcasting sector; Resolution 1636 (2008) of the Parliamentary Assembly of the

Europe has issued a number of recommendations of relevance and although these are not legally binding, they do provide important guidance on how freedom of expression shall be guaranteed in reality. For more technical matters, international standards that most often are binding are developed by organisations such as the International Telecommunications Union (ITU). Such standards mostly concern matters that do not fall directly within the mandate of the OSCE Representative on Freedom of the Media, but nevertheless all such international standards together create the framework which determine the standards of the media and communications landscape.

Scope of the Law and Definitions (Part I)

The draft Law includes all issues related to electronic communications, as enumerated in Article 1. Most of this is easy to understand and logical, but as the Law does not cover any content issues – paragraph 2 of Article 1 – the extent to which any broadcasting matters may be covered by the Law is somewhat unclear. Digital radio and television are mentioned in the first paragraph, which read together with the second one indicates that only the technical side is covered by the Law. In practice, it is not always obvious what matters are linked to "content" as excluded by the second paragraph. Regarding the scope, another matter that could be confusing is the link between this Law and a number of other laws on issues such as competition and consumer protection – also explicitly excluded in Article 2 but at the same time covered by Article 1.

This is not so much a criticism of the draft Law as a comment to highlight the need to be clear in practice on what laws apply to which situations and how concerned authorities deal with any borderline issues. There may also be a need for secondary legislation on this issue. There is a constellation of laws in place that deal with broadcasting and other content regulation matters; still it is recommended that a future Audiovisual Media Services Law should be approved, and should be consistent with what is already established in this Electronic Communications Law.

Council of Europe and Declaration of the Committee of Ministers (26 March 2008) on the independence and functions of regulatory authorities for the broadcasting sector.

The section on definitions is long and detailed, with internationally accepted definitions used to a large extent, which is good. The definition of electronic communication service further serves to exclude what traditionally is referred to as broadcasting. There are also definitions of audiovisual media services and radio media service, which is unusual as audiovisual normally incudes audio (radio) AND visual (TV), but as the definitions otherwise are similar this is not likely to have any important effect. As a question of style, it may be pointed out that in addition to the section on definitions, the Law in many places also includes definitions in the text, in brackets after certain names or concepts.[7] When there is a section on definitions, it would be clearer to have all definitions there.

Other than this, the only comment to the definitions is the importance also in this context to bear in mind the relationship between this Law and other laws, as definitions like the one on relevant market or that on consent should be in line with such definitions in other (competition and data protection) laws.

Competences, role and tasks of the Council of Ministers, Ministry and Regulatory Agency (Part II, Chapters I and II)

The Law contains some Articles that are not normative but just programme statements. One such Article is Article 4 on public interest. It just makes a statement and it is not clear what legal effect this statement might have. It may however be useful for interpretation and in that case the stress can be on the public interest for BiH: for the country as a whole.

The main problem with the draft Law is that it is not clear on the division of competences. It is important that the new Law does not entail any steps backwards and that it does not endanger the well-functioning, independence of the Communications Regulatory Agency (CRA/RAK). The Agency is preserved in this new Law and Article 5, paragraph 2 explicitly underlines its independence in decision-making, which is positive. However, at the same time, the actual division of competence between the Agency and the Council of Ministers (and the Ministry of Communications and Transport) is not always clear. Given the occasional challenges to the independence of any regulatory agencies and especially the

[7] E.g. Article 103 paragraph 2, Article 122 paragraph 4.

complex political framework of BiH, it is of utmost importance that there are no ambiguities in the Law on the role of the Agency and its independence.

It is in line with international practice that the government makes policy, adopts strategies and conducts other such activities that are of a policy nature, reflected in Article 5. However, such work should not be so detailed that there is no scope left for real independence of the Regulator. The explicit recognition of non-interference in decision-making in Article 5 paragraph 2 is very good, yet the guidelines for implementation mentioned in the same paragraph give raise to some concern. The Agency should act independently both in its decision-making and its rule-making. The activities will be carried out in the framework of the Law as well as the policy and strategy and such instruments may directly or indirectly give guidance to especially the rule-making activity, but specific implementation guidelines may be a back-door way to reduce the independence of the Agency.

Article 6 on the competences of the Ministry adds to the interpretation that there is a potential risk of excessive interference of the political organs in the regulatory work of the Agency, especially the monitoring and coordination as well as implementation tasks in paragraph 1 of Article 6.

As for the competencies of the Ministry (Article 6), attention can also be drawn to paragraph 4 on representation of BiH in international organisations and similar. This should be decided depending on the exact tasks of such cooperation; if the Agency has already established certain contacts and in some international fora, then the regulator may be a better representative than the Ministry (as the regulator is an expert and non-political body).

The definition of the legal status and enumeration of competencies of the Agency, Articles 7, 8 and 9, are good. Here the independence is well stressed. The principle of the work of the Agency being public is good (Article 7 paragraph 5) but this needs to be clarified in secondary legal instruments, as the regulator does need a possibility to conduct some confidential work as well. Such situations need to be set out clearly, so there is legal certainty and a proper basis for reducing openness. This analysis does not include an analysis of other legislation such as the Law on Ministries and other Administrative Bodies

or the Law on Administration (Article 7 paragraph 7) but it must be underlined that it is essential that these laws in no way are taken to reduce the independence of the Agency or otherwise affect its role and status under this Law.

The Agency bodies are set out in Articles 10 to 21. A large part of this section concerns appointment of Council members. This is indeed one of the most central and complex issues when it comes to securing true independence as well as quality of the independent regulator. There is a need to think about both real independence and professionalism and the perception of this: the two are not always the same. Thus, there is a need to ensure as much as possible that the procedure for appointing members, the nature of the candidates and the transparency of the entire process are perceived to be honest and professional. In the given case, the procedure proposed in the draft Law may not meet these high standards. One flaw is the mention of the NGO sector (Article 13 paragraph 2) as one part of designating members, but with no definition or explanation of what this means more specifically, which organisations have the right to participate in the process and how they are selected. It may be difficult to decide which organisations to select and how to involve them, so this needs clearer support in the Law. There is also a risk, if there is no clear provision in this respect, that political forces may try to exert influence by, for example, including organisations in the selected NGO sector that are not really independent NGOs. Also the other members of the Ad Hoc Committee may be politically one-sided, as the process does not offer any guarantees that a wide range of opinions are considered.

For the same reasons – guaranteeing a politically unbiased Council with a wide variety of views represented and ensuring that the perception of the Council also supports this – there should be rules on how the Parliamentary decisions in this context are taken. This is relevant both in the appointment of the Ad Hoc Committee (Article 13) and the appointment of the Council Members (Article 11). Especially for the appointment of the Committee, it is advisable to ensure that the parliamentary opposition also has a chance to influence the appointment decision, so it should not be made with just a regular majority vote but it should be either a “super-majority” or a guaranteed approval by the opposition as well.

The other concern in relation to the appointment process is what happens if there is no agreement. Experience has shown that it is difficult to reach agreement in the complicated structure of the state of BiH and although a law can never totally guarantee its own

successful implementation, as there is now a reform of the law, it is the right time to consider what additional measures could be decided so as to reduce the risk of deadlock. If there are some such measures in the Law, this may also concentrate the minds of the relevant persons who then know that they have no alternative but to agree. Article 14 does contain some provisions on what happens if the first suggestion is not approved, with deadlines, but not all time limits are clear and the end result may still be that no agreement is reached, in which case the process could be very long indeed.

As for the appointment of the president and deputy president of the Council (Article 11 paragraph 4) consensus is required. It is of course to be hoped that the Council will work well together and have no problem reaching such consensus among themselves, but even so a fall-back (vote with 2/3 majority for example) in case consensus is not reached should be in the Law.

Article 15 on requirements for Council members contains a reference to the Law on Ministerial Appointments. This Law has not been examined in this analysis, but it is presumed that it does not add any unreasonable demands. The requirements in the Article are good. The relationship between paragraph 1 point b) and paragraph 2 point f) is not totally clear, as the first point has any criminal proceedings as an exclusion point while the second one focuses on certain crimes. This is not necessarily a problem though, as it makes sense in the case of an ongoing proceeding to be more careful, while for already decided matters it is good to have a more specific list than just a blanket exclusion. As paragraph 2 (point f) lists serious matters that really would reduce public confidence in the person (more than for example some traffic crime or juvenile shoplifting might do), it can be questioned if the limit of five years really is enough or if such exclusion should not be life-long.

One of the essential prerequisites for the independence of the regulatory agency is that it can operate without fear of dismissal, as long as it operates within the law. This is why the rules on dismissal of Council members or of the Director are so essential in any communications law. The Council members can be dismissed by the Parliamentary Assembly and the reasons for this are listed in Article 16. Some of these reasons leave room for a subjective interpretation (notably points c) and d) of paragraph 2). As the relationship between the Council of Ministers and the Regulatory Agency is a very important matter and there should be no hidden ways to compromise the independence of the Agency, it should

be clearer how a potential process of dismissal can take place. Regarding both points c) and d) in Article 16 paragraph 2 the question immediately comes to mind: Who makes this evaluation and how?

The Director should also be able to act without fear of dismissal, but as he/she is potentially dismissed by the Council of the Agency (Article 20) there should be no risk of outside interference and thus challenge to the independence of the regulator. At the same time, some criteria are rather subjective (paragraph 2, point c) and to some extent point h)) so here a requirement for transparency and proper motivation by the Council on why, how and through what actions or inactions the unacceptable behaviour has taken place is needed. That way the Director can defend him/herself and it is seen by everyone interested what took place so no suspicions of political or personal machinations can be entertained.

Concerning the internal organisation of work in the Agency, Article 21 paragraph 4 sets out that salaries are regulated by the Law on the salaries and compensations in the institutions of BiH (and labour relations by the Law on Employment in the institutions of BiH). These laws are not analysed here. It is understandable that there is a desire for a common framework for public institutions so there is no objection as such to this legislation being applicable and for labour relations, most likely (without having analysed that law) there is nothing that should not be suitable for the Agency. However, as concerns salaries, the staff of a regulator such as RAK need specific competencies in areas that are not within the normal requirements for civil servants. If some staff of various institutions can quite easily move between institutions, using their general skills and competences, the tasks of a technical, specialised body entails different demands. The recruitment and the potential employers to compete with are different than for most civil servants and to get competent staff, the Agency must have some freedom in what conditions and salary it offers. Unless the mentioned law allows for such exceptions, these should be specified in this Law.

It is good that the internal rulebook of the Agency will give more detail on staff and internal organisation (Article 21 paragraph 2) and it is also positive that no ethnic or other quotas are made, provided of course that no such requirement follows from any of the other legislation referred to.

The fact that the Agency can use revenue from fees administered by it is also good (Article 23). The more independently a regulatory agency can operate, also financially, the more real independence it has. It is, however, crucial that the Law is structured in a way that ensures that the Agency has sufficient income. There is one concern related to Article 23; if the fees should not provide necessary funding, then there needs to be an additional provision ensuring that the Agency is always guaranteed enough income to be able to operate. The easiest is to just add an open-ended provision on any additional financing as and if needed. The meaning of Article 24 on financing according to the Law on Financing of the Institutions of BiH and especially the relation of this provision to Article 23 and the stipulated resources for the Agency is not clear. The point of having access to own resources must of course be the right to have sufficient income from this and to mainly administer it independently (including deciding what is sufficient income).

The decision-making of the Agency is generally well described, with a possibility for parties to make declarations (Article 26) which is very important. The somewhat vague formulation of paragraph 4 of Article 26 could risk undermining this positive element, if it is interpreted widely. It really has to be that only in exceptional cases is it necessary to take decisions without giving the parties a chance to comment.

A very important issue is the provision related to appeals, the formulation of Article 26 paragraph 5 is not very elegant and could be misleading. Instead of stating that no appeal can be made, it should be stated that an administrative dispute can be initiated – focus on what can be done rather than what cannot. A further reason for this, apart from just good drafting technique, is that Article 6 of the European Convention on Human Rights - to which BiH is a party – requires (as shown by the case law of the European Court of Human Rights) the possibility of appeal in the broad sense of any decisions with consequences for private subjects. The administrative dispute procedure normally meets the requirements of the Convention as it is the substance and not the form of an appeal/complaint that the provision focuses on, but it is still potentially problematic to explicitly exclude an appeal in the text of the Law, without clarifying that the alternative procedure meets all requirements.

Other provisions on the work of the Agency are generally good, like its role on dispute resolution between operators (Article 27), which is an important task for a regulator, and on

public consultations (Article 28) and publicity (Article 29). For consultations, the Article has the right choice of words in that it makes consultations as well as taking account of proposals compulsory, but not the actual implementing of proposals. It is never known what proposals come and although they should always be taken seriously and thoroughly considered, it must be the Agency that takes the final decision.

In the provisions on public consultations, publicity and data gathering (Articles 28 to 30) the key issue that requires careful consideration (with additional rules in internal rules and/or guidelines of the Agency) is the question of how to deal with confidential information while at the same time maintaining maximum transparency. As private firms (or individuals) are required to submit information to the Agency for it to be able to do its work properly, there must be safeguards against sensitive information on business secrets being revealed. At the same time, maximum transparency is the best way to ensure quality and honesty of the work of the Agency and increase its credibility. The provisions in the draft Law are not very clear as they mainly refer to other acts, without it being clear what those acts may be: regulations of the Agency?; regulations by other bodies?; one or several laws? See Article 30 paragraph 6 and 8 as well as paragraph 9, also Article 28 paragraph 6 and Article 29 paragraph 6. It cannot be left up to the owners of the information to determine if it is secret or not, but the authority that possesses information must have clear rules set out in law (possibly supplemented with other legal acts) for what is excluded from the principle of access to information.

Electronic Communications Infrastructure and Other Related Equipment (Part II, Chapter III)

The section on electronic communication infrastructure and other related equipment is technical, quite detailed and in general in line with international standards on the issue. For this section as well as for many of the following ones, the main issue of potential concern is linked again to the independence of the regulator. This concern arises from the provisions on the rulebook to be issued by the Agency (see Article 32 paragraph 5). The concept is very good and it is exactly how good regulation in a complex and technical field should be made: with basic provisions in law and additional rules in another form of instrument, that can be

more flexible, is easier to change and can contain examples, alternatives and generally freer language than a law. What is worrying here is not the idea as such but the vagueness of the provision that the rulebook shall have the approval of the ministries of the Entities. The meaning and process of such approval or the consequences if approval is not given are not made clear and this can potentially be extremely disruptive for the work of the Agency. It would be best if the approval was not needed, although consultations with the ministries (and the Department of Brcko authority) can be stipulated. That way, if the Agency fulfils its task and consults with the relevant authorities, they have a chance to discuss and influence the detail to the extent it concerns them, but they cannot block the work of the Agency.[8]

It can be noted that in most provisions the Agency can issue a rulebook without it being approved by the ministries. It is not clear from the content of the respective provisions why it is sometimes in one way and sometimes another way. The better solution is for the rulebook to be by the Agency Council with *no* ministerial approval, as, for example, right of way in Article 36 paragraph 5 or joint use of facilities, Article 37 paragraph 9. There are many mentions of different rulebooks to be issued by the Agency Council and although this is a good method of regulation, it could be a bit confusing which rulebook is applicable when, so the Agency needs to think about this aspect when drafting or – most probably in most cases, as it already has many rules on most relevant matters – updating its rules. Each set of rules could clearly refer to relevant Articles in the Law and as most people will consult the rulebooks electronically, some effort should go into the electronic search-methods to be used for finding information in the rulebooks.

As far as priority to defence forces and other similar purposes (Article 33 paragraph 6) this is in itself legitimate and also inevitable, but requests should nevertheless be reasonable and the mentioned organs should neither ask for nor automatically get more than what is needed for them to fulfil their duties.

[8] The same comment applies also to the following provision: Article 34, paragraph 5;

Electronic Communications Network and Services and Universal Service (Part II, Chapter IV and V)

Licensing provisions with the distinction between general authorisations and licences are in line with best European and international practice. Implementing regulations are to be made in a non-discriminatory, proportionate and transparent manner with additional provisions in a rulebook by the Council (with no ministerial approval), which is very good (Article 42). The fee for performing activities of electronic communication shall be prescribed by the Agency (Article 43). Here it is important that such a fee is not too high so that it deters any serious operators. The transparency of the fee as per paragraph 2 of Article 43 and the fact that the Agency stipulates it are however the best way to do this.

The section on universal services is in line with international practice. It is not necessary to enable the connection at a fixed location (Article 44) as long as it is provided. More and more countries make internet access (for example by way of broadband) a service that falls under universal service and it may be useful to mention this in Article 44, although Article 48 covers it and any changes can be made through Article 45. The detail on universal services is to be set out in a rulebook by the Agency Council, with no external approval (Article 46 paragraph 5). When determining the exact content of the obligation (like for internet speed – Article 48 – or public pay telephones – Article 50) it is important that the Agency takes into account not only the most modern and useful technology but also what is relevant for different parts of the country.

Article 52 is a good Article on measures to assist vulnerable end-users with a good division of competences between the Agency and the ministry and Council of Ministers: The Agency deals independently with the telecommunications aspects but does not get involved in deciding who falls into a certain category based on social criteria, something which is not within its core competence. Article 55 sets up a good system for reimbursing excess costs. Such systems are notably difficult in practice as it is far from obvious to determine what excess costs actually are (far more difficult than what Article 56 appears to indicate), but the legal framework created here is adequate. Transparency as shown by paragraph 9 of Article 55 is essential.

The rulebook of Article 46 paragraph 5 is very important for many matters related to universal services, so it is very important that such a rulebook is adopted (or an existing one updated) without delay. As the Agency has rules on many of the issues mentioned in this Law, the best way to do it is to use such rules and maybe reformulate them somewhat or collect them in a different manner, rather than to start from the beginning.

Protection of Rights of End-Users (Part II, Chapter VI)

The section on protection of rights of end-users (Chapter VI) meets international standards. It provides for written agreements with certain conditions to protect users. The provisions are rather detailed, but even if it generally can be good to make laws more general and shorter with detail in secondary legislation, when it comes to protection of consumers or other end-users there may be a good reason to have more detail in the Law, so there can be no ambiguity concerning what provisions are binding. In Article 64 the requirement of printed form of the bill appears old-fashioned when most countries are moving toward e-governance and e-business. Regarding the same Article, paragraph 3, the Agency can ask for additional information, which is reasonable, but the amount of information should be proportional to the need for it.

Article 66 on the public directory appears in line with international standards and should not raise any data protection concerns. It is assumed that it is coordinated with relevant data protection legislation in the country. Article 70 on unsolicited communications needs to be coordinated with marketing and consumer protection legislation as well as with data protection legislation. As the disabling of an e-mail account may have very serious consequences in today´s connected world, the measures under paragraphs 9 to 11 of Article 70 must be carefully considered and not undertaken without having as much information as possible of the whole picture. This needs to be made clear in the rulebook referred to in paragraph 12 of the Article.

In Article 75 paragraph 7 the reference to paragraph 7 must be a mistake (should probably be 6?) and in Article 76 paragraph 8 the reference to paragraph 8 should probably be 6.

Article 76 on dispute resolution is good; such processes are an important element of the liberalised communications market.

Provisions on Competition and on Addressing and Numbering (Part II, Chapter VII and VIII)

The provisions on competition (Chapter VII) are in line with international standards. As these provisions largely touch upon general competition issues and as practice in other counties has shown that with increased liberalisation, many competition issues in fact become similar across different sectors of the economy, a careful harmonisation with competition law as well as cooperation with relevant competition authorities is essential. Cooperation is mentioned in the Law and it is important that it is developed in practice. Eventually issues from this Law may be better handled by general competition authorities. It may be noted that the provisions on cooperation with (Article 77 paragraph 3) and seeking opinions from (Article 83 paragraph 2) the competition authority leave room for the Agency to decide whether to do this ("shall, as appropriate…" or "may"). Although cooperation should be a natural part of the work, it is still felt that such formulations may be appropriate in order not to hinder work in case the cooperation, for whatever reasons, in practice is not successful. It is, however, very important that the Agency makes serious efforts to have such cooperation.

Article 85 could also include an obligation to provide services, but this may be included in point f), which is also unclear. In Article 86 on transparency, the requests made by the Agency under paragraph 3 and 4 should be proportional and reasonable, so as not to overburden the operator. This can be done in the rulebook referred to in paragraph 5.

Chapter VIII concerns addressing and numbering. The section is in line with international standards. As a general remark – for instance relevant to Article 94 paragraph 4 a) on rejecting the application – the Agency should have the possibility to ask for additional information and give the applicant the chance to improve the application if it can be made complete with simple measures. Good administration includes guidance to applicants and even if criteria can be stricter when dealing with firms rather than consumers, at least the

Agency should have the discretion to not reject an application but seek to improve it.[9] Other than this, there are no reasons for specific comments on the section – as in other areas, details will be set out in the rulebook, passed by the Council with no outside approval, which is good. Potential challenges to legitimate expectations through changes in numbering (Article 98) do consider proportionality and respect for economic consequences. Number portability is stipulated (Articles 67 and 99) so in general the Law includes modern telecommunications concepts. The different fees and costs are to be determined by the Agency and it is essential that these are reasonable and the way to determine them transparent.

The rulebook with details on the emergency number is to be made by the Minister for Communications in cooperation with the Ministry of Security of Bosnia and Herzegovina (Article 100 paragraph 7). The Agency should also be involved in this work, even if it is legitimate that the Ministry has responsibility.

Management of the Radio Frequency Spectrum and Digital Radio and Television (Part II, Chapter IX and X)

Chapter IX deals with the frequency spectrum. The Agency here shares the work with the Ministry and the Council of Ministers (Article 104 paragraph 3). It is not unusual in an international context that the international obligations vis-à-vis the International Telecommunications Union (ITU) in this context are handled by the government rather than the regulator, but there is also nothing preventing delegation to the regulator. This section is somewhat unclear on the exact division of competencies – Article 103 appears to give full control to the Agency but Article 104 introduces a Decision by the Council of Ministers without having explained this Decision. The calculation of fees is also to be decided by the Council of Ministers (Article 108 paragraph 4). All other rules are made by the Agency (see Article 106, 107 and 108). The overall impression is that the division between the Council of Ministers decision (made on the suggestion of the Ministry) and the competence of the Agency to make decisions is not clear. It may be a good idea to add an Article at the start of the section where the respective roles are clearly set out.

[9] This should also apply to Article 110 on licences, paragraph 3.

The formulation of Article 110 is odd as it refers to more detailed provisions which shall be set forth in Article 106 of the Law. If referring to the same Law, such detail is already set forth and a simple reference to the other Article can be made – otherwise to a procedure under that Article to make rules. For Articles 111 to 113 it could be studied whether there is some way to express the same content in a simpler fashion, as the language in these Articles is particularly opaque.

Article 116 deals with military, police and similar use of frequencies. It is normal in all countries that there are special rules on use of the radio frequency spectrum by the military and such use is normally considered when the spectrum allocation plan is made, with some of the spectrum reserved for military use. Such reservation should be proportionate and the military should cooperate with the civilian authorities to the greatest extent possible, to avoid interference. What may be more of a problem is when the military or police or security forces use also additional parts of the frequency spectrum. Such use may be necessary but if there is too much of it, it may undermine the work of the Regulatory Agency. This is especially the case if the military and other forces use the spectrum for uses that are not intrinsically linked with their core work (the clearest example being when the military operates radio stations for its troops). Article 116 is attempting a good balance between such different uses and situations, with the difference between paragraphs 1 and 2 and this may be all that can be done in this Law. Additionally the relevant forces should be obliged to coordinate with the Agency to the extent possible and their obligation to submit reports must be properly fulfilled. Such obligations need to be in other rules and their implementation properly monitored by the relevant organs, as the content of Article 116 cannot really be enforced by the Agency itself.

Chapter X deals with digital radio and television. This section is surprisingly short and general for such an important issue. In addition, the first paragraph of Article 126 is not normative but just descriptive. The second paragraph is difficult to understand and although the third paragraph is good, this hardly gives an adequate regulatory framework to digitalisation of broadcasting transmission. As mentioned above, audiovisual media services are covered by other laws and as the delimitation of what is in one law and what is in another is not totally clear, it is possible that more provisions are found elsewhere. This is however not shown by this Law by any specific references. As the transition to digital

transmission has not been completed in BiH there are a number of matters that need to be regulated and the question arises where these are regulated and why so little of the detail is in this main Law on Electronic Communications.

Security and Integrity, Confidentiality and Data Retention (Part II, Chapter XI and XII)

Chapter XI deals with security and integrity and confidentiality of communications. These provisions should be studied for their compatibility with data protection legislation. Coordination with the data protection commissioner is important, such cooperation is foreseen in Article 128 paragraph 9. The two authorities will need to elaborate a process for their cooperation so it is not deadlocked as the Law does not explain how the cooperation – for example issuing of recommendations – shall take place. The same applies to Article 129 paragraph 7, 8 and 9. It is to be hoped that the Agency and the authority for data protection will be able to work out good rules jointly, including for how their ongoing cooperation shall take place. In line with European standards, the data protection commissioner (that should not be called an authority) shall be independent from the governing structures and not be seen as a state agency but as an oversight commission. This way, the regulatory agency – which is an independent agency but still an agency of state authority - and the data protection commissioner have different mandates and roles. It is important that the cooperation between them does not diminish the role of any one of them. The bigger risk in this context would be that the independent oversight role of the data protection commissioner is compromised if its recommendations are to be harmonised with those of the Agency, so even if cooperation is good and to be commended, it is important that both organs retain their independence and can act also in case they cannot agree on a common action.

In Article 131 it is not clear what an end-user without the status of subscriber is, which could be described in the definitions or made clearer in the text of the Article. This is all the more so as this is one of the areas where the Minister and not the Agency issues further rules.

Chapter XII deals with data retention and interception of communications. Some of the provisions also under Chapter XI deal with matters included in the general concept of data retention.

Mostly the data retention rules appear in conformity with European standards like the EU Data Retention Directive. This legislation is under constant debate in the EU so it is important to be alert to what changes may be introduced, as data retention is an activity where there are risks of personal data protection breaches, while at the same time the activity is seen as important for law enforcement and security. Proportionality and a clear legal basis are essential for any measures in this respect. According to European practice (case law from the European Court on Human Rights), data gathering is a potential breach of data protection, not just the use of such data. Thus also the retention must be examined from this perspective, even when made under the Law on Intelligence and Security Agency as set out in Article 135 paragraph 1. Paragraph 4 of Article 136, prohibiting revealing of the content, is very important. The data protection authority has the supervision role, which is fine, provided that there are no obstacles to this authority being given tasks under this Law.

Supervisory Inspection and Penalty Provisions (Part II, Chapter XIII and XIV)

In Chapter XIII the supervisory inspection to be performed by the Agency is regulated. Here again the rulebook (mentioned in Article 139 paragraph 4 and adopted by the Agency Council) is important as the tasks of the inspector need to be exercised in a reasonable, proportional manner. The potential interference for operators through measures under Article 140 and 141 is large, so this must be applied with reason. The measures are however legitimate, if properly applied. It is reasonable that an appeal does not prevent the execution of decisions (Article 142) as time may be of the essence, but this further underlines the importance to apply the rules with great caution. In Article 142, it would be better to use the word “may” as it should be up to the Council to in some events also be able to decide on a postponement in case of appeal. As with the Law in general, transitory provisions to continue the ongoing and well-established work of the Agency so far are important.

Penalties are found in Chapter XIV. The wording in Article 143 is confusing as the first paragraph talks about legal persons while paragraph 3 again mentions legal persons but with different amounts of possible fines. The offences are, in any case, unlikely to be committed by physical persons other than in the case they, as representatives of the legal persons, have caused the offence, but this appears to be covered by paragraph 2.

The provisions on fines are good in that they stipulate a range of the applicable fine, which allows for discretion and taking all relevant circumstances into account when determining the fine. One potentially problematic matter from a basic legal principle viewpoint (reflecting legal principles on predictability, legal certainty and proper stipulation in law) is that some provisions set out fines for breaches of rules in the rulebooks referred to in different places in the Law (some examples: Article 144, paragraph 1, h), k) t) and so on). As these rulebooks are not yet in existence – at least the Law refers to the task of adopting them, even if in practice many may already exist – penalties are introduced for offenses against rules that do not yet exist. This is the wrong order in which to adopt rules. It should either be done by a general allowing provision upon which the rulebooks can set out sanctions or by restricting the formulation in Article 144 to violations of the Law – even if in practice the exact extent and nature of the violation will be determined also with the help of the various rulebooks.

Transitional Provisions (Part III)

The final part, Part III, of the Law contains the very important transitional provisions. As there is a functioning Agency that has operated for many years, it is important that nothing in this Law will disrupt this work. Although, mainly, the Law does provide in a concise manner the needed rules to ensure that rules and decisions remain in force until new ones have been adopted, the meaning of the harmonisation in Article 149 paragraph 2 on validity of licences and permits is not clear. Any requirement for operators to undertake something while they have a valid licence or permit should be at a minimum, when the change is brought about not by their action but by a change in the law.

The Law should set out that the mandate of the current Director remains valid until a new one is appointed or otherwise make some other proclamation of who has the duties of Director until the process of appointment under the new Law has been completed.

As it is difficult without going into detail of all secondary legal acts passed in the area to see the difference between regulations mentioned in Articles and the Rules specifically listed in Articles – combined with the cessation of effect of certain rules by the entry into force of this Law, the comments on this must be of a more general nature. Regulation such as the one for electronic communication, with a huge amount of technical detail that requires very many additional rules (the so called rulebooks) to be effective and properly implementable cannot be made in a very short period. To avoid disruption, rules and regulations in force should stay in force until replaced by new ones. A period can be set for this, of not less than a year, but in any case the presumption must be that existing rules stay in force. Anything else will severely disrupt the work of the Agency and seriously harm the sector. Legally, by-laws can stay in force even if the law upon which they were adopted has been replaced, for a limited time. It is not possible to know if the list in Article 151 of instruments that stay in force is sufficient – a more encompassing manner of stipulating this would have been better.