II MONITORING OF THE IMPLEMENTATION OF EXISTING LAWS

1. Law on Public Information

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

1.2. On a session held on July 22, the Constitutional Court decided upon the constitutionality of the Law on Public Information adopted on August 31 last year. We hereby remind that a motion for the assessment of the constitutionality of the said Law, harshly criticized by media professionals, had been tabled by the Ombudsman Sasa Jankovic. There were also another three initiatives pertaining to the same Law. It follows from the release of the Constitutional Court, published on its web site on July 22, 2010, that the Court ruled that most of the provisions of the Law on Public Information were not in accordance with the Constitution and ratified international Treaties. By the time this report was being finalized, the Court's decision was not yet published in Serbian Official Gazette.

First, the Constitutional Court found that the provision, stipulating that a public media may only be established by a domestic legal entity, but not by a natural person or foreign legal entity, was not in conformity with Article 50 of the Constitution, which establishes the freedom of any person to, without any permission and in the manner laid down by law, establish newspapers and other forms of public information. Moreover, the above said provision was found to be in breach of Articles 10 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Article 19 of the International Treaty on Civil and Political Rights.

Furthermore, the Constitutional Court found that the provisions, imposing obligations to the Prosecutor and the Court by determining measures that these authorities must undertake in economic offence proceedings, were in discordance with articles 4, 142 and 156 of the Constitution. These articles namely stipulate that the legal system shall be indivisible; that power shall be separated into three branches of government – legislative, executive and judicial; that the courts shall be autonomous and independent; that the Public Prosecutor's Office is an independent state authority that prosecutes criminal and other offenders. Taking into account the fact that the domain of economic offences is already regulated by the Law on Economic Offences, the Constitutional Court found that the provision of different rules of procedure in that area of criminal law results in breaching the principle of the uniformity of

the legal system, as well as the principles of equality before the Law guaranteed by Article 21 of the Constitution. We hereby remind that the Constitutional Court refers in this particular case to the provisions of the Law ordering the Public Prosecutor to request a temporary suspension of publishing of a public media where this media is not registered with the Register of Media Organizations, as well as provisions requiring the court to order the founder of the public media, within 12 hours of the submission of the Public Prosecutor's motion, to temporarily suspend the publishing of the public media even before the outcome of the proceedings that are underway becomes final; as well as provisions ordering the court to mandatorily accompany the fine pronounced for an economic offence with a ban on publishing of the public media. The Constitutional Court also found that, with the provision of the obligation to pronounce a temporary suspension of publishing of the public media in case of failing to register with the Register of Media Organizations, the said registration obtained the character of constitutive element of the procedure of establishment of a public media, which is inconsistent with Article 50 of the Constitution, as well as with Article 10 of the European Convention and Article 19 of the International Treaty.

Furthermore, the Constitutional Court found that the provisions introducing fines for economic offences and misdemeanors against the founder, the founder's responsible person and the responsible editor of a public media, as well as the provisions introducing the obligation of the court to pronounce a temporary ban on publishing of a public media, namely the obligation to pronounce a probation sentence, were inconsistent with the principles of the uniformity of the legal system, equality of all persons before the Constitution and the Law, the principle of division of powers and independence of the judiciary, guaranteed freedom of the media and the right to legal security in criminal law. The Court also found that the prescribed sanctions were also in breach of the constitutional principles provided for in Article 20 of the Constitution that determine the prerequisites for a legitimate restriction of human and minority rights and freedoms, which are also contained in Article 10 of the European Convention. In that manner, the Court actually upheld the criticism that the legally provided fines were excessive, i.e. disproportionate to the purpose of the above mentioned restrictions of rights, which provided that such restriction is legitimate, could be achieved with a lesser limitation of the essence of the right to freedom of expression.

The Court rejected the proposal and did not accept the initiatives pertaining to the provisions of the Law, which stipulate that a public media must be registered with the Register of Media Organizations; which prohibit the publisher from disposing its right to a particular public media or right to publish a public media, as well as the invalidity of such contract; which provide for a ban on establishing a new public media under the same or similar name within one year after the termination of the public media or the cessation of the printing and

publishing thereof; which provide that the Register of Media Organizations shall be kept by the Business Registers Agency; which provide the obligations of that Agency towards the Ministry of Culture, as well as obligations pertaining to the furnishing information to the Ministry of Culture about the founders of public media as subject to forced collection procedure. The Court namely found that the above provisions did not infringe on rights guaranteed by the Constitution and ratified international treaties.

In the part in which the initiatives went further than the Ombudsman's motion for the assessment of constitutionality, the Court accepted the initiative and initiated the procedure for the assessment of the constitutionality of provisions stipulating that the Culture Minister shall regulate more closely the keeping of the Register of Media Organizations, as well as the obligations of founders of public media to submit applications for registration. The Court namely found the question, whether the powers conferred to the Minister were in conformity with the Constitution, to be legitimate.

The legal consequence of such a decision by the Constitutional Court is that the provisions of the Law on the Amendments to the Law on Public Information from 2009 that have been declared unconstitutional shall cease to be effective on the day of the publication of the decision in the Official Gazette of the Republic of Serbia.

Although the decision of the Constitutional Court may be interpreted as a democratic leap forward and a significant achievement in the area of protecting the right to freedom of expression in Serbia, it nevertheless leaves a bitter taste. We may rightfully ask why such law had to be passed in the first place, when since its very adoption it was perfectly clear, ever since its very adoption, that it was unconstitutional. What is even more paradoxical, the provisions of that Law – except for the introduction of the Register of Media Organizations – are not being implemented in practice. Its only outcome is a year lost for the Serbian media in trying to prove the obvious, as well as growing self-censorship in fear of the Law's potential implementation.

2. Broadcasting Law

2.1. The implementation of the Broadcasting Law in this report will be partially elaborated on in the section about monitoring of the activities of the Republic Broadcasting Agency.

2.2. On July 12, 2010, the Republic Broadcasting Agency Council announced that, while examining the annual accounts for the previous year, it had established that the overall revenues of the Agency exceed its expenditures. The press release said that the Council transferred 139 million RSD (the difference between revenues and expenditures) in the budget of the Republic of Serbia. According to the press release, these funds will be earmarked in equal parts for the improvement and development of culture, healthcare, education and social security, respectively.

The revenues of the Republic Broadcasting Agency consist of funds generated from the fee charged to broadcasters for their broadcasting licenses. If the Agency fails to generate revenue from this source, the Broadcasting Law stipulates that the missing funds will be supplied from the Budget of the Republic of Serbia. Pursuant to Article 34, paragraph 7 of the Law, if the overall revenue generated from the fee charged to broadcasters exceed the expenditures of the Agency, the difference will be transferred into the budget of the Republic of Serbia and earmarked in equal parts for improving and developing culture, healthcare, education and social security, respectively. The purpose of this provision, however, is not to introduce an obligation to the Republic Broadcasting Agency to pass financial plans foreseeing revenues greatly exceeding expenditures. On the contrary, the intent of the legislator when introducing the fee was to cover the costs of regulation from that source, namely to secure the Agency's financial independence from the executive. Contrary to such intent of the legislator and the principles provided by the Broadcasting Law of regulating relations in this area, which emphasize the development and incentives to creativity in the area of radio and television programming in Serbia, the RBA is actually financially obstructing the activities of the media by maintaining unreasonably high fees. Most respondents in polls conducted among media professionals say that excessive broadcasting fees and excessive fees of collective organizations for the protection of copyright and related rights are the biggest hurdle for financial self-sustainability. In order to illustrate the excessive level of the said fees, we hereby remind that, in the most difficult period of crisis in the Serbian media, which have seen their annual advertising revenues to drop by at least 20% for the third year in a row, the RBA continues to feed the state budget with huge amounts generated from broadcasting fees, while certain collective organizations proudly boast that they have distributed 25% more revenues than the previous year to owners' rights. RBA's decision to transfer the excess of collected funds in the budget is apparently in accordance with the Law at least to the extent in which the RBA should not be allowed to distribute the difference in revenues and expenditures as bonuses for its employees or Council members. However, such decision is actually in deep discord with the Law, since it may point to the fact that the RBA Council's true goal is not to regulate in order to meet the citizens' need for

quality media content, but to additionally tax the media in order to fill up the budget, at the expense of the said need.

2.3. In early July, the media reported that Aleksandar Tijanic had been re-elected to the position of General Manager of the RTS. Tijanic reportedly received the support of seven members of the Public Broadcasting Service Management Board, while two members voted against him. Tijanic has been occupying the position for six years. Tanjug quoted Tijanic as saying that in consideration for the seven votes he had received in the Management Board he would persevere and justify the support of the viewers in the next four years.

In keeping with the Broadcasting Law, the appointment of the General Manager of the Public Broadcasting Service falls within the competence of the RTS Management Board, consisting of nine members. The members of the Management Board are appointed and dismissed by the Republic Broadcasting Agency from the ranks of journalists and renowned professionals from the area of media, management, law and finance, as well as other prominent figures. The Law bars members of Parliament, members of the RBA Council, Ministers in the Republic or Provincial governments from becoming members of the RTS Management Board, as well as nominated or appointed persons in the executive branch and provincial authorities, and political party officials. The Law expressly states that the Management Board appoints and dismisses the General Manager of the RTS by a two-third majority of the total members, whereby it delivers the decision about the appointment after the completion of a public competition. An interesting issue of concern is the fact that, a whole month after the appointment, which was preceded by a public competition, the reasoned decision of the Management Board on Tijanic's reappointment and the reasons that have motivated the members of the Management Board to make such a decision, is yet to be published. According to what the authors hereof have learned, the reasoned decision about Tijanic's reappointment wasn't communicated to other applicants on the public competition either, which were not chosen by the Management Board. What additionally reinforces the bitter taste left due to the opacity of the Management Board' s activities is the fact that the reports and minutes from its sessions have not been posted on the RTS web page for more than a year and a half now. Moreover, the last session of the Management Board, from which the public may see the minutes, was held in January 26, 2009.

3. Law on Protection of Competition

In the absence of a separate law on media concentration, outside of the rules governing electronic media and cross-ownership of media, which are contained in the Broadcasting

Law, in the period covered by this report, we had two cases of takeovers and mergers in the media sector that have been subject to the Law on Protection of Competition. That Law contains rules pertaining to media concentration, irrespective of the sector where it occurs.

The first case concerns the establishing of a joint company Ringier Axel Springer Media AG seated in Switzerland, in the framework of which the Swiss-based Ringier AG and the German company Axel Springer AG have merged their investments in Eastern Europe – Axel Springer's operations in Poland, the Czech Republic and Hungary and Ringier its operations in Serbia, Slovakia, the Czech Republic and Hungary. This news, as well as the information that the transaction has been approved, amongst others, by the Competition Protection Commission of the Republic of Serbia (CPC) – that found it would not hamper competition in the country – was reported by Blic, the top selling daily newspaper of the newly established Ringier Axel Springer Media Group in Serbia.

At the same time, the CPC has voiced its opinion about the problematic takeover of Novosti. The latter case has been elaborated on in our previous reports, in which we quoted Serbia's Interior Minister Ivica Dacic saying that the police had, at the orders of the Prosecutor's Office, launched an investigation about the privatization of a media company, as well as the press release of the German WAZ media group announcing the takeover of the Austrian company Ardos Holding GmbH, one of Novosti's shareholders, as one of the mechanisms WAZ intended to use in order to sell its share in Novosti and thereby exit the Serbian market. The CPC joined the debate between the management of Novosti and WAZ about whether the CPC's failure to respond to WAZ's request from January 2010 for taking over Novosti might be deemed as an approval of the proposed concentration, when the CPC President Dijana Markovic Bajalovic confirmed to the Beta news agency that WAZ had been informed by the Commission that the concentration had not been approved. Namely, WAZ also own shares of the Politika and Dnevnik dailies and it is at the same time the sole owner of the Stampa system distribution network. WAZ had previously claimed that in January 2010, after the coming into force of the new Law on Protection of Competition, it filed a new request for approval of the concentration and practically given up the request submitted according to the old Law in September last year. From that fact, WAZ inferred that the failure of the CPC to rule upon the request within the four month deadline meant that it had tacitly approved the concentration, which is in fact envisaged by the new Law. However, from the statement of Dijana Markovic Bajalovic, it stems that the Commission believes that this is all one and the same procedure, initiated in September 2009 under the old Law on Protection of Competition which, according to the interim and final provisions of the new Law, must be completed under the same Law that was effective when the procedure was instituted.

Not delving into the interpretations as to who is right in the above case – WAZ or the management of Novosti and the Competition Protection Commission – we wish to remind that the representatives of the publishers of the top selling print media were the most vocal critics of the adoption of the Law on Media Concentration. Since there are no special rules regulating the concentration of ownership of print media, which, concerning electronic media, are provided in the Broadcasting Law and which are significantly more restrictive than the general rules of the Law on Protection of Competition, today in Serbia we have a situation in which the print media market is fairly consolidated, as opposed to the electronic media market, saturated by too many media and too many media owners. Since concentration in the media, just like in other sectors, has both positive and negative effects, the consolidation of the electronic media market is definitively an issue that deserves serious consideration in the future.