



**Montenegro
BROADCASTING AGENCY
No. 02 – 460
Podgorica, 1 July 2009**

MINISTRY OF CULTURE, SPORT AND MEDIA

Podgorica

Subject: Draft Electronic Media Law

Dear Sir,

On 2 June 2009, the Ministry of Culture, Sport and Media has invited all interested parties to participate in public consultation on the Draft Electronic Media Law and provide their comments and suggestions.

We hereby submit the comments of the Broadcasting Agency on the Draft Electronic Media Law.

Yours sincerely,

Abaz Beli Džafić
DIRECTOR

Annex:

- General and specific comments

CC:

- Broadcasting Agency Council
- Archive

INTRODUCTION

1. In early 2008, a debate started on the revision of a set of media laws, regulating the conditions for the beginning of operation and supervision of the broadcasting activities of the electronic media in Montenegro. The need for these activities was recognized during the implementation of the Broadcasting Law and the RTCG Law, adopted in 2002.

Without calling in question the necessity and legitimacy of such a procedure, we must recognize that the main impulse for the revision of the media legislation came during the finalization of the draft and immediately after the adoption of the Electronic Communications Law. In spite of the warnings of the Agency, and even of your Ministry and other stakeholders, that all these laws should be regarded as a whole (a package of laws the implementation of which is connected) and have a joint debate on the provisions they contain, that never happened.

As early as in September 2008, we faced with the consequences resulting in a serious discontinuity in carrying out the competencies of the regulator related to the exercising of the right to use broadcasting frequencies, which used to be regulated by the Broadcasting Law. Adoption of the new RTCG Law in December 2008, which abolished some other provisions of the Broadcasting Law, confirmed that a partial revision of the entire framework of the system will not stop at that point. That continued an inadmissible legal practice of destroying a sound whole by changing its individual segments, which has, in the Agency's opinion, brought the entire system on the verge of sustainability and legal order.

2. With coming into effect of the Electronic Communications Law and the RTCG Law in 2008, a series of competencies of the Broadcasting Agency was abolished, most of which was not transferred to any other authority. They include the ones dealing with the regulation of conditions and conducting of procedures of awarding the right to use radio and TV frequencies for the broadcasting/distribution of radio or TV programme. Consequently, the valid legal framework does not regulate, in a complete and clear manner, the procedure of awarding of these rights as one of the important parameters of the framework defining the beginning and conditions of conducting the activities of electronic media.

Position, rights and duties of the independent broadcast regulator, as defined by the Broadcasting Law of 2002, were the pillar of the media reform. The adopted provisions and their implementation have received continuous positive evaluations by all international institutions. These evaluations have a special importance, given that the adoption of the Broadcasting Law sent a strong message that Montenegro was committed to thorough changes in the media sphere and ready to depart from the system in which broadcast media were under significant influence and control of the executive or legislative power. That kind of primarily political decision was advanced and progressive both for Montenegro and for the region. It was precisely that what gave a special significance to the successful implementation that confirmed in practice the commitment shown during the adoption of the law. In that context, the development and results of the Broadcasting Agency have been the standard which should not be called into question or unnecessarily jeopardized during the revision of the legal framework of 2002.

The process of adoption and implementation of the Electronic Communications Law, as well as the process of development of the Electronic Media Law and the Digital Switchover Law, have shown that all that is called into question and that, unfortunately, the entire process of development of this sector has slowed down and regressed, introducing more difficult conditions of work both for the broadcasters and the regulator. Deprivation of competencies and abolition of stable and sustainable sources of funding of the Agency cannot be regarded and interpreted any more as a temporary consequence of the legal vacuum, resulting from the inconsistency in the set of systemic laws. It shows the absence of vision and sound orientation as regards the role of independent broadcast regulator, i.e. the sector of audiovisual media services in Montenegro, offering sustainable conditions for undisturbed work and development of the broadcasters.

3. Revision of the regulatory framework in the fields of telecommunications and broadcasting, for the purpose of their harmonization with the EU standards, is an important task defined by the process of stabilization and association with the EU. In that way, Montenegro should create initial conditions for the development and implementation of policy in the sectors of electronic communications and audiovisual

services in line with the EU principles and guidelines. The commitments ensuing from Montenegro's membership in the Council of Europe should not be forgotten, especially those related to the implementation of the European Convention of Human Rights and Fundamental Freedoms, as well as series of other instruments obligating the member countries to adopt and implement the standards related to freedom of expression and information; transfrontier television; independence and functioning of the regulatory authorities for the broadcasting sector, measures to promote media pluralism, guarantee of independence of public service broadcasting, etc.

4. Adoption of the Electronic Communications Law, as a response to the need to promote regulatory framework in order to stimulate further development of the market of electronic communications services and audiovisual services, has shown its shortcomings as it calls into question or jeopardizes the previous level and pace of development of these sectors. As regards the broadcasting sector, it is absolutely clear that the sustainability, stability, and transparency have been a positive stimulus for a very intensive development of and interest of the foreign and local investors in these sectors in Montenegro (cable/MMDS/IPTV distribution, new radio and TV stations, etc.). In our opinion, selective and ill-advised changing of the framework, calls these trends into question.

In view of the aforementioned, the Broadcasting Agency hopes that further activities on drafting of the electronic media law, will comprehensively regulate unnecessary open issues concerning the role of the independent regulatory authority, as well as all other issues of vital importance for future development of audiovisual media sector in Montenegro. Moreover, we are convinced that, recognizing the achieved results and level of development in this field, the new framework could be a step forward and another positive example of Montenegrin reforms in the process of European integration.

GENERAL COMMENTS

For the purpose of better clarity and simplicity, the general comments will follow the organization and structure of the Draft Electronic Media Law.

Subject of the Law (Article 1)

Article 1, paragraph (2) says that "The provisions of this Law shall not be applied to conditions and procedure of granting licenses for broadcasting frequencies, and shall not be applied to conditions and procedure of rights acquisition of electronic media on installing, use, and maintenance of fixed and mobile broadcasting equipment." This unnecessarily excludes from the systemic law a set of very important issues, related to the rights and obligations of the Electronic Media Agency in the procedure of exercising the right to use of broadcasting frequencies, which is why this paragraph should be deleted.

We propose deletion of paragraph (2) of Article 1 of the Draft Law for the following reasons:

- Such a provision may be justified if related to the networks, but not to the procedure of granting the rights to broadcasting frequencies. The Electronic Communications Law envisages cooperation between the Electronic Communications Agency and "the regulatory body for programme contents", without the necessary elaboration (establishment of a commission, decision-making criteria related to the AVM services, rights and obligations of the two regulators in the procedure, etc.), which is why this problem is already apparent in practice. It would be natural to solve that problem through the amendments to the Electronic Communications Law.
- The Electronic Media Agency should be authorized to conduct the procedure of awarding the right to use broadcasting frequencies. The implementation of this standard also requires the amendments to the Electronic Communications Law, since this law concentrates the competence for awarding the right to use all frequencies in the Agency for Electronic Communications and Postal Services. Necessary amendments to the Electronic Communications Law would not change the competence of the Electronic Communications Agency to plan, coordinate, and conduct technical monitoring of the broadcasting spectrum. The awarding of rights to use broadcasting frequencies for the purpose of provision of audiovisual media services is one of the most important functions of the regulatory authority for the broadcasting sector, which was the reason why the previous regulatory framework of Montenegro in this field received such high evaluations.
- Regulation of relations in the broadcasting sector, i.e. the sector of audiovisual media services, must not disregard the importance of access to the broadcasting frequencies for entering the market by the broadcast media and their development in Montenegro. Despite the fact that the trend of development and penetration of alternative platforms for access to radio and TV programmes is strong (cable, IPTV, MMDS, DTH, etc.), the use of free-to-air television is still a dominant platform in Montenegro. Therefore, the Electronic Media Law should clearly define the rights and obligations of all relevant stakeholders in this process (electronic media regulator, electronic communications regulator, media, distributors, operators, etc.).

Definition of terms (Article 5)

For the purpose of consistency of the law, it is necessary to harmonize the text of the law with the definitions provided in Article 5. The list of definitions should be revised in order to keep only the terms used in the law (see specific comments).

Strategy for Development of Audiovisual Media Services Sector (Article 6)

The Agency should play a more important role in the development and implementation of the Strategy for Development of Audiovisual Media Services Sector. Because of the importance of this document, its adoption by the competent public authority should be preceded by public consultations, enabling all interested parties to provide their opinion. We believe that the Agency Council should be authorized to adopt the strategy or its proposal, not "the professional basis for the development of strategy".

CHAPTER II - AGENCY FOR ELECTRONIC MEDIA (Articles 7-42)

1. Draft Law envisages the establishment of the Electronic Media Agency, which would take over the function of the Broadcasting Agency. Since the position, remit, independence, sources and sustainability of funding and responsibility of the independent regulator are some of the main features of a good regulatory framework, the Broadcasting Agency believes that the solution offered by the Draft Law are a step back as

compared to the ones from 2002, which were considerably harmonized with the Council of Europe Recommendation (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector.

With regard to this matter, we have to take into account the Council of Europe recommendation that "the rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests." The validity of this Recommendation within the framework of obligations of the member countries was confirmed by the Declaration of the Council of Europe adopted in March 2008, dealing with the independence and functions of regulatory authorities for the broadcasting sector. The importance of adherence to the standards in the field of media, defined by the Council of Europe is reiterated by the European Commission, reminding that the observance of these standards is the basis for the evaluation of fulfilment of the political criteria contained in the Stabilization and Association Agreement, as well as for the assessment of the level of alignment of the Montenegrin system with the EU Acquis, and its capacity to take over the obligations in the audiovisual sector ensuing from the EU membership.

2. Article 10, paragraph (2) of the Draft Law should be revised in order to make it clear that the coordination with the public authorities is necessary only for the cooperation within the intergovernmental organizations, while the coordination is not necessary in case of cooperation with the independent regulatory authorities of other countries. We believe that it is necessary to keep the provision of the current law that "competent public authorities are obliged to provide the opinion of the Agency before signing international conventions and other agreements related to the field of audiovisual policy".
3. Agency Council. In compliance with the Broadcasting Law as *lex specialis*, the duties and authorities of the Broadcasting Agency are clearly defined in Montenegro, as well as its obligations and responsibilities to the public, appointment procedure for the Agency Council members, and the manner of provision of funds guaranteeing its financing, independent from the Government or any other stakeholder. According to the Council of Europe recommendations, the Broadcasting Agency is accountable only to the public, through the representative of the widest public in the Agency Council.

The fact that the list of competences of the new agency was narrowed down, as compared to the provisions of 2002, is only partially justified. We believe that it should be supplemented with the competences related to:

- Providing consent for the frequency allocation plan, concerning the terrestrial broadcasting.
 - Cooperation with the regulatory authority for electronic communications and the body in charge of protection of competition in conducting analysis of the market of electronic communications services.
 - Cooperation with the Electronic Communications Agency when identifying the operator with significant market power, if it is determined on the basis of the analysis that certain relevant market of electronic communications services is not sufficiently competitive.
 - Initiation and conducting of the first-degree offense procedure for the violation of this law and terms and conditions contained in the issued licences.
4. Instead of the previous provision of the Broadcasting Law that the Parliament of Montenegro only confirms the appointment of the Council members, the Draft Law proposes that the Parliament appoints and revokes council members of the new Agency, at the proposal of certain categories of stakeholders. We believe that the competence for the appointment of the Agency Council should be left to the institutions of civil sector, without transferring it to the Parliament of Montenegro.
 5. The structure of the authorised nominators of the Agency Council members should not include the public authorities (Government or individual ministries), because of the conflict of interests. In our opinion, inclusion of the line ministry in this list is unfounded and cannot be justified by the previous right of the Government to nominate one member of the Broadcasting Agency Council. We would like to remind that the involvement of the Government in the nomination of one member of the Council was previously justified by the fact that the competences of the Broadcasting Agency included the exercising of rights of the founder of the Broadcasting Centre (supervision, providing consent to the price list, statute, selection of auditor for financial reports, etc.), a state-owned company and the most important operator of telecommunications equipment and infrastructure used for broadcasting. With the abolishment of competences of the Broadcasting Agency related to this matter, this argument is no longer valid.

6. The structure of authorised nominators of the Agency Council members should not include, also because of the conflict of interests, any of the associations of broadcasters or distributors under the direct authority of the Agency. Otherwise, the issue of discrimination among the providers of AVM services would be raised, if the provision that one Agency Council member is nominated only by the associations of commercial electronic media remained in the law. The Broadcasting Agency believes that these provisions should be amended in order to eliminate these problems.
7. As regards the competences of the Council, apart from the already mentioned omission of certain competencies of the Agency, Article 12 does not provide for its competencies to adopt financial plans and reports. In the domain of the financial policy, adoption of the financial plans and reports is the main control mechanism of the founder of certain entity. Since the state transferred the rights of the founder to the Agency Council, we believe that it is necessary to prescribe the competence of the Council for the adoption of the aforementioned documents by the proposed draft law.
8. Agency Director. With regard to division of competences between the Council and Director, the Draft Law proposes that the Council issues licences of the AVM services and considers complaints and objections to the work of broadcasters and operators. We believe that the division of competences should be defined in such a way that Director issues licences (on the basis of a bylaw adopted by the Council) and considers petitions and complaints to the work of broadcasters and operators. In that way, Director would be the first-degree body, whose decisions would be subject to compliant to the Council as the second-degree body (which was envisaged according to the competences of the Council in Article 12). This creates a legal possibility for filing a complaint, which is a constitutional category preceding court protection.
9. Funding of the Agency. The Council of Europe Recommendation (2000) 23 obligates the member countries to provide sustainable and stable framework for the financial independence (from the Government) of the independent regulatory authority for the broadcasting sector.

The proposed set of provisions proposes the framework that does not provide the financial independence, but enables direct interference of the Government with the work of the regulator, if the provision that one of the sources of funding are "fees paid for using of broadcasting frequencies prescribed by the Law governing field of electronic communication" (Article 41 of the Draft Law).

We would like to remind that Article 84, paragraphs (3) and (4) of the Electronic Communications Law prescribes that:

(3) Holder of approval for radio frequencies shall be obliged to pay a regulatory annual radio frequencies usage fee to the Agency¹, **which shall be used solely for covering the expenses of frequency spectrum supervision and management.**

(4) **The Ministry shall prescribe methodology and manner of calculation of fees level,** expressed in points. The Agency shall suggest monetary value of the point, based on estimation of total annual regulatory costs on the above mentioned basis, by which level of fees will be calculated and incorporated in the Financial Plan for the following calendar year and the **level of fee shall be determined by the Government, by adoption of Financial Plan of the Agency.**

In view of that, it can be concluded that there is a conflict, i.e. incompliance between the provisions of Article 41, paragraph (1), point 1) of the Draft Law and Article 84, paragraph (3) of the Electronic Communications Law, since they define the purpose of the same fee in different manners. While the Draft Law recognizes this fee as one of the sources of funding of the Electronic Media Agency, the Electronic Communications Law defines this fee as the income of the Electronic Communications Agency, which can be used only for "covering the expenses of frequency spectrum supervision and management" .

It is not clear why an agency would have the right to these fees if it does not have the authority to perform the activities for the covering of whose costs the fee can only be used? Furthermore, the fact that the Electronic Media Agency has no influence on this source of income remains a key problem. It is not involved in the planning, invoicing, collection of this income, or in any other activity that can affect the stability of sustainability of this source.

The provision contained in the proposed Article 41, paragraph (2) of the Draft Law is not sufficient because it creates a conflict, i.e. incompliance of this provision with Article 84 paragraph (4) of the Electronic

¹ Agency for Electronic Communications and Postal Services.

Communications Law. Namely, while Article 21, paragraph (2) of the Draft Law prescribes that the level of this fee "shall be determined by the Agency Council and by the Council of regulatory body for electronic communications," Article 84, paragraph (4) of the Electronic Communications Law prescribes that this fee is calculated on the basis of methodology and in a manner defined by the Ministry of Telecommunications, while the level of the fee "shall be determined by the Government, by adoption of Financial Plan of the Agency²."

As regards this source of funding, there is also an issue of the share of the fees that would belong to the Electronic Media Agency. We believe that this issue should be clearly defined by law, as well as the dynamics of transfer of funds to the Electronic Media Agency (e.g. on quarterly basis, on the basis of issued invoices for fees for issued licences, etc.).

Bearing in mind the competences related to the planning and use of the sources of funding, we believe that the Draft Law should be supplemented with the provisions related to:

- Manner of use of surplus income over the expenses of the Agency;
- Obligation of payment of the registration and annual fees by the providers of AVM services, as well as the competence of the Agency Council to prescribe the terms and conditions for their determination and payment (new Article 42a).

10. Another disputable source of funding of the Electronic Media Agency is the second one, prescribed by Article 41 of the Draft Law, i.e. a part of "the subscription paid to distributors of AVM program contents."

The new Agency will have the competences of the regulatory authority for the broadcasting sector, i.e. AVM sector. Therefore, it will issue licences to the providers of AVM services (broadcast media, i.e. radio and TV broadcasters, cable/MMDS/IPTV/DTH distributors of radio and TV programmes, with conditional or free-to-air access, etc.) and supervise these activities. Consequently, it is not clear why it is not planned that one of the Agency's sources of funding are fees for the regulation of this sector, payable by the licence holders, the level of which would depend on the income coming from the provision of these services, which would be determined on the basis of clear and transparent criteria defined by the Agency Council.

Instead, it is prescribed that one of the sources of funding will be "a part of the subscription paid to distributors of AVM program contents". It means that only the distributors of radio and TV programme will cover most of the costs of the Agency's operation. Why are radio and TV broadcasters excluded, if we know that regulation and monitoring of their operation will be a predominant activity of future agency? It is not clear why the fee is based on the subscription paid to the distributors of radio and TV programmes by users. Does it mean that the distributors will be paying certain amount per user, regardless of the fact if the user is subscribed to the basic or several packages of channels?

We believe that this source of funding is defined in a very confusing and unrealistic manner, and it should be revised and it should clearly define that it refers to the regulation of market and that it is related to the income from provision of certain AVM services licensed by the Electronic Media Agency.

The fact that a source of funding defined in such manner does not contribute to a reliable financing of the agency's competences is confirmed by the provision that the income from these fees is partly allocated to the Media Pluralism Fund. Instead of paying regulatory fee to the regulator, the broadcast media, as a group within the sector supervised by the Agency, will be indirectly receiving funds from the distributors through the Media Pluralism Fund. In this way, the entire burden of financing of regulation of this sector rests on one group of stakeholders, on top of the planned redistribution of distributors' income to the broadcast media. It is our opinion that the provision that financing of the media pluralism fund is provided form a part of fees that are one of the main sources of agency's finding should be revised. We would like to point out that the provision that the Council provides consent to the level of prices of distributors' services, on the one hand, and determines the share of the fees collected from the distributors to be allocated to the fund, on the other, would result in the conflict of interests of the Council and completely block its work.

11. It is not clear what was the intention of the drafter concerning the fee payable by the providers of AVM services, since the Agency has a competence (according to Article 10, paragraph (1), point 3) to "determine amount of compensation for issuing and using license for AVM service providing", which later

² Agency for Electronic Communications and Postal Services.

does not reflect on the structure of the sources of funding (Article 41 of the Draft). Therefore, it is necessary to harmonize the provisions of the law.

12. We believe that the proposed provision considerably contributes to uncertainty/instability of the regulator's working conditions. It should greatly rely on the Government's commitment to the electronic communications sector, in order to provide the necessary resources for the implementation of the sector policy. Bearing in mind great efforts and funds that have been invested in the regulation of the broadcasting sector in Montenegro, we believe that that the proposed legal framework disregards all that, unnecessarily trying to reinstate Government's control over the competences of the regulator. The Broadcasting Agency believes that such an attempt is not justified and it cannot be based on the results of the independent regulation of the broadcasting sector achieved so far.

On the other hand, the overall set of sources of funding is not objective and it does not recognize the structure of subjects of supervision and the need to determine the Agency's remit on the basis of it, and consequently to plan the justified income and expenses.

13. The Law does not contain the provisions regulating the **right of natural and legal persons to file complaints to the Agency** concerning the work of broadcasters and distributors. This should be corrected, since it is one of the main competences of the regulator. This could be just an omission, because Article 12 (Competence of the Council) prescribes the Council's competence to adopt a bylaw, regulating the procedure of deciding upon the complaints and objections (indented line 21). Therefore, we suggest a new article to be added, correcting this omission (see specific comments – new article 42b).

CHAPTER III – LICENCES FOR PROVISION OF AVM SERVICES (Articles 43-61)

Provisions contained in this chapter disregard the need to regulate competences, rights and obligations of the electronic media regulator in the procedure of awarding the rights to use broadcasting frequencies, i.e. when preparing and carrying out a tender procedure for awarding these rights.

Even if the drafter's determination was that the new agency has no such competences, it remains unclear what is the procedure for obtaining the right to broadcast radio and/or TV programme by digital broadcasting system using VHF and UHF frequency bands, allocated to the multiplex operator for digital terrestrial broadcasting (Article 44, point 2).

One again, we would like to warn that if broadcasting or radio or TV programme is based on the use of broadcasting frequencies, the obtaining of the right to use them is the first precondition for the beginning of provision of AVM services.

Given that the Electronic Communications Law is not the subject of public consultations but the Draft Electronic Media Law, showing our readiness to try to provide our assistance and find the best possible way out of the problem, we would like to indicate that it could be solved.

The Electronic Communications Law could be amended by adding a set of provisions related to the following rights and obligations of the Electronic Media Agency:

- 1) establishment of criteria and commission for the tender for awarding the rights to use broadcasting frequencies by the Electronic Communications Agency,
- 2) carrying out public tender for awarding the right to a capacity in the digital multiplex for terrestrial broadcasting.

Given that the Broadcasting Agency has an extensive five-year experience in defining and carrying out tender procedures and awarding the licences for obtaining the right to broadcast radio and TV programme, we would like to express our full readiness to assist in providing a good legal regulation of this very important segment, if the drafter has a need for such an assistance. Our concept of the possible model is provided in the Annex to these comments.

Bearing in mind that drafting of the Digital switchover Law (law on transition from analogue to digital broadcasting systems) is currently under way, it is necessary to provide compliance among these three laws in order to avoid problems in their implementation. In our opinion, the systemic issues should be dealt with by the Electronic Media Law or the Electronic Communications Law, since the Digital Switchover Law will be a primarily the law regulating a time-limited process, which should be based on and compatible with the provisions of the systemic laws.

Sanctions imposed by the Agency (Articles 62-67)

The Draft Law inadequately prescribes that the Electronic Media Agency is not in charge of imposing fines, which is contrary to the spirit and character of other provisions dealing with its competences. Namely, if an independent regulatory authority is entrusted with deciding on the most severe penalty such as revocation of licences for the

provision of AVM services, it makes no sense depriving it of the competence to impose milder sanctions, including the fines. Even more so, since the Draft Law does not specify whose competence it is.

The possibility of efficient supervision and carrying out of legal competences of the Agency's is limited if it has no competences to impose a complete set of measures, including warnings, fines, suspension and revocation of licences. That is a scale of penalties that ensures gradualness, proportionality and efficiency in completion of this regulatory function. Consequently, we suggest that Articles 62 to 66 of the Draft Law should be elaborated and unified in Chapter XI - Supervision (new Articles 140d to 140h).

CHAPTER IV – RIGHTS AND OBLIGATIONS OF ELECTRONIC MEDIA (Articles 68-80)

This chapter should contain a key set of provisions aimed at alignment with the AVMS Directive. Prior to the adoption of the proposed provisions, it is necessary to examine the possibilities of electronic media, since they will impose considerable new obligations to them, to be met in a short-term period after their coming into effect.

We believe that the need to regulate this matter in detail by law should be reconsidered once again. The provision empowering the Agency Council by law to prescribe in detail the conditions and dynamics of legal commitments related to the programme quotas should be taken into consideration instead. That has been the practice so far, enabling the Agency to adjust the dynamics of introduction of obligations on the basis on the level of development of the sector and society as a whole, in line with the standards contained in the Council of Europe and EU documents.

CHAPTER V – LICENCE FOR DISTRIBUTION OF AVM ON-DEMAND SERVICES (Articles 81-86)

This chapter also disregards the need to involve the Electronic Media Agency in the procedure of awarding the right to use broadcasting frequencies for the provision of AVM on-demand services. Therefore, we would like to underline the need for amending the Electronic Communications Law by adding the provisions dealing with this issue, especially the ones dealing with the issue of cooperation on preparation of tender for awarding the rights to use digital multiplex for terrestrial broadcasting. Our concept of possible model is provided in Annex to these comments.

CHAPTER VI – RIGHTS AND OBLIGATIONS OF DISTRIBUTORS (Articles 87-94)

1. The Draft Law keeps the existing legal provision prohibiting the distributors to distribute their own programmes (except the information on time, functioning of the system and the electronic programme guide), as well as to have a stake in the legal person involved in broadcasting radio or TV programme. In that way, the limitations that are not generally justified are preserved.

The Broadcasting Agency believes that the new law should eliminate this barrier for entering the market of AVM services. Possible abuse of the monopoly position based on the control over the electronic communications networks, etc. could be regulated by measures of the mandatory separate accounting of income and expenditure based on the provision of different types of services, and the obligation of provision of equal and non-discriminatory conditions for distribution of TV programmes other than their own.

2. This chapter should be supplemented with the provisions regulating:
 - obligations of multiplex operators related to the electronic media that obtained the right to access the capacities of certain type of multiplex (national, regional, local);
 - obligations of distributors to distribute the programme of public broadcast media.
3. The provision obligating the Agency to impose an obligation to the distributors to include domestic TV programmes into their offer should be reconsidered, if the distribution of their services is "predominant way of reception of these programmes in certain service zone". We believe that this provision is unfounded and should be rephrased in that way that it provides for a possibility but not the obligation of the Agency to do so. Because, it is primarily a business decision whether to include certain TV programme in the distributor's offer and it is based on the assessment if and in which degree the programme contributes to the attractiveness of the overall service and consequently to a higher demand. An intervention by the Agency could be envisaged only with justified reasons.
4. User contract. It is prescribed that the Agency approves the text of the contract and provides its consent to the price list and its changes, which was previously not the case. We believe that it would be sufficient if the Agency provided consent to the model user contract, and that it is not necessary to provide consent to the price list.
5. The Draft Law contains a provision (Article 94) obligating all programme service distributors to provide the Agency with the Internet access to their subscriber data bases, in line with the regulations on protection of

private data. This obligation should be seriously reconsidered from the aspect of feasibility and usefulness. We believe that it should be deleted.

Protection of conditional access services

Only in the definition of terms (Article 5), the Law implies that the drafter's intention might be to regulate by this law the implementation of protection measures for the conditional access services. If the drafter opts for that kind of provision, the Draft Law should be supplemented with appropriate article (provided in the specific comments – new Article 94a) in the chapter related to the licences for distribution. Certain definitions in Article 5 should also be revised, and a new article should be added (new Article 141a) prescribing fines for the violation of this law. In any case, the harmonization should be formulated taking into consideration the Directive on the Protection of Conditional Access Services³, and the European Convention on the Legal Protection of Conditional Access Services⁴.

CHAPTER VII – FUND FOR THE PROTECTION OF MEDIA PLURALISM (Articles 95-99)

1. Setting up a fund for the protection of media pluralism is a good idea that will, at least in certain degree, establish continuity with the practice introduced by the Broadcasting Law. The mechanism, which provided a strong support to the electronic media in facing with the obligations introduced by a set of media law of 2002, has proved its purpose. However, a set of provisions contained in this law should be revised in order to improve the system, and not to transform it into a source of discrimination through selective support to only certain type of media.
2. If the purpose of the fund is to contribute to the media pluralism, the access to this fund should not be restricted to the local and regional commercial media. The access to the fund should be provided to the commercial media with the national coverage, but also to the local public broadcasters. The coverage zone cannot be used as a benchmark for measuring contribution to pluralism, and the explanation that the local public broadcasters should be deprived access to this fund, since they are financed from the budget and also have advertising revenues, suggests that the fund has primarily the social dimension. The proposed division is not possible even in this case, since it would be very discriminatory to completely prevent them from using these funds even if the need for differentiation of the scope of funds allocated for the local broadcasters was recognized, because economic conditions both commercial and public broadcasters operate in are difficult, with a steady downward trend in the level of funding allocated to these media from the municipal budget (regardless of the fact that their sustainability was called into question after the abolishment of the broadcasting fee).
3. According to the proposed provisions, the Agency will have no influence to the collection and planning of funds from most of the proposed sources of financing. The provision that the Agency has a state budget as one of the sources of financing is incompatible with the position of an independent regulator. If the state budget remains in this law as one of the sources of financing for the fund, this chapter should be revised in such way that the Agency is not in charge of the planning, administration, distribution and supervision over the use of the finances from this fund, i.e. that the fund does not function within the Agency.

CHAPTER VII – PUBLIC BROADCASTING SERVICES (Articles 100-113)

This chapter should be supplemented with the provisions defining the right of local broadcast media to be awarded the right to use broadcasting frequencies without tender. Their right to access the capacities of local or regional multiplex should also be envisaged (if not provided by the Digital Switchover Law).

CHAPTER XI - SUPERVISION (Articles 139-140)

1. We believe that this chapter should be supplemented with new Articles 140a to 140h (amended versions of Articles 62 to 67 of the Draft Law), in such way that the penal measures apply to all providers of AVM services.
2. We also believe that the law should precisely regulate the competences of the Agency to conduct the inspection and initiate the first-degree infringement proceedings.

CHAPTER X – TRANSITIONAL AND FINAL PROVISIONS (142-153)

1. It is necessary to reconsider and revise the feasibility of deadlines and succession of activities that should be completed in order to harmonize the functioning of the Broadcasting Agency with this law (appointment of the Council, adoption of the statute, election of the Director, re-registration, etc.).

³ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.

⁴ European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access.

2. This chapter should be supplemented with the provisions related to:
 - deadline for harmonization of work of local broadcast media with the law;
 - Government's obligation to provide premises for the Agency;
 - deadline for harmonization of licences, awarded in compliance with the Broadcasting Law, with the new law, i.e. awarding of the licences for broadcasting and distribution.
3. One of the objectives of the Electronic Media Law is to provide alignment with the AVMS Directive. Given the level of production and sustainability of the media, we believe that it would be realistic to postpone the beginning of application of the obligations related to the share of the European audiovisual works and independent production (Articles 72 and 74).