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DRAFT LAW ON MEDIA OWNERSHIP CONCENTRATION: MOMENTUM TO FIGHT POTENTIAL 'LAST MINUTE' LAW AMENDMENTS

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I

Concentration of media is a trend in the marketing development in which the number of media companies, that is, the number of those who directly or indirectly perform the control over the media companies is declining. The concentration which leads to the creation or strengthening of a dominant position in the market and destroys competition is damaging in any industry and states use different mechanisms in order to control and prevent occurrence of such media concentration. In the media sector, prevention of competition is not significant only for economic reasons, but above all for ensuring media pluralism and freedom of press. Namely, the owners of media, by the rule, dictate the media contents, which in turn means that smaller number of owners necessarily also means less diversity of programmes.

In the Serbian legislation, media concentration was first dealt with by the 2002 Law on Broadcasting[1], but solely with regards to the concentration of ownership of the broadcasting public media and the so-called cross media ownership, that is, simultaneous ownership of electronic and printed media. Therefore, there was a strong need to additionally regulate media concentration in a systematic and comprehensive manner.

Having recognised this necessity, the Ministry of Culture of the Republic of Serbia, with the support of the Organisation for Security and Co-operation in Europe (OSCE), created, at the end of June 2007, a working group whose task was to prepare a draft law on the prevention of illegal media concentration and on the transparency of the media ownership.

The working group started from the Recommendation Rec (2007)2 of the Committee of Ministers of the Council of Europe member countries on media pluralism and the diversity of media programmes, by which it is recommended to the members to strive towards the situation in which the public has at its disposal sufficiently wide selection of media of different owners, both private and public ones, taking into account the

[1] "The Official Herald of the Republic of Serbia," no. 42/2002, 97/2004, 76/2005, 79/2005, 62/2006, 85/2006, 86/2006

characteristics of the media market, particularly commercial and competitive aspects. The above-mentioned recommendation also stipulates that where the application of the general rules on competition and the existing regulations are not sufficient to guarantee the demands in connection with cultural diversity and pluralistic expression of ideas and opinions, member countries should adopt special measures. The assessment of the working group was precisely such, that neither the current Law on the Protection of Competition ("The Official Herald of the Republic of Serbia" no. 79/2005), nor the provisions on illegal media concentration contained in the Law on Broadcasting, are a sufficient guarantee of media pluralism and cultural diversity.

In connection with the transparency of the media ownership, the working group started from two assumptions. The first one was that the prevention of media concentration is inconceivable in light of non-transparent media ownership, and the second one was, in line with the already quoted Recommendation Rec (2007)2 of the Committee of Ministers of the Council of Europe member countries on media, that the public should be provided with an access to certain data concerning the ownership structure, management bodies and, different interests groups with a probability to exercise a significant influence on a concrete medium. All of these measures are stipulated to enable the public to be in a position to create its own analysis of information, ideas and opinions expressed in the media. In those terms, the Recommendation underlines the need of the public to have a provided access to:

- information in connection with the persons or bodies that participate in the structure of the media, and about the nature and scope of the participation of those persons or bodies in the concerned structure and, wherever it is possible, information on the end users of that participation;
- information about the nature and scope of the interest which the above-mentioned persons and bodies have in other media or media companies, and even in other economic sectors;
- information about other persons or bodies for which there is a probability that they will significantly influence the programme policy or editorial policy, and
- information in connection with the support measures approved to the media.

In order for the stated information to be made available, the working group has foreseen introduction of a unique Public Media Register that would be kept by the

ministry in charge of public information affairs. The data from the Register would be available to everyone, without any obligation to prove his/her legal interest in the concrete case or state the reasons for the search.

The working group has further foreseen that the Register should contain the data on the public medium, data on the founder of the public medium, that is, the person that participates in the ownership of the founder, data on the persons who may, even without any participation in the ownership of the public medium founder, exercise influence on the editorial policy of public media, etc.

Discussing the data on a public medium which the Register would contain, the working group bore in mind mostly the data which are anyway an obligation to be published pursuant to the provisions on press of the Law on Public Information[2] that is, pursuant to the provisions of the Law on Issuing Publications[3], such as the name of the public medium, name and seat of the printing office, data on the issued broadcasting licence, name of the editor in chief, names of other accountable editors, if there are any, data on the circulation, etc.

Discussing the data on the founder of the public medium, that is, the person who participates in the ownership of the founder in the Register, they bore in mind the company and its premises, that is, the name, surname and residence of the founder, as well as of the person who participates in the ownership of the founder, and the ownership share with the percentages for each of these persons. Taking into account frequent doubts present in the practice that some owners of the media hold in fact their ownership shares for somebody else, on the basis of some hidden legal grounds, that is, that they obtained their shares with the capital of somebody else, received precisely in order to obtain a share in media and under conditions more favourable than the market ones, the working group has also foreseen an obligation of listing in the Register the data on the persons for whom the owner is holding his/her share in the medium, that is, who have given the capital for the acquisition of the ownership under the conditions more favourable than the market ones.

[2] "The Official Herald of the Republic of Serbia," no. 43/2003, 61/2005
[3] "The Official Herald of the Republic of Serbia," no. br. 37/91, 53/93, 67/93, 48/94, 135/2004, 101/2005

Debating the data on the persons who can, even without a share in the ownership of the public medium founder, exercise influence on the editorial policy of the public media, the data that are to be listed in the Register, the working group bore in mind the data on the person that puts at the disposal of the founder of the media funds or amounts without any compensation, or under the conditions more favourable than the regular ones, as well as the data on the advertiser or client of other services provided by the founder of the media, if such person, independently or jointly with associated persons, participates in the total income of the founder earned through advertising or providing some other service with over 30% at the annual level.

The Register would also list the data on the earnings of the founder of the media coming from the direct or indirect budget users, organisations that have been commissioned with performing public duties, legal entities with majority state or social ownership, international organisations, foreign states, political parties and persons who take part in elections or who advertise themselves in connection with elections.

The stated data would be listed in the Register by the ministry on the basis of the applications that would be submitted by the founders of the media. Failure to submit an application within the set period of time would entail tortious liability of the founder.

With regards to the media concentration, the working group has foreseen certain thresholds above which the concentration should be considered illegal, with these thresholds being linked to the number of media of certain coverage or circulation or a percentage of the ownership share in them. Thus the working group took a position that nobody can have more than two national broadcasting media (one national radio and one national television), that is, more than three regional or local broadcasting media. The limitations of the ownership in the printed media stem from the number of those media or their circulation, and other limitations are foreseen for the cross media ownership (simultaneous ownership of both printed and broadcasting media, that is, simultaneous ownership of a press agency and printed or broadcasting media).

II

The group prepared the first draft, entitled the Draft law on prohibited unification and the transparency of the public media ownership, at the end of February 2008. The first comments were received in April from the Council of Europe experts, and then there was a presentation of both the draft and the comments.

The comments of the Council of Europe experts say that Article 10 of the European Convention for the Protection of Human Rights and Basic Freedoms protects the freedom of expression of every person. The freedom of expression includes, that is, encompasses the freedom of having one's own opinion, receiving and communicating information and ideas without the interference of the public authorities and regardless of the borders. However, this right to freedom is not absolute; it may be limited under certain circumstances. These circumstances are coming down to the fact that the limitations must be stipulated by the law, must incline solely towards realisation of some of the legitimate goals clearly listed in Article 10, paragraph 2 of the European Convention, as well as that they must be necessary in a democratic society, or in other words, that they must be proportionate to the goal which is being protected in the concrete case.

The setting of the ownership limitations or establishing of the obligation for the founders of the public media to publish certain information may directly or indirectly influence their basic right to the freedom of expression and in those terms, like any other limitation of the right to the freedom of expression, it must necessarily meet the above-stated requirements.

In the concrete case the ownership limitations and the obligations to make certain data accessible would have a legitimate goal to provide a protection of the right of everybody to the freedom of expression, to receiving and give information, starting from the obligation of the state to ensure that these rights to the freedom of expression are indeed enjoyed by everybody. These limitations are necessary in a democratic society. They are proportionate to the goal which is protected in the concrete case when the domination of a certain participant in the media market is such that there is a

danger that he/she may influence the exercising of the right of freedom of expression of the others.

The remarks contained in the commentary of the Council of Europe experts with regards to the draft text of the Law on prohibited unification and the transparency of the public media ownership, which they saw, are three-fold. With regards to a part of those remarks, it may be said that they are the consequence of the imprecision in the translation of the text that was submitted to them, whereas these imprecision can be easily removed. Second remark was the lack of definition of certain notions in the draft, which was the result of the position of the working group that the notions that have already been defined in other laws (such as, e.g., notions of public medium and founder of a public medium, whose definition is already contained in the Law on Public Information) which the Council of Europe experts have not been acquainted with in details, should not be repeated in this draft and burden the experts. Other remarks, which should certainly be taken into serious consideration, relate, on the one hand, to the concern of the experts of the Council of Europe that with regards to certain stipulated ownership limitations, that is, the obligation of the founders of the public media to make certain information available, there is lack of proportion with the goal which is being protected in the concrete case. On the other hand, it points at the possibility to approach the definition of the borderline values of illegal media concentration by setting up a threshold of the share in the number of viewers or the number of listeners, share in the total circulation and similar criteria, instead of through determining maximum number of media which an owner may have.

After the calm that ensued with the government crisis and the dissolution of the assembly, it is to be expected that the working version of the law on prohibited unification and the transparency of the public media, possibly additionally corrected in line with the remarks of the Council of Europe experts, will enter into public debate. After that the new government will send it to the assembly for adoption. Unfortunately, the experience so far with the adoption of the media related regulations in Serbia indicate that it is precisely in this phase that there are the most serious obstacles to the attempts to reform the legal framework for the operations of media in Serbia. There are more than sufficient number of examples of abrupt changes to the

draft texts before the very adoption in the assembly, often in the way in which it undermines in advance the system coherency of the new legal framework.

III

The work on the drafts of the laws that should have represented the new legal framework for the media sphere in Serbia, after the October 2000 changes and the fall of the Slobodan Milosevic's regime, formally started as early as November of the same year, with the establishment of the Media Centre and NUNS working group for the preparation of media regulations. The members of this group were domestic experts, while their work was supported by the experts of the Council of Europe and OSCE.

The working group's draft of the, at that time, new Law on Broadcasting was submitted to the Government of the Republic of Serbia in August 2001. Its aim was to have the broadcasting sector reformed in two ways, through the transformation of the state-owned RTS into the public service broadcaster of Serbia and the province public service broadcaster of Vojvodina, along with mandatory privatisation of all other state-owned radio and television stations. The Law also stipulated the passing of the regulatory competences and the authority to grant broadcasting licences from the government to the newly-founded independent regulatory body – the Republic Broadcasting Agency. The Government finally adopted the draft and submitted it as its proposal to the Assembly only in April 2002. However, already at the beginning of July of the same year, 2002, the Government suddenly withdrew the proposal of the law from the parliamentary procedure, justifying such decision with a large number of amendments. Only a week later the proposal was given back to the parliament for the adoption, but changed in a way that the number of members of the independent regulatory body (Council of the Republic Broadcasting Agency) was reduced from 15 to 9, and the list of authorised proposers for the members of the Council was changed to the harm of the civic sector. Thus, the adopted solution was that the state proposes four out of a total of nine Council members, two are to be proposed by social institutions – universities and churches, two by non-governmental and professional organisations, and the ninth member – by the previous eight, provided that that person must live and work in Kosovo and Metohija. Such changes enabled the influence of

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the state on the Republic Broadcasting Agency, and therefore on the overall broadcasting system (including also public service institutions, since according to the draft the Republic Broadcasting Agency, among other things, also appoints and relieves of their duty the members of the public service's Management Board), becomes predominant.

The selection of the re-composed Council was also not an easy task. The Government and the Assembly kept postponing proposal of their respective candidates, so that the legal deadlines for the setting up of the Council were passed by more than six months. The first eight members of the Council were finally appointed on 11th April, 2003, but in such a way that the appointing of two members meant the violation of the procedure stipulated by the law by ignoring the public in the process of their candidacy. Namely, although the Law stipulates the obligation of the Assembly to publish, at least 30 days before the decision on the selection of the Council members, all valid lists of candidates with the basic biographic data, the candidacy of Nenad Cekic was published only three days prior to deciding on the appointment, while the candidacy of Vladimir Cvetkovic was published on the very day of the selection. The legality of the selection of the ninth member of the Council was also put under the question mark. Namely, at the proposal of the previously appointed Council members, on 27th May, 2003, the Assembly selected Goran Radenovic, without even checking if the formal conditions for Radenovic's membership in the Council had been met (there was a serious suspicion that they had not been met) and without any assessment of the fact that his candidacy was supported by the two Council members who themselves had been appointed despite a violation of the procedure.

Because of the decision of the majority of the appointed members of the Council to have this body constituted even with obvious illegalities in the selection and candidacy proceedings, the member of the Council nominated by professional organisations, Snjezana Milivojevic, submitted her resignation. Soon after, the resignation of Vladimir Vodinelic, member of the Council nominated by non-governmental organisations, followed suit. The facts that even before it started working the Council was left without two members, as well as that from among the remaining seven members three of them were appointed illegally, practically blocked the functioning of the this body and led to a further postponement of the enforcement

of the Law on Broadcasting. The parliamentary majority, instead of repeating the proceedings for the appointment of the Council members, decided to vote on the proposal of the impeachment of Cvetkovic, Cekic and Radenovic, but this proposal did not get the necessary number of votes. The disputable members remained at the Council. The very Republic Broadcasting agency, however, existed only formally during 2003 and 2004, since the Assembly did not approve its Statute, as stipulated by the law. By not agreeing to correct the error made during the appointing procedure of the Council members and with the blockade in the work of this body, it was not possible to prepare a public tender for granting licences for the broadcasting of programmes and the chaos existing in the media market was unnecessarily prolonged. Also, the beginning of the transformation of the Radio and Television of Serbia into a public service broadcaster was made impossible and this company was left without stable sources of financing and new management structure, which made it still open for external influences. The control of the legality of the work of electronic media in Serbia, in terms of observing regulations on advertising, prohibition of piracy, and special protection of juvenile persons, was also not possible. This also led to the blocking of the assistance provided by the European Commission and the European Agency for Reconstruction, which was frozen at the end of August 2003.

Meanwhile, the Serbian Assembly was dissolved and there were parliamentary elections and constitution of the new Assembly. Taking into account that in accordance to the domestic legislation the decisions of the Serbian Assembly on the appointment of the Council members were individual documents, therefore they could not be challenged in a proceeding initiated before the Constitutional Court. But also, taking into account that they were as individual documents passed by the Serbian Assembly, they could neither be challenged in an administrative dispute. As many experts pointed out the committed violation of the law could have been corrected only if the Assembly itself would pass a decision to repeat the illegally executed procedure. The new parliamentary majority, however, decided to change the Law on Broadcasting. The list of the authorised proposers of candidates for the Council members was changed, inasmuch that the republic and province government were deleted from it, while the assembly itself was authorised to propose candidates for the Council members instead. Although this change was not essential in its nature, the new parliamentary majority thus gave itself of an opportunity to select a completely

new Council of the Republic Broadcasting Agency. The Law was amended in August, during the season of summer vacations, when the attention of the public is anyway less directed to the work of the assembly, within the scope of an urgent procedure and without any public debate. It turned out that a precedent was created in this way that will be used for the enactment of all the laws of importance for the media in Serbia in the future.

Only a year later, in line with an identical model, the Law on Broadcasting was once again amended in August, within the scope of an urgent procedure and without any public debate. The Radio and Television of Serbia got the right to collect subscription before its transformation into a public service, that is, as still state-owned media under direct control of the government. The members of the Council of the Republic Broadcasting Agency had their mandates extended in a manner which broke the principle of rotation, aiming to prevent that all the Council members can be replaced during the same assembly composition, which created precisely that kind of possibility. The right of veto to the Council decisions related to Vojvodina was abolished for the Council member appointed upon the proposal of the authorised proposer from that province, without offering any alternative that would serve to protect the specific needs of Vojvodina, as a multi-ethnic region. The deadline for the privatisation of the local public media was extended. The Law on Broadcasting looked less and less like the text originally prepared by the Media Centre and NUNS working group.

However, this was not the end. During the summer of the next year the Law was first amended in terms of increasing the number of members of the Public Service Broadcaster Programme Board appointed upon the proposal of the assembly, from 6 to 7, in order to feed the appetites of the parliamentary deputy clubs.

Practically at the same time, at the proposal of a few deputies, a proposal for new amendments entered the parliamentary procedure. These amendments, among other things, foresaw that the government should give its consent to the financial plan of the Republic Broadcasting Agency, instead of the assembly, which brought under question mark the issue of independence and autonomy of the regulatory body with regards to the executive authority. The amendments also stipulated that the Council

can suspend its member on its own, not leaving this to the Assembly, as the body which appoints and relieves the Council members, to give its opinion on such suspension. The possibilities of the Council to control, and perform the supervision over the work of broadcasters and observe the conditions under which they got their licences issued with regards to the type and quality of the programme they broadcast were narrowed down, so that supervision is appreciated only in terms of the respect for the general programme standards. The right of churches and religious communities to propose candidates for the Council members is now recognised only for the traditional churches and religious communities, in a way which undoubtedly represents discrimination of small religious communities. The Council is authorised to forcefully execute its decisions, even with sealing telecommunications equipment, which is the kind of authority earlier enjoyed solely by the regulatory body for telecommunications. Such amendments to the law were fiercely criticised in public, and these criticisms have led to the situation in which the President of the Republic, Boris Tadic, refused to sign the decree on the proclamation of the Law on Amendments and Supplements to the Law on Broadcasting. The assembly, however, has not shown any understanding and thus the law was passed for the second time and eventually came into force in October 2006.

Sudden amendment to the draft, also prepared by the Media Centre and NUNS working group, was shared by the Law on Public Information as well just before the very adoption in the assembly. This basic media law that should guarantee the freedom of the media, and the rights and obligations of journalists, was adopted during the state of emergency introduced after the assassination of Prime Minister Zoran Djindjic, when the human and civic rights and freedoms were limited, also in the sphere of the freedom of expression. The public debate on certain articles included in the Law proposal directly before it was sent to the Assembly was practically avoided. There was also lack of public debate on some amendments of the deputies supported by the Government, although such solutions were rejected as unacceptable during several-month long public debate. The adopted law contains nine completely new articles that regulate extremely sensitive matter of prohibition of information distribution. This helped create a sense shared by the media that this is an attempt to introduce censorship into the Serbian media legislation through the back door. Also, a provision was put into the law, in the form of a deputy amendment, which enabled

establishing of a state press agency. Such legal solution was rejected in the course of a public debate for several reasons. Primarily because a special regime is being introduced for just one form of public medium – the press agency, while all other state media must be transformed into public service institutions or privatised. This amendment was accepted with the justification that "the public has the right to be objectively and impartially acquainted with all the positions and decisions of the state bodies" and because, in case that other press agencies are only private ones, "public media could be deprived of information on the decisions and positions of the state." Such justification has not only strengthened the opinion about the administration's serious mistrust of the media not under its direct control, but also represented a kind of insult to the entire private media sector. The Law on Public Information also regulated the protection of the source of information more restrictively than the draft prepared by the experts, without any valid justification. Thus it is stipulated that a journalist is still under obligation to disclose the data in connection with the source of information, if such data relate to a criminal act or to a perpetrator of a criminal act for which there is an envisaged imprison sentence of at least five years.

What does make a difference between the Law on Public Information and the Law on Broadcasting is that so far it has undergone only one amendment which is small in its scope. Namely, in summer 2005, the law was amended inasmuch that the deadline for the mandatory privatisation of the state-owned printed media was extended from two to three years from the date of that law coming into force, that is, until April 2006. It turned out, however, that even this extension of the deadline was not sufficient for the privatisation to be fully implemented, and neither was sufficient the deadline for the electronic state-owned media set for 31.12.2007, as stipulated by the amendments to the Law on Broadcasting also from 2005.

Similar thing also happened with the Law on Advertising ("The Official Herald of the Republic of Serbia," no. 79/2005). The most questionable change is the one by which the provision, that was almost literally quoted from the Television Without Frontier Directive in line with so-called advertising in public interest (concretely, advertising messages of non-profit organisations for charitable and humanitarian actions, as well as their calls for a charitable or humanitarian action) is not considered television advertising and thus is not calculated into the maximum allowed advertising time per

any full hour of broadcasted programme. Namely, this provision was reformulated is such a manner that advertising in public interest is done exclusively without any compensation, but is still calculated into the maximum allowed advertising time per any full hour of broadcasted programme. Yet another inserted provision, in line with which the state or a local self-government advertises a humanitarian action or an action for the protection and enhancement of health, as well as a call for assistance to directly vulnerable persons, such advertisement will not be calculated into the maximum allowed advertising time per any full hour of programme, showed hidden agenda behind the proposed amendments.

There was another, serious and unacceptable blow to the media sector reforms in Serbia towards the very end of 2007 when the Assembly adopted the Law on Local Self-Government ("The Official Herald of the Republic of Serbia," no. 129/2007) and the Law on the Capital City ("The Official Herald of the Republic of Serbia," no. 129/2007). In addition, two days before the adoption of the disputed laws and several days before the expiry of the deadline for the privatisation of the electronic media in Serbia stipulated by the Law on Broadcasting, the Government adopted the Conclusion by which all privatisation proceedings for all the media were practically stopped. In other words the privatisation of the state-owned media, as one of the key foundations of the media reforms in the country, was prevented. These laws were adopted in the best tradition of the adoption of amendments to the Law on Broadcasting, only instead of the annual leave season it was the New Year's holiday season that was chosen as the moment when the attention of the public is reduced. Neither the expert nor professional public, as it seems, even the line Ministry of Culture of the Republic of Serbia were consulted.

The Law on Local Government stipulates that municipalities shall be founders of television and radio stations in order to provide information in the language of the national minorities which is officially used in the respective municipality, as well as in order to provide information in the language of the national minorities not officially used, when such information-provision represents the achieved level of the minority rights. The Law on the Capital City goes two steps further; namely it has authorised the Assembly of city of Belgrade to establish television and radio stations, newspapers and other media to provide public information.

In the light of the stated negative experience, there is a question as to how to prevent that the draft of the perhaps clumsily entitled Law on Prohibited Unification and the Transparency of the Public Media Ownership has the same destiny as its predecessors and becomes its own contradiction through legislative intervention and editing.

IV

The politics is indeed the art of the possible and it necessarily requires compromises. Media professionals are aware that some ideal world in which politicians and deputies adopt and respect all their proposals and remarks does not exist. What is, however, extremely important and what has not been shown by the political elites in Serbia so far is that they have a clear vision of the media sector reform in Serbia which would logically give rise to a coherent strategy, plans of action and principles that will be adhered to by different state bodies when implementing reform goals.

Unfortunately, the declarative reference to the freedom of expression and the highest European standards has not been sufficiently often supported by practical examples of advocating for the same objectives. What is particularly worrying before the announced adoption of the Law on Prohibited Unification and the Transparency of the Public Media Ownership is the possibility that the political elites will see it as an obstacle to the attempts of achieving domination in the media market and as a regulation that could make the hidden mechanisms for influencing certain media more visible. And the political elites will indeed see it like that, precisely because this law, among other things, aims exactly towards such objectives. One line of resistance could be reflected in the attempts to adjust the thresholds of prohibited media concentration in such a way that they do not disturb the status quo including the future planned fusions in the media market, that is, that these thresholds are used in settling scores with the political opponents. Second line of resistance could be the quantity of data that would be contained in the Public Media Register, particularly those related to the hidden and nominal owners, as well as the persons who exercise influence on the media without participating in the ownership structure, such as the biggest advertisers, those who grant loans without interests, etc., remain hidden, either through deleting the provisions that stipulate that such data is to be entered into the

Register or through preventing the competent body from investigating the accuracy of the data that have been entered into the Register and imposing sanctions or initiating proceedings through which sanctions will be imposed.

What is it, however, that professional media associations could do in order to strengthen their influence on the enactment of the regulations that are in the best of interest not only of the profession, but also of the public as the media audience and those who receive information?

It seems to us that the basic thing is that the participation of professional media and press associations in the legislative process must not be limited only to the "delegation" of their experts into the working groups for the preparation of draft media regulations and issuance of announcements with which they will protest because the law that has been adopted is different from what the experts proposed. There is more to be done and it must be done even after the working group has completed its task. The participation in the public debate and consultation processes must be much more active. Argumentation must be ready for each challenge and the answer must be ready for each question. We must go towards the deputies, insist on public hearings and public debates regarding Law proposals at the very parliamentary boards where media professionals, in a direct contact with the deputies, could point at the problems and advantages which the offered solutions have in comparison with the alternatives. We must convince them that behind the advocacy for transparent media ownership and the media market free of the domination of misuse and the domination as such, there is no hidden agenda.

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