III MONITORING OF THE PROCESS OF ADOPTION OF NEW LAWS

In early August, the Ministry of Culture and Media posted on its website the Draft Law on Electronic Media and the Draft Law on Public Service Broadcasters. The Ministry said the purpose was to prepare a public debate about these laws. Part of the public has reacted by criticizing the lack of transparency and democratic principles in the procedure of drafting/passing the media laws, since the draft laws that were posted substantially differ from those drafted by the working group. Unfortunately, there was no qualitative analysis of the said drafts, which, despite of containing several very questionable provisions, still represent a step forward compared to the working group's drafts. On the other hand, no clear argument was presented to support the alleged lack of transparency and democratic principles of the drafting process, since the working group completed its work in early May, after which the competent ministry was authorized to formulate the draft on its own, as the sole authority responsible for media and information policy. So, the Ministry's actions are not legally questionable, while the issue of legitimacy is a completely different one and it unfortunately corresponds to the state of cultural transparency in enacting the law, which, in turn, is narrowly connected to the democratization of society. The issue of transparency and democracy of the procedure of adoption of new media laws is a very important one, but it is also important to adopt the said laws as soon as possible, given that they are five months late. The issue of transparency of the said procedure aside, the fact is that the ministry could have at least tried to explain why it has altered certain concepts from the previous draft. Otherwise, the public could get the impression that the draft was changed in order to satisfy somebody's particular interests. Whatever the case may be, we will try in our analysis to point to certain provisions that could bear strong implications for the media market and the freedom of expression in general.

3.1. Draft Law on Electronic Media

The basis for the drafting of the Draft Law on Electronic Media is the Audio-Visual Media Services Directive of the European Commission (EC). The Draft mirrors that Directive to a great extent, but certain concepts from the Directive are implemented so as to give excessive authority to the independent regulator (the RBA). Under Article 24, paragraph 3 of the Draft Law, the Regulator shall control electronic media (for the purposes of the Law on Electronic Media), with the exception of electronic versions of print media and independent electronic editions, which are supervised by the ministry in charge of information affairs. That concretely means that the control of radio and TV broadcasters' online portals (in the context of the statutory obligation

from the Law on Electronic Media – protection of minors, prohibition of hate speech, etc.) is performed by the RBA, while the ministry controls, in a similar way, electronic versions of print media and independent electronic editions. Both concepts seem questionable. While interests such as the protection if minors and ban on hate speech are unquestionable, claiming the authority to supervise online editions is problematic, since it has major implications for the protection of the right to free expression on the Internet, without a valid reason. The right to freedom of expression may be restricted only if it is (under the Law) necessary in a democratic society, for the purpose of protecting the vital interests of society (national security, public health, rights and freedoms of others, etc.), while the restrictive measures and the purpose to be achieved must be proportionate. These standards were accepted by Serbia as a member of the Council of Europe and signatory of the European Convention on Human Rights and Fundamental Freedoms. What is questionable is the right of the Ministry of Culture and Media to oversee the fulfillment of obligations from the Law on Electronic Media by the online versions of newspapers, if that obligation does not exist relative to the print version of these newspapers. This is a very important question, since print editions are regulated completely differently, which may lead to identical content in print form and in online form being subject to different regimes. On the other hand, the RBA's authority to control online portals of radio and TV stations is questionable too, since the nature of online content of electronic media may be completely different than that of traditional television and radio services – the two are namely not always comparable. The online portals of radio and TV broadcasters in Serbia are similar to the portals of print media and independent online editions. They all typically contain news, links to certain video content, comments and the like. With its wide-ranging powers under the Draft Law, the RBA may (for the purpose of enforcing the hate speech ban or protecting minors) create mechanisms that substantially restrict freedom of expression or result in self-censorship, which is very dangerous, especially if we bear in mind the nature and significance of Internet as a media. The intent of the legislator, when introducing such control, remains unclear. Is it really necessary to force online media into the "molds" in which we deal with traditional media? If we carefully analyze the regulations in the region, we will see a tendency to strengthen mechanisms for the control of online media. Croatia and Montenegro have introduced the obligation of registering so-called electronic publications, which causes many problems. Furthermore, it needs to be stressed that the Directive on Audio-Visual Media Services, as its name says, primarily concerns audio-visual media services, both linear (television) and non-linear (services on request). The Directive allows member countries to extend the range to other media services. The question is, however, to what extent it is suitable to expand the scope of the Directive beyond radio, at least in Serbia. The Ministry stopped short of explaining to the public the reasons behind introducing such interference in the realization of freedom of expression on the Internet. Additionally, certain provisions of the Draft Law are difficult to apply to online media.

For example, Article 27 of the Draft Law, which provides for a mechanism of reporting improper behavior and the actions of the RBA upon such report, prescribes a 30-day deadline from the first showing or the rerun of the questionable content. On the Internet page, the content is stored on the server and lasts for a undetermined time, opening the possibility for online portals to be reported for "improper content" without time limitations, namely after the expiration of time limits relative to the broadcasting of the same content on radio and television. Another open issue is the treatment of user-generated content on electronic media websites, since the broadcasting regulator does not have any relevant experience in relation to such type of interactivity. The issue of responsibility for comments posted on media portals is also topical in global professional communities and there is an absence of a single and unified response as to how to regulate it. Such user-generated content implies a series of questions. Is the comment part of the news that is posted? May the portal, as an intermediary in communication, be held responsible for the user-generated content? Finally, is the current system of comment moderation effective and could it constitute a form of censorship? These questions remain open. Each new questions opens up a new controversy and it is necessary to tackle them with a wide consensus of the professionals and the general public, bearing in mind the need to maintain "democratic principles on the Internet", which is in the interest of each individual user. In addition, strong interference with the freedom of expression may also affect the business models of the media, which means that the media market, which is already declining, may be affected too.

What is also questionable in the Draft Law is the failure to separate the functions of the Chairman of the RBA Council from the function of Director of the services providing expert and technical services for the Agency. In the previous version of the Draft Law, the working group held the opposite position. Apart from the fact that the concept providing for the "merger" of functions seems undemocratic, since it gives excessive authority to one person, from the hitherto practice of the RBA, it seems that the circumstance that the chairpersons of the Council were at the same time the directors of the Agency did not bring any particular value to the regulation of broadcasting in Serbia. On the other hand, it looks as if the separation of the functions could contribute to better operational capacity of the Agency on the daily level and the development and strengthening of its overall capacities. The concept entailing the separation of the functions has been embraced by other countries in the region too, such as Croatia and Montenegro. Furthermore, the European practice of non-convergent regulators – those whose authority does not encompass electronic media – is moving in the direction of separating the aforementioned functions. The contrary position leads to possible abuse of excessive powers by

one person and the transformation of advisory and technical departments of the regulator into advisory and technical services of one person.

A notable shortcoming of the Draft Law on Electronic Media, released by the Ministry of Culture and Media in early August, is the systemic inconsistency of the criteria for assessing unlawful concentration of media ownership relative to the criteria provided for by the Draft Law on Public Information and Media, the draft version of which has already undergone public debate. Relative to previous drafts, the Ministry particularly intervened in the text made by the working group, prescribing new thresholds of unlawful media concentration that are even more rigid than the concept contained in the current Broadcasting Law. It should be stressed that, in the initial draft media laws, all rules concerning media concentration were contained by the Draft Law on Public Information and Media; subsequently, the provisions about electronic media were removed from the latest version of the draft. Finally, the new concepts embraced by the Draft Law on Electronic Media constituted a "Copernican Turn" relative to everything we had the opportunity to hear in the last few years, back in time of never adopted Draft Law on the Transparency of Media Ownership from 2008. In a nutshell, as opposed the prohibition of vertical integration of the publishers of print media and press distributors, the Draft Law on Electronic Media allows the vertical integration of broadcasters and the owners of cable or other distribution systems. Furthermore, in the situation where the impending digital switchover of terrestrial broadcasting is hoped to open up additional space on the air compared to the analog era, stricter restrictions are proposed for media concentration than those in force today, when the terrestrial frequency is a far scarcer resource. Moreover, stricter restrictions in terrestrial broadcasting are not accompanied by stricter restrictions in cable broadcasting, although the number of households receiving terrestrial TV signal (according to RATEL's official statistics for 2012) has fallen to about 40%, with a clear downward tendency. This actually creates the situation where the ministry, with the supposed aim to protect media pluralism, is showing the intent of protecting such pluralism with stricter rules in the ever-less-important terrestrial reception, while neglecting it in the increasingly prevalent cable, IPTV and satellite DTH reception. If such concepts prevail, the consequence will be that the same owner will not be allowed to have several channels that would be available to the minority of citizens, but he will be able to have an unlimited number of channels that will be available to the majority of viewers. Re-regulating the (analog) transfer that has lost its predominant character and that will soon stop being a scarce resource (while at the same time de-regulating the dominant digital transfer and opening up space for the further vertical integration of the media and telecommunications operators) is unlikely to bring anything positive.

3.2. Draft Law on Public Service Broadcasters

The Draft Law on Public Service Broadcasters was subject of a debate in part of the public and it was quickly removed from the Ministry's website. A new mini-working group was subsequently formed with the task of ironing out its shortcomings. Particularly questionable in the Draft Law was the budget financing of PSB. This was most unfortunate, since many arguments and clear negative examples from international practice were put forward to demonstrate that budget financing enabled a high degree of political influence on the editorial policy of PSB and their further indebting. However, not even the budget financing provisions complied with European standards. They did not provide for any protective mechanism against blackmail and political pressure with each particular payment, which have been set at monthly level. At the same time, the dates when the payments are to be made were not precisely determined, nor were any mechanisms envisioned that would set objective, predetermined and international standards-based criteria for determining the amounts of the payments to PSB. Furthermore, the Draft Law has completely neglected the principle of balancing the revenues from public and commercial sources, which is provided for by the Media Strategy. Under the latter document, the PSB revenues from commercial sources shall be restricted, when proceeds from subscription fees reach a level sufficient for the realization of the PSB basic functions.

The competences of the RBA concerning the realization of programming functions of PSB are questionable too. Although the provisions on the Agency's monitoring of the PSB programming are completely adequate as a controlling instrument, certain concepts regarding the way in which such controlling is conducted seem problematic. Namely, what is the purpose of procedures against PSB for the non-fulfillment of programming functions? For example, PSB are required to submit to the RBA complaints against their work received from viewers and listeners, as well as the PSB response to these complaints. However, what the Agency does with these complaints and responses remains unclear. Furthermore, it is prohibited to influence the independence of the PSB editorial policy, which is good, but the Draft Law fails to prescribe the RBA's response where such influences have taken place. Finally, the Law does not provide for the proper punitive measures and hence there are no sanctions against the PSB for non-compliance or the RBA, when the latter fails to discharge its competences.

Article 15 of the Draft Law is particularly interesting, since it says that the PSB may be dismantled. Although this may be done only by Law, this provision could also be interpreted as a

justification to really dismantle a PSB as part of austerity measures, which would serve as an excuse for dismantling it over its editorial policy.

A particular curiosity is the fact that the Draft Law contains norms that are even more general in nature than those contained in the Media Strategy. Under the latter document, new PSB channels may be set up, as an exception, after the digital switchover (although this is solely in the function of fulfilling the obligation of the PSB) and that new channels will be introduced at the request of PSB. These requests shall be considered and decided upon by the independent regulator, in keeping with the Law and taking into consideration the programming principles and obligations in realizing the public interest (on the basis of a prior analysis of the extent to which these principles and obligations are realized by the existing programs), accompanied by guarantees that the new channel will not perturb the media market. The Draft Law, meanwhile, has abandoned all the aforementioned provisions, opting instead for a concept under which the PSB at the level of the Republic realizes its programming functions through at least two general and two specialized channels (more than there currently are) and three radio channels. At that, the sole obligation of the PSB, when introducing new services, is to submit a program study to the regulator. The Draft Law stops short of prescribing the authority of the regulator relative to that study.