IV MONITORING OF THE WORK OF REGULATORY BODIES, STATE AUTHORITIES AND COLLECTIVE ORGANIZATIONS FOR THE PROTECTION OF COPYRIGHT AND RELATED RIGHTS

REGULATORY BODIES

1. Republic Broadcasting Agency (RBA)

1.1. We have written about the activities of the Republic Broadcasting Agency in the part of this Report pertaining to the implementation of the Broadcasting Law.

1.2. On the eve of the May 1 holidays, the RBA Council called an open competition for the issuance of the license for television broadcasting with national coverage in the K5 network. The latter is a national analog network left vacant after TV Avala lost its license. We will examine the effect of this decision on the digitalization process in the part of this Monitoring Report dedicated to this process. In this section, we will analyze the powers to pass the decision on calling the open competition.

Article 49, paragraph 2 of the Broadcasting Law stipulates that an open competition for the issuance of the license for television broadcasting shall be called when there are possibilities for issuing new broadcasting licenses on the basis of the Radio Frequency Allocation Plan. The rationale of such a provision, at the time when the Broadcasting Law was adopted – more than a decade ago – was to prevent the situation in which the RBA would refuse to call an open competition, in the case where there are frequencies available and several persons interested to participate in the tender. It was assumed that freedom of expression might be threatened also with the failure to call a tender, which would, in turn, deny any new players access to the media market. However, many things have changed in the last ten years. The penetration of cable, IPTV and satellite DTH distribution has exceeded 50% of households. On the other hand, the prolonged crisis has resulted in very few players being interested in entering the media market. In the case of Serbia, rather than entering the market, serious players have opted to withdraw, such as in the case of the German WAZ Group (in the print media sector) or the News Corporation (in the field of electronic media). Furthermore, there has been a consensus for years that the electronic media scene is completely saturated. In order to survive, stations have been forced to cut down costs, resulting in poorer in quality and typically more expensive programs.

In the present situation, if one wants to ensure a variety and quality of program offer for viewers, the solution is not to issue new license, but to create an environment where the media will be able to find sustainable business models. On the media-saturated market, impoverished in terms of advertising budgets, constantly influenced by the state with covert or opaque state aid, calling a competition for the issuance of new license seems like an ill-starred decision.

The question remains, however, if the RBA had any choice at all, namely, whether the mandatory calling of an open competition under the Article 49, paragraph 2 of the Broadcasting Law is mandatory indeed. It seems it is not. We cannot ignore the fact that the frequencies of TV Avala are not the only frequencies that were left vacant in the previous period, while the competition was called for them only. We remind that, only four days after the license of TV Avala was revoked last October, the same happened with the licenses of TV Zona from Nis, TV S from Belgrade, Radio Prick from Grdelica and Radio Vinex from Rekovac. Is the RBA breaking the Broadcasting Law by failing to call a competition for new television stations in Nis and Belgrade or new radio stations in Grdelica and Rekovac? On the other hand, is the RBA perhaps applying the Law arbitrarily and selectively? The other problem is that the Law says that the competition shall be called when, based on the Radio Frequency Allocation Plan, there are possibilities for issuing new broadcasting licenses. The said Plan is a live thing, subject to changes, and according to the Law on Electronic Communications, it is adopted by the Ministry of Foreign and Domestic Trade and Telecommunications, at the proposal of the Electronic Communications Agency (RATEL). When the Allocation Plan is adopted, again, under the Law on Electronic Communications, the criteria will include international agreements and recommendations. In the concrete case, the latter are contained in the Final Acts of the Regional Conference on Radio Communications for the Planning of the Digital Terrestrial Service in parts of regions 1 and 3, in the frequency bands 174-230 MHz and 470-862 MHz (RRC-06). Serbia has even passed the Law on Ratifying the Final Acts of the Regional Conference RRC-06, which was published in the "Official Gazette of RS – International Agreements", no. 4/10. By ratifying the final acts of the Regional Conference RRC-06, the Republic of Serbia assumed the obligation to switch to digital TV broadcasting no later than by June 17, 2015. By calling an open competition for the issuance of licenses for analog coverage only two years prior to the expiration of the last deadline for the digital switchover, Serbia has actually sent a message to the world that it is not a reliable partner and that it has no intent on adhering to its internationally assumed obligations. To make matters worse, the competition was called less than a month after the completion of RATEL's public consultation on the Rulebook on the Amendments to the Rulebook on Laying down the Plan for the Allocation of Frequencies/Locations for Terrestrial Analog FM and TV Broadcasting Stations for the Territory of the Republic of Serbia. Namely, RATEL had already prepared the Draft

Rulebook foreseeing the vacant frequencies formerly held by TV Avala to be used for expanding the Initial Network for testing the digital TV signal, which was subject to consultations held between March 21 and April 5, 2013. At these consultations, only the RBA opposed such use of vacant frequencies. While it was widely expected that the Ministry of Foreign and Internal Trade and Telecommunications would adopt the new Rulebook under RATEL's draft, the RBA clearly made its move first.

The question here is what is next? Any serious investor will be reluctant to incur the costs of developing the national analog network, in the situation where the digital switchover is an imminent process in which Serbia must not remain the last analog island in Europe. Hence, the issuance of license may result in two equally bad scenarios: that the license is issued to a candidate that is unable to guarantee he will improve the quality and diversity of the offer to the viewers, or to one that will not invest any serious efforts to set up the analog network, opting instead to buy time until the switchover is complete and use the network at minimum capacity, while preventing the expansion of the Initial Network for testing the digital TV signal of the public company "Broadcasting Equipment and Communications" (ETV), thus jeopardizing digitalization. Both outcomes are to the detriment of the public interest, but what is still not clear is for whose benefit. It seems that the only logical and dignified remedy for the clear mistake made by calling the open competition would be for Rasim Ljajic's Ministry of Foreign and Internal Trade and Telecommunications to adopt RATEL's Draft Rulebook on Laying Down the Plan for the Allocation of Frequencies/Locations for Terrestrial Analog FM and TV Broadcasting Stations for the Territory of the Republic of Serbia. Since the Ministry failed to avert calling the competition, this would allow it at least to prevent a license to be issued on that competition.

2. Republic Agency for Electronic Communications (RATEL)

On April 5, RATEL completed the public consultations about the Draft Rulebook on the Amendments to the Rulebook on Laying down the Plan on the Allocation of Frequencies/Locations for Terrestrial Analog FM and TV Broadcasting Stations for the Territory of the Republic of Serbia. These Amendments foresee the vacant frequencies of TV Avala to be used to expand the Initial Network for the testing of the digital TV signal. The competition called by the RBA for the issuance of the television broadcasting license for national coverage on the exact same frequencies has created an ambiguous legal situation in terms of the further procedure of adopting the Rulebook, which means that the Ministry of Foreign and Internal

Trade and Telecommunications will have the final saying. Article 84 of the Law on Electronic Communications says that the Allocations Plans will be passed by the ministry in charge of the field of electronic communications, with the participation of the competent body of the autonomous province, at the proposal of the Agency. That article also stipulates that, in the procedure of preparing the draft allocations plans, RATEL shall conduct public consultations and ask the opinion of defense and security authorities, as well as that of emergency services. The legal grounds for adopting the Allocation Plan exist. Article 84 of the Law does not give any formal advantage to RBA's opinion in the public consultations procedure and hence the Ministry of Foreign and Internal Trade and Telecommunications has the final word in terms of deciding if the proposal will be adopted. RBA's decision has made things more complicated, but has not automatically prejudiced the decision of the Ministry.

STATE AUTHORITIES

3. Ombudsman

On April 2, the Ombudsman reminded that it is forbidden under the Advertising Law to use the face, voice or personal attribute of an official in advertising state authorities' activities and measures of relevance for the citizens. Nonetheless, the Ombudsman pointed out that such occurrences do happen. In his press release, he said that the only advertisers exempt of the penalty provided for by the Advertising Law were the state officials who had violated the ban contained in the Law. Therefore, the Ombudsman requested the RBA to prohibit the release of advertising messages that violated the Law, while publicly calling on state officials – on the national, provincial and local levels – to respect the rule of law in every domain, including advertising.

Article 86 of the Advertising Law indeed provides for certain restrictions when state authorities, organizations, territorial autonomy and local self-government bodies, public services and public companies, are making information about their work available to the public. In the advertising message promoting such activities, one may not use the name, face, voice or personal attribute of a state officials/officials of state authorities, organizations, territorial autonomy and local self-government bodies, public services and public companies; furthermore, a political organization or other organization founded by a state authority, political party or politician, may not be advertised directly or indirectly. Moreover, the Advertising Law does not provide for misdemeanor responsibility for non-compliance with obligations from Article 86 for officials.

Hence, it is completely justified for the Ombudsman to be pointing out to this shortcoming of the Law and addressing the independent regulator from the field of electronic media. We have written several times in these reports about how the regulation of advertising in Serbia typically ends at the detriment of the media, as the conveyors of advertising messages. The chain of participants in advertising is wider and more complex and the Ombudsman has rightfully noticed the paradox that the politicians are practically exempt from the responsibility for breaking the Advertising Law. Since the Ministry of Foreign and Internal Trade and Telecommunications has established the working group for drafting the new Draft Advertising Law, the Ombudsman's recommendation should definitely be reviewed by the working group too, in order to prevent the existing misuse identified by the Ombudsman.