III MONITORING OF THE PROCESS OF ADOPTION OF NEW LAWS

In the period covered by this Report, public discussions were held about several new laws with implications for the media sector. Particularly important is the work on a set of media laws and the beginning of the public discussion about the Draft Law on Public Information and Media.

1. Draft Law on Public Information and Media

On February 27, the Ministry of Culture and Media initiated a public discussion about the Draft Law on Public Information and Media. The public discussion will lasts until March 22 and four round tables are scheduled to take place in Novi Sad, Novi Pazar, Nis and Belgrade, respectively. In this way, after almost ten years after the adoption of the Public Information Law, a new umbrella law shall be enacted in order to set the legal basis of the media reform that has started with the adoption of the Strategy on the Development of the Public Information System in the Republic of Serbia until 2016. The Draft Law leans on the previous law, but it also introduces many new institutes that, according to the announcements by the Ministry, should enable further development of the media sector. However, in spite of some positive trends, the Draft Law abounds with shortcomings identified in the separate opinion, which the Media Coalition, consisted of the most significant media and journalists' associations presented through its representatives in the working group. First, the Draft Law does not put sufficient emphasis on journalists' rights and the overall impression is that it is very restrictive against the media. A greater emphasis is on obligations, while the rights remain at the level of insufficiently worked up principles. Nonetheless, the good news is that the Draft Law sets the principles determining that the provisions of the legislation are interpreted and enforced in line with the rules of the European Convention on the Protection of Human Rights and Fundamental Freedoms and decisions of the ECHR (Article 30, paragraph 2 of the Draft Law). In addition, the Draft Law has made a clearer attempt than before to define the public interest in the media sphere and so recognize the significant role the media must have in a democratic society. Such a commitment is important not only from the standpoint of principles, but it also opens the way to certain forms of public-private partnerships in the interest of finding the best model for creating a favorable environment for the development of media and freedom of expression in general. We will explain some of the proposed solutions below.

1.1. The media, media publisher and publishing rights

Instead of the hitherto term "public media", the Draft Law has introduced the concept of "media". Such a solution is not a mere aligning of the wording with the European regulations; it rather determines the very essence of the media. The media still does not have the attribute of a legal person and instead of the term "founder of a public media", the term "media publisher" is used. An important novelty is the definition of publishing rights to media as the right to establishing and implementing the programming concept of the media, which may be part of legal transactions (Article 31 of the Draft Law). Although the authors of the Draft have clearly attempted to enable a more flexible system of disposing with an individual media outlet, such a provision may result in problems in practice, since it is not clear what does "establishing and implementing the programming concept" means. This was the point of the Media Coalition's objections in its separate opinion.

1.2. Project financing

The second significant novelty in the Draft Law is the chapter on project financing, which generally lays down the manner of distribution of public funds, the criteria for the allocation of these funds and the related procedure. The main intent of the authors of the Draft Law has been to clearly put an end to the practice of budget financing and have the financing of public interest based on the financing of quality programming content. This is correlated with the obligations Serbia has under the SAA to harmonize with the EU its regulations in the field of state aid control, including aid to public companies. Nevertheless, the main objection related to this part of the Law is the fact that the rules on the allocation of funds from public sources are set too broadly, thus opening the possibility of different interpretation on various levels of government. The Media Coalition said that the criteria ought to be clearly set in the Law itself and that they should be clear, measurable and non-discriminatory (especially having in mind the uneven starting position for privately-owned media and those that have been publicly owned to date). This particularly applies to the importance of recognizing the observance of professional and ethical standards manifested by the readiness to accept the competence of self-regulatory bodies, adhering to the decisions of the regulatory body from the field of electronic media, but also accepting objective and transparent rules on measuring ratings and circulation (independent circulation audit, etc.). Additionally, the provisions on the manner of appointing a commission that would allocate public funds have not been clearly set, failing to recognize the importance of such commission. At that, it should be emphasized that the decision on allocating the funds is ultimately always taken by the authorized person of the

competent body allocating the funds (the minister, the competent authority of the autonomous province and competent authority of the unit of local self-government). Moreover, it is not specified if the decision of the expert commission is binding for the competent authority, or if that authority has the discretionary right to pass a decision differing from the proposal of the commission. Furthermore, the provisions on the procedure are very vague and may lead to uneven application in practice, depending on the applying authority. For example, under the Law on General Administrative Procedures, the decision passed by the ministry may be subject to an appeal, if a separate law provides for the appeal. Since it is not provided for by this Draft Law, it may happen that the decision on the allocation of funds passed by the minister becomes final and that it may be challenged only in administrative procedure, while the decisions passed by the authorities of the autonomous province or local self-government may be challenged by an appeal (second-instance administrative procedure), or action in administrative procedure. Furthermore, the concept, under which different levels of government may pass a bylaw regulating in more detail the procedure of allocating the funds, is not a good solution, since it may result in legal uncertainty and uneven practice in the enforcement of the Law at different levels of government. The Media Coalition pointed out to that problem too in its separate opinion.

1.3. Transparency of ownership, excessive concentration, merger and the media register

The provisions on transparency of ownership, excessive concentration and the media register are also new to the media-related legislation and constitute an important step forward. Transparency of ownership is one of the basic principles of the European legislation in this field as well, but it seems that the provisions concerning the register contain too many norms, exceeding the purpose of establishing the register. The information that is public in the register must be reduced to data enabling the citizens to know who are the owners/publishers of media, in order to make an informed opinion about that media. The Media Coalition pointed out that the provisions of the register greatly departed from the objective of establishing the register and particularly in terms of the provisions on connected parties (involving also the issue of protection of personal data). In accordance with the Draft Law, the republic authority in charge of protecting the competition (the Commission for Protection of Competition) shall settle cases of excessive concentration of media. However, it might happen in practice that the prerequisites for conducting the procedure by the Commission for Protection of Competition will not be met (especially due to the underdeveloped media market and low revenues generated by media publishers, even when they are clearly dominant in a specific media market). In that case, the Commission will be unable to conduct a

procedure and pronounce proper measures in spite of a clear case of excessive concentration. The Draft Law should therefore recognize such cases, which are not rare in practice.

1.4. Retraction

Retraction, as a new institute (in addition to the response to the information and correction of the information) is conceived as the possibility to avoid overly frequent damage claims. In this way, the authors of the Draft Law have attempted to introduce the principle of gradation of different legal measures at the disposal of the person to whom the information applies. However, the formulation of the right itself in the Draft Law is problematic that seemingly might cause major problems in practice and significantly affect the course of journalistic research and reporting.

1.5. Mandatory privatization of media

The concept of media privatization contained in the Draft Law has been elaborated on in the section of this Report concerning privatization.

2. Draft Law on Fees for Use of Public Goods

On February 20, 2013, the Ministry of Finances and Economy launched the public discussion on the Draft Law on Fees for Use of Public Goods. Particularly relevant for the media are the provisions concerning the fees charged by regulatory bodies and those paid for the public service broadcasting. In keeping with this Draft Law, three fees are envisaged: the broadcasting fee, the fee charged for public service broadcasting (jointly called "fees for using broadcasting space) and the fee for the use of radio frequency. The Draft Law says that laws on electronic media and on electronic communications will regulate the payers, the amount of the fees, allocation, designated purpose and other important issues related to the aforementioned fees. Furthermore, the Draft Law stipulates that no new fees outside of the Law on Fees for Use of Public Goods shall be introduced by sector laws, which should guarantee the legal security of the payers. It seems, however, that the Draft Law is mixing up two different things. While radio frequencies and, to some extent, the public service broadcasting may be considered public goods, the broadcasting fee is entirely a regulatory charge, namely cost of the regulation. In principle, the regulator may use this fee as a means of achieving regulatory objectives, but that does not make it the fee that is charged for the use of public goods. Moreover, even if we accept the claim that the intention of putting order into the

system of fees is a good one, certain provisions of the Draft Law undermine the independence of regulatory bodies (the financial aspect of it, before all). While the provisions of the Draft Law concerning the manner of determining the amount of the fees and payment terms do not infringe upon the independence of the regulators, the provisions determining whom the revenues from the fees belong to, as well as those regulating the payment technique, constitute a serious threat to independence. According to the Draft Law, the revenues from the fees belong to the regulatory bodies only up to the amount necessary to cover the expenditures foreseen by the financial plan. This is contradicting to both sector laws, which say that the balance between the revenues and the expenditures shall belong to the budget of the Republic of Serbia. Under the provisions regulating the payment technique, the payments shall be transferred to the designated public revenues accounts in the Treasury Department. From these accounts, the funds are automatically channeled to the account of regulatory bodies until the amount reaches the level of expenditures provided for in the regulator's financial plan. Such a concept fundamentally infringes upon the financial independence of the regulatory bodies in two ways: by reducing the amount of funds (only up to the level of expenditures provided for in the regulator's financial plan) and through the payment technique, which stops short of foreseeing the possibility for regulatory bodies to directly levy revenue from the fees. As for public service broadcasting, it is determined in principle that the fee charged for the public service broadcasting shall belong to the public service broadcaster at the national level, while the 70% of the fee for the public service broadcasting levied in Vojvodina shall belong to the public service broadcaster of the autonomous province, with the restriction that any surplus of the revenues over the expenditures shall belong to the budget. The payment procedure is the same as for the regulatory bodies and hence the public service broadcasters are prevented from receiving the payments directly – they will receive them indirectly, through a central account, but without any guarantees and penalties for not transferring the funds upon payment. ANEM pointed to these shortcomings of the Draft Law during the public discussion and in its written comments and suggestions for amending the Draft Law, which were supported by other organizations of the Media Coalition as well.