III MONITORING OF THE PROCESS OF ADOPTION OF NEW LAWS

1. Law on Electronic Media, Law on Public Service Broadcasters, Law on Public Information and Media

After the public debate on the Draft Law on Electronic Media and the Draft Law on Public Service Broadcasters, in November the competent ministry formed a mini-working group consisting of the representatives of the ministry, RBA, public service broadcasters and media law experts, which was also supported by European Commission (EC) experts. The task of this working group was to review the comments, implement some of them and perhaps improve the text of the draft. We remind hereby that more than 400 pages of suggestions were received relative to both draft texts, making the job of the working group challenging to say the least. The group has completed its job and the latest versions of both drafts are expected to be sent for review to the competent ministries in December and January (and forwarded to the EC through the Government EU Integration Office). Meanwhile, the Draft Law on Public Information and Media was sent for a "second round of consultations" to a number of ministries and the Legislative Secretariat (only to be subsequently transmitted, also via the EU Integration Office, to the EC for review). While making any predictions seems futile at this point, all media laws should be expected to be tabled for parliamentary review in late February or early March 2014, which means that the Media Strategy deadline will have been exceeded by one year. The latter brings in doubt the timely realization of the key tasks of the media reform, namely the privatization of the still non-privatized state media, which was scheduled to be finished by December 31, 2014, as well as the actual realization of the system of project-based financing of media from public sources in 2014.

Nonetheless, the hottest topic among media in November hasn't been the work of the working group and the speculation as to when media laws will be adopted, but Article 109 of the Draft Law on Electronic Media, which provides for rules on illicit media concentration. In our prior reports, we have written about this article and its provisions concerning the ban on one entity holding two national broadcasting licenses (which makes the Draft Law even more rigid than the current Broadcasting Law). We have also written about the mysterious disappearance from the Draft Law of a provision, which tied the concentration threshold to a "technologically neutral" criterion (35% ratings in the coverage zone in one calendar year). This time, the media focused their attention on the rules pertaining to illicit media concentration, namely the provision barring a telecommunications network operator (which network is used for the distribution of

media services) to be at the same time the founder of a general-type media outlet or a media outlet providing news services. Such a provision would prevent one of the biggest operators in Serbia to realize a project involving the creation of a regional news program akin to CNN. By comparing EU practice in this field, it may be said that the Draft Law is utterly restrictive in this case, since it prohibits vertical integration of the operator and the media services provider, relative to the type of content they broadcast (in the case of general-type services and news content). Although the concept of media pluralism (which would be protected by such a provision) primarily concerns the variety of news content, there are no persuasive arguments for tying the ban on vertical integration to news programs. Namely, if the problematic provision remains in effect, the operator might have 100 music, 100 sports or 100 entertainment programs, which, in the opinion of the author of the provision, would have not an unfavorable influence on the pluralism of ideas, views and opinions. At the same time, possessing a single news channel would exert "dominant influence on public opinion". Furthermore, the Draft Law does not contain a precise definition of "general media service" and "specialized news content service". The criteria of classification are set in a general manner, leaving the possibility for arbitrary interpretation, which is intolerable in such sensitive matters. Moreover, if mechanisms are ensured, owing to which other providers of media services may access the electronic network of an operator that has its own channel, proprietary control must not always be key in exerting dominant influence on public opinion. The criteria for access (both in the case of proprietary and non-proprietary radio channels) should be based on market criteria, under which all service providers have the right to compete for a spot on cable, satellite or multiplex. However, it seems that in the present system, prior regulation of the right to access to the distribution network is possible neither under the Law on Electronic Communication, nor under the Draft Law on Electronic Media. The only thing that remains is *ex post* application of the rules from the Competition Protection Law, in case the operator grants more favorable conditions to its own operator than to other operators. Namely, access to the network should be based on objective, measureable, clear and non-discriminatory criteria, in compliance with the free market and under strong supervision of the Competition Protection Commission, which would punish each violation *ex post* (subsequently) and not *ex ante* (preventively). There are two key problems with vertical integration. The first is putting proprietary channels in a more favorable position compared to other channels and the second is "cross-subsidizing" the operator's own media services from revenues generated by telecommunication activities. The first problem could be solved by offering access to everyone (including proprietary channels) under equal conditions (non-discrimination, transparency and objectivity), which includes non-discriminatory access to the service of logical channel numbering (LCN) and more clear regulation of the must-carry obligation. The goal would be avoiding an excessive burden on the operators, as well as introducing rules on separate accounting of business operations (revenues)

stemming from the provision of media services and those arising from the provision of telecommunication services. Bearing in mind those are institutes of competition law, in the absence of grounds for prior regulation in telecommunication or media related regulations, oversight should be vested in the Competition Protection Commission. Unfortunately, it seems that the Commission lacks the capacity to tackle this challenge; meanwhile, the circumstances on the market are such that it is impossible to absolutely exclude discriminatory treatment of the operator against non-proprietary service providers. It is therefore not a bad idea to have certain rules concerning vertical integration included in media laws. However, the concept that was integrated in the Draft Law on Electronic Media is unacceptable, because it introduces barriers for certain types of content, without genuinely protecting media pluralism or preventing network operators to discriminate against non-connected content providers. The minimum rules that should be contained in media laws should clearly define, with the aim of safeguarding media pluralism, the minimum set of channels each distributor must offer in the basic service package, as well as the rules of LCN. The goal would be to prevent the situation (which happened recently with an operator) where a new commercial cable channel would appear overnight, in the place of one we had been watching for years.

2. Law on Amendments to the Law on Copyright and Related Rights

In late November 2013, the Ministry of Education, Science and Technological Development presented the Draft Law on Amendments to the Law on Copyright and Related Rights – the third change to that Law in the last four years. The amendments primarily pertain to extending the duration of copyright protection from 50 to 70 years, in conformity with the relevant EU recommendations. The changes also concern the extension of the list for computer equipment used for copying actual copyrighted works and hence fall under the regime of so-called special fees.

As for provisions relevant for the media, we hereby want point to the amendment to the hitherto Article 6 of the Law on Copyright and Related Rights, as well as to certain changes to the criteria for determining the tariff for exploiting the object of copyright and related rights. The said amendments unjustifiably introduce a new category of exception from the notion of author work (copyrighted work), providing that author works shall not include “daily news and other news with the character of press information”. The explanation accompanying the Draft Law says that the aforementioned change results from the harmonization of our legislation with Article 2, paragraph 8 of the Bern Convention, which in English language reads: “The protection of this

Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." The difference between the proposed formulation of the law and the text of the Bern Convention is clear, since the Draft Law mentions "daily news and other news with the character of media information", while the Convention merely mentions miscellaneous facts having the character of mere items of press information. Hence, this is about exempting from copyright protection news, or even more precisely – factual claims that are part of media reports (which is not disputed in practice). It remains unclear, however, what practical change the authors of the Draft Law wish to accomplish by exempting from copyright protection "news having the character of mere items of press information." This definition is broad and imprecise and it may lead to exempting from copyright protection nearly all media content. In addition, the Convention is limited to "common press reports", which means daily reports by print media, which is understandable in view of the fact that the Convention was passed in 1886 and revised in 1971 the last time. If one takes into account the "age" of the Convention, extending the exemption to all media content is completely inapt. The *ratio legis* of the provisions of the Convention is to prevent copyrights to thwart the free flow of daily information (i.e. facts) and not to deny the character of author works to all media content. This goal is already achieved with the existing formulation of Article 43, paragraph 1 of the current Law on Copyright and Related Rights, which prescribes that, under certain conditions, it is allowed to use the copyrighted object without the author's permission and without paying the copyright fee in the scope of informing the public about current events through the press, radio, television and other media, to the extent necessary for the realization of the purpose and manner of providing information about the current event. Therefore, the amendment is neither necessary nor justified; on the other hand, it may cause serious problems to journalists and the media, because their author content will be freely disseminated, copied and modified, without the obligation to state the source and the author of the information (as it was hitherto prescribed in Article 41 of the Law). Furthermore, the introduced exception will practically suspend Articles 41 (relative to press information) and 43 and it is hence unclear what is the relation between amendments to Article 6 and the aforementioned articles, since the amendments to the Law stop short of addressing that relation.

The second major change relevant for the media landscape is the change to Article 170, paragraph 5 of the Law on Copyright and Related Rights, namely the change to the criteria for determining the tariffs implemented by collective organizations in the negotiations with the representative association of users. Until now, the criterion was the GDP, where it was not clearly emphasized if it is GDP per capita or total GDP, which enabled each side in the negotiations to invoke the examples of countries they found suitable to their interests, while

indirectly hampering an agreement. Instead of clarifying things, the legislators opted for an even vaguer criterion, which may only complicate further the odds of reaching an agreement between collective organizations and the representative association of users. However, even if the benchmarking criteria were more clear and unambiguous, the problem remains with the failure to recognize the specific circumstances of the relevant markets where the object of protection by copyright and related rights is exploited. For example, the media market in Croatia is not comparable to the Serbian one, since it has less radio and TV stations, which compete on a richer market and hence the media may withstand higher charges. The specificity of our media market is the excessive number of electronic media (more than 500), placing Serbia at the top of the European list in that respect. It is therefore difficult to find a pilot country for Serbia to emulate. Moreover, the representative associations of users also have the problem of not being able to access data about the tariffs of collective organizations in other countries, which makes their negotiating position uneven.

Finally, the legislator failed to regulate more closely the procedure for determining the tariff in cases of unsuccessful negotiations. Namely, the current Article 176 of the Law stipulates that, in the absence of an agreement, the managing board of the collective organization shall determine the proposed tariff, which proposal shall be subject to the approval of the Intellectual Property Office. In its present definition, Article 176 leaves two possibilities to the Office – to approve the proposed tariff or to deny approval. That means that the Office may not change the proposed tariff and hence there is no guarantee that the proposals of the representative association of users will be accepted at all. In order to have the interests of both sides in the procedure before the Office protected, the Office must be authorized to end the procedure by passing a decision about the tariff (and not only approving the tariff proposed by the collective organization) if the negotiations fail, in compliance with the criteria from the Law, the negotiations and the arguments voiced in the course thereof.