II MONITORING OF THE IMPLEMENTATION OF EXISTING LAWS

1. Public Information Law

1.1. The implementation of the Public Information Law has been elaborated on in the section about freedom of expression.

2. Broadcasting Law

2.1. The Council of the Republic Broadcasting Agency (RBA) invited on July 13 all cable operators to introduce in their offer the channels of all regional and local broadcasters in the areas where these broadcasters possess a terrestrial broadcasting license. RBA said in its press release that this field is not regulated and that the respective regulations are still being prepared and hence the RBA Council recommends that the aforementioned channels be included in order to contribute to more complete information of citizens and pluralism of opinions. This was preceded by a press release of the Journalists' Association of Serbia (UNS) requesting the RBA to react after the cable operator SBB switched off on July 5 the channel TV K9, which holds a local broadcasting license for Novi Sad. According to UNS, SBB's network encompasses more than 50% of households in that city. ANEM press release indicated that the case of the exclusion of TV K9 was not an isolated one, since TV VK, holding a local broadcasting license for Kikinda, suffered the same fate.

The Broadcasting Law does not provide for an obligation of cable operators to include channels holding a terrestrial broadcasting license in their offer. The law only stipulates that the operators, fulfilling the conditions for the provision of the service of television programs/channels in accordance with telecommunication regulations, must acquire the rights and licenses for program distribution, whereas the license for cable broadcasting is not acquired for channels that may be received through free (unscrambled) satellite broadcasting on the territory of the Republic of Serbia, as well as for those channels holding the license for terrestrial broadcasting in the area for which the broadcasting license was issued, while the public service broadcasters' programs shall be aired free of charge. In practice, however, cable broadcasting licenses are still not being issued and cable operators are free to contractually regulate their relationships with stations the programs of which they are broadcasting. At that, there are serious reasons to suspect that cable operators are discriminating against domestic channels and especially domestic channels possessing local coverage broadcasting licenses. Namely, cable operators pay foreign television channels for

the rights to distribution thereof in their systems, while domestic channels are charged for being included in the program in the cable offer. Certain television stations holding a terrestrial broadcasting license, which refuse to pay the fee, shall ultimately remain without this type of distribution, i.e. this program will not be distributed. In a situation where only 50% of the population receives television program via terrestrial transmission, exclusion from the cable offer represents a serious problem for each broadcaster. At the same time, contractual freedom invoked by the cable operators is threatening to become a bottleneck and a place where selection of information that are fed to the citizens is performed, for purely economic reasons. Furthermore, such attitude of cable operators could also represent a breach of competition. Namely, the Law on Competition Protection stipulates that the application of uneven business conditions to the same business transactions, in respect of different market participants, placing the market participants in a less favorable position than their competitors, is a restrictive practice that is directly prohibited by Law. The Competition Protection Commission, tasked by Law to keep track of and analyze the conditions of competition and to take measure to protect it, has dealt with cable operators several times. However, these were typically cases handled on the basis of complaints mutually lodged by the operators themselves against each other and mostly regarding mutual contracts providing for the exclusive distribution of certain television channels. In the meantime, the Republic Electronic Communications Agency passed on July 7, 2011, the Decision on determining the relevant markets that are subject to prior regulation. According to that Decision, one of the markets subject to prior regulation is the retail market of media content distribution. The next part of this Report, containing the analysis of the implementation of the Law on Electronic Communications, will delve more deeply into this subject.

3. Law on Electronic Communications

3.1. The Managing Board of the Republic Electronic Communications Agency passed on July 7, 2011, the Decision on determining the relevant markets that are subject to prior regulation. The decision is significant for the media sector primarily because it provides for prior regulation of the retail market of the media content distribution. The report on the analysis of that market, which analysis was performed by RATEL in keeping with the provisions of the Law on Electronic Communications, concludes there are structural barriers for accessing the cable distribution market, which come in the form of an absence of economic interest of the operators for building their own distribution network on territories where the network of some other operator already exists. Furthermore, according to RATEL, there are also regulatory barriers to entry, namely in the IPTV segment, since Telekom Srbija is the owner of the entire landline network on the territory of the Republic of Serbia. The

analysis determines SBB, as an operator with a 50 % market share, as an operator with major market strength and announces the passage of a decision that would introduce regulatory obligations to SBB to refrain from charging excessive fees, obstructing other operators to enter the market or from restricting competition by charging excessive or dumping fees, giving unjustified preference to certain end users. Furthermore, the level of retail prices would be limited, the operator would be obliged to obtain a formal approval from the Agency for determining and changing the content and price of service packages. Finally, the control of individual tariffs would be introduced, while the prices would be based on the costs of services provided or prices in comparable markets.

The aforementioned report on the analysis indicates that the number of cable, IPTV and DTH satellite subscribers in 2009 was about 1,1 million households, with a penetration of about 42 %. Distribution services are provided by 81 registered operators, of which 76 cable operators, two IPTV operators and three DTV operators. Seven operators have a market share of more than 85 % and SBB alone holds more than 50 %. The goal of the pre-regulation announced by RATEL is to prevent SBB from using its market strength and the absence of genuine competition by investing less, increasing the costs and decreasing the quality of services. Furthermore, in RATEL's opinion, SBB could, in the absence of regulation, be in the position to be able to raise the price of its services without justification, which could be interpreted by the other regulators as a signal to start behaving in the same way, to the detriment of end users. The regulatory obligations that were announced would not, however, have an effect on the current problem posed by the discrimination suffered by certain media, the program of which is excluded from the cable offer. In order to solve this problem, the Law on Electronic Communications foresees a different solution. Namely, it provides for the possibility for RATEL to determine, on the request of the RBA, the operator that is obliged to transmit one or several radio or television channels, at the national, provincial, regional or local level. RATEL is expected to introduce this measure when a considerable number of end users will be using the electronic communication network of that specific operator as the sole or primary channel for receiving media content and also when the measure is necessary in order to achieve a set of clearly defined goals of general interest, which goals will be determined by the RBA, in accordance with the principle of proportionality and transparency. This decision has never been passed and the RBA has instead opted for a non-binding recommendation to the cable operators, as we have already mentioned in this Report.

3.2. The Ministry of Culture, Media and Information Society launched on July 21 public consultations about the Draft Rulebook on Technical Requirements for Equipment and Program Support for Lawful Interception of Electronic Communications and Retaining of Data on Electronic Communications. The Rulebook is to be passed pursuant to Article 127,

paragraph 5 and Article 129, paragraph 4 of the Electronic Communications Law and the Ministry has foreseen that the public consultations should last until August 4.

Article 127 of the Electronic Communications Law stipulates that electronic communications operators must enable lawful interception of communications. It actually concerns the disclosure of the content of communication, which disclosure is, without the user's consent, allowed only for a certain period of time and only on the basis of a court decision, if necessary for the purpose of criminal proceedings or the protection of the security of the Republic of Serbia, in the manner provided for by Law. In order to realize the obligation to allow the lawful interception of communications, the operators must, at their own expense, ensure the necessary technical and organizational conditions (equipment and program support) and the Ministry of Culture, Media and Information Society should prescribe more precisely the requirements concerning the said equipment and programming support, after having obtained the opinion of the Justice Ministry, the Internal Affairs Ministry, the Defense Ministry, the Security Information Agency and the Commissioner for Personal Data Protection. Article 129, paragraph 4 of the Electronic Communications Law says that the Ministry of Culture, Media and Information Society shall, again after having obtained the opinion of the Justice Ministry, the Internal Affairs Ministry, the Defense Ministry, the Security Information Agency and the Commissioner for Personal Data Protection, prescribe more precisely the requirements concerning the retaining of data required for the tracking and identifying of the source of communication, identifying the destination of the communication, establishing the beginning, duration and end of the communication, establishing the type of communication, identifying the terminal equipment of the user and identifying the location of the mobile terminal equipment of the user. The operators are required to retain this data for the needs of conducting an investigation, uncovering of criminal acts and conducting criminal proceedings, in accordance with the Law governing criminal proceedings, as well as for the purpose of protecting national and public security in the Republic of Serbia, in keeping with the laws governing the activities of security services of the Republic of Serbia and those of internal affairs agencies. The obligation to retain the aforementioned data shall last 12 months from the day when the communication took place and the operator shall retain it so that the data may be promptly accessed and delivered. The interception of communication, i.e. the finding out the content thereof without the consent of the user, as well as the retaining of data required for the tracking and identifying of the source of communication, establishing the type of communication and the type of equipment of the user and identifying the location – even when it concerns mobile equipment – if abused and resorted to outside of the constitutional guarantees for the protection of the secrecy of communications, can cause great damage to human rights. Therefore, it is commendable that the Draft Rulebook are subject to a public debate. On the other hand,

these consultations are held during the summer holidays season and last merely ten business days, instead of 30 days, as the Law stipulates for acts pertaining to determining general requirements for the performance of electronic communications-related activities. Moreover, the constitutionality of provisions that represent the basis for passing this Rulebook has been partly contested by the Proposal for the assessment of constitutionality filed by the Commissioner for Personal Data Protection and the Ombudsman to the Constitutional Court of the Republic of Serbia back on the 30th of September 2010. In such circumstances the Ministry should have either waited for a decision of the Constitutional Court or at least to hold public consultation in a longer period of time or in a period when the attendance of a greater number of stakeholders was possible. The main concern as to the text of the Draft Rules is definitively the fact that it has failed to specify the technical requirements for the devices and equipment, as one could assume from its name. Instead, it transfers the right to prescribe the functional specification of the equipment, devices and programming support to the Security Information Agency, which falls far outside of the framework provided for by the Electronic Communications Law. What makes this Rulebook particularly interesting for the media is the fact that the misuse thereof would irrevocably compromise the legally established right to the protection of journalists' sources.