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# ANALYSIS OF THE DRAFT-LAW ON MEDIA AND AUDIOVISUAL MEDIA SERVICES

USAID Program for Strengthening Independent Media in Macedonia,  
Project for Responsible Media and Media Legal Reform

Skopje, May 2013

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USAID Program for Strengthening Independent Media in Macedonia,  
Project for Responsible Media and Media Legal Reform

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## LIST OF ABBREVIATIONS

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|              |   |
|--------------|---|
| AEC          | Agency for Electronic Communications  |
| SEC          | State Elections Commission  |
| EU Directive | Directive 2010/13/EU of the European Parliament and of the Council, of March 10, 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) |
| EU           | European Union  |
| ECTT         | European Convention on Transfrontier Television   |
| ECHR         | European Convention for the Protection of Human Rights and Fundamental Freedoms   |
| LEC          | Law on Electronic Communications  |
| ZELS         | Association of Units of Local Self-Government   |
| LBA          | Law on Broadcasting Activity  |
| MANU         | Macedonian Academy of Arts and Sciences   |
| MRT          | Macedonian Radio and Television Public Enterprise   |
| Draft-Law    | Draft-law on media and audiovisual media services   |
| BC           | Broadcasting Council  |

## FOREWORD

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This document offers an analysis of the Draft-Law on Media and Audiovisual Media Services, released to the public by the Government of Macedonia on April 8, 2013. The Draft-Law is a working version of a comprehensive media legislation that was prepared behind close doors, without any consultations with the expert community. At that, the Government never really opened the debate on the need to adopt such a law, having in mind that in the existing legal system in the Republic of Macedonia, with exception of broadcasting, the other types of media and the work of journalists were never made subject to regulation.

In the preparation of this analysis, the Media Development Centre took into consideration the remarks, comments and suggestions by the majority of associations of journalists and media workers in the Republic of Macedonia. The analysis focuses on the Draft-Law on Media and Audiovisual Media Services from the viewpoint of its compatibility with international standards and EU's *acquis communautaire*, specifically with the EU Directive on Audiovisual Media Services, the Convention on Transfrontier Television and recommendations and resolutions of the Council of Europe.

This analysis doesn't cover the provisions of the chapters on the public broadcasting service and the broadcasting fee which will be subject to a separate analysis.

This analysis identifies the defects of the proposed Draft-Law on Media and Audiovisual Media Services and makes recommendations how to overcome those defects. The analysis aims to contribute to adoption of adequate normative solutions that will respond to the contemporary challenges and needs of the media in the Republic of Macedonia.

## THE BASIS OF THIS ANALYSIS

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### THE COUNCIL OF EUROPE

In a democratic society, the media legislation is based on the foundations provided by the principle of freedom of expression, guaranteed by Article 19 of the Universal Declaration of Human Rights and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR).

ECHR guarantees the freedom of expression that includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. These rights and freedoms refer to all persons, including journalists, and for the state, it brings about the obligation that it shall list the rules for exercise of those rights and freedoms in its legislation, in accordance with principles of democratic society.

The Court in Strasbourg repeatedly notes that all limitations to the freedom of expression ought to be based solely on the specific list provided in Articles 10, Paragraph 2 of the ECHR, to be defined in a law, narrowly interpreted, respond to a specific social need, have legitimate goal and be proportional to that goal, and to be deemed necessary in a democratic society.

### EUROPEAN UNION

The Republic of Macedonia, as a country candidate for membership, works continuously to synchronize the domestic legislation with EU's *acquis communautaire*. In the area of media legislation, an emphasis is placed on the need to synchronize the national legislation with the Directive on Audiovisual Media Services.<sup>1</sup>

The latest reports released by the EU note great concerns over the issues of self-censorship, deteriorating labour rights of the journalists, and the access to objective reporting. They also note a lack of balanced coverage of elections. The reports underline the need to address and remedy the said issues and adoption and implementation of adequate legislative and functional measures.

### EXISTING SITUATION AND LEGISLATION

The Law on Broadcasting Activity (hereinafter: LBA) was adopted in 2005. The working groups that worked on the preparation of the Law were established in 2002 and involved all media associations. Also, dr. Karol Jakubowicz, expert engaged by the Council of Europe and EU, conducted three separate expert analysis of the proposed draft and provided his opinions. Most of his remarks and comments were accepted and incorporated in the text of the LBA.

To this date, there were seven rounds of changes and amendments of the LBA: Once in 2007, twice in 2008, twice in 2010, once in 2011 and once in January 2012. The changes of the Law are implemented at a rate that leaves little room for proper and realistic review and consideration of their effects.

The new Draft-Law was presented to the public just one year after the last changes of the LBA. There is the logical question, if a need for a new law was identified, why then adopt changes instead of engaging in an in-depth and comprehensive analysis of the problems with involvement

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<sup>1</sup> Directive 2010/13/EU of the European Parliament and of the Council, of March 10, 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

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of all relevant stake-holders. It is not clear how it was determined that there is a need for a comprehensive regulation of the media sphere with a single law, changes in the set-up of the regulatory body, in-depth changes of governance of the public broadcasting service and numerous other changes that bring about a qualitative change in the media sphere regulation. The Initial assessment of the impact of regulation<sup>2</sup>, one of the texts accompanying the Law states, on page 14, notes that none of the necessary 7 analysis that need to be attached to the draft have been prepared, in spite of the fact that it estimates that the Law shall have effect on national competitiveness levels, on socially excluded and vulnerable groups, the rights of citizens, and could bring about significant political changes in the market economy, including an assessment of its impact on consumers and competitiveness.

In the segment referring to the scope of the Law and the political influence of the proposed regulatory body, there were notable similarities with the controversial Hungarian Media Law. On the other hand, if it follows the Hungarian practices, it would have been good if it copied the positive solutions, for example, the recording of sessions of Parliament, protection for minors and the obligation for the media to ensure greater accessibility to the persons with impaired sight or hearing.<sup>3</sup>

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<sup>2</sup> Initial Regulatory Impact Assessment – Law on Media and Audiovisual Media Services, available at [www.ener.gov.mk](http://www.ener.gov.mk), accessed on April 8, 2013

<sup>3</sup> Article 13 of the Hungarian Law on Media Services and Mass Communications prescribes the creation of an audiovisual system that will follow and record all sessions of the Parliament, Parliamentary committees when working on nominations or appointments, and on per need basis. A copy of the recordings is kept in the Parliamentary Library, and access to those recordings is guaranteed to all persons;

- The protection for minors is far more precisely regulated with concrete classification of programmes and permitted time-slots for airing (article 9);
- Media publishers are not stimulated to make their services accessible to persons with impaired hearing and sight; rather, they are obliged to do it and a list of actual steps and measures is provided (article 39).

## GENERAL COMMENTS AND EVALUATION

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The proposed Draft-Law on Media and Audiovisual Media Services contains numerous technical defects and, above all defects related to its contents. In short, the remarks cover the following issues:

- The scope of regulation of the Draft-law on media and audiovisual media services,
- Protection of journalists,
- The status and independence of the regulatory body,
- The extensive competences and powers of the regulatory body to further regulate a number of issues with by-laws and the overwhelming formality it promotes,
- The synchronisation with international instruments,
- The Status, independence and functioning of the public broadcasting service.

## DETAILED COMMENTS

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### Article 1 – Subject of the Law

*„This Law shall regulate the rights, obligations and responsibilities of media publishers, providers of audiovisual services and providers of programme packages.“*

The Law proposed by the Ministry of Information Society and Administration is a comprehensive law that regulates the media sphere. Therefore, in view of the definitions proposed in Article 3 of the Draft-Law, it proposes to replace the existing media regulation that regulates the area of broadcasting with a law that will cover all media.

**Article 3** of the Draft-Law lists 45 definitions of terms, while the BLA defines 15 terms in its Article 4.

### Article 2 – Purpose of the Law

One positive aspect is that several new aims were added, especially the principles of transparency and accountability of the public broadcasting service.

### Article 3 Point 1 – Definition of “media”

*„The media are means of providing public information, such as: newspapers, magazines and other printed media, radio programmes and television, electronic publications, teletext, and other forms of edited programme content which is published, that is, broadcasted daily or periodically in a written form, as sound or picture, in a manner available to the wider public.*

*Media shall exclude books, textbooks, bulletins, catalogues, web sites or other information carriers intended only for the education, science and culture system, advertising, business correspondence, information related to companies, institutions, associations, political parties, state and justice bodies, public enterprises, legal entities with public competencies, religious organisations, school newspapers and bulletins, the “Official Gazette of the Republic of Macedonia”, publications of the local self-government units, posters, leaflets, brochures and placards, video pages without live feed and other free publications, unless stipulated otherwise in this Law.“*

According to the quoted provision, everything that is not specifically listed in the second sentence of this point shall be considered to be media for the purposes of this law. Therefore, it is a comprehensive Law which regulates all forms of public communication, any transmission of information in any form, apart from the listed exceptions. Consequently, the constitutionally guaranteed freedom of expression, freedom of access to information, reception and imparting of information in any form is placed in a defined framework, which brings about the need for especially careful consideration of proposed solutions.

**We should note here that, according to the Council of Europe, the media regulation should meet the requirements for strictly defined necessity and minimal intervention, i.e. protection of media from interference, regulation of use of limited resources, ensure media pluralism and address the responsibilities of the media in accordance with Article 10, paragraph 2 of the ECHR.<sup>4</sup>**

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<sup>4</sup> Recommendation CM/Rec (2011)7 of the Council of Europe on the new notion of media, Annex to the recommendation, paragraph 59

From that point of view, instead of implementing the recommendation of the Council of Europe for minimal regulation, the Law adopts the totally opposite approach and insists on regulation of all forms and types of media. That concept is questionable also from the point of view of tradition of regulation in Macedonia and in Europe in general. Namely, due to its characteristics and the fact that it uses a limited resource, broadcasting has been subject of regulation, while print and new media are left alone and are regulated by more general legislation, such as anti-trust laws, copyright laws, criminal codes, civil law, etc. The existing approach helps ensure the freedom of media and pluralism of media sphere because it uses as its starting point the principle of non-interference by the state and government in matters related to freedom of expression as fundamental principle of any democratic society. That principle arises, in fact, from Article 10 of the ECHR.

Furthermore, the definition is not clear enough in the listing of exceptions, including both activities and types of contents and content carriers, i.e. media: "*Media shall exclude books, textbooks, bulletins, catalogues, web sites or other information carriers intended only for the education, science and culture system, advertising, business correspondence, information related to companies, institutions, associations, political parties, state and justice bodies, public enterprises, legal entities with public competencies, religious organisations, school newspapers and bulletins, the "Official Gazette of the Republic of Macedonia", publications of the local self-government units, posters, leaflets, brochures and placards, video pages without live feed and other free publications, unless stipulated otherwise in this Law.*"

The underlined are not media but types of contents that can be carried over a medium. Therefore, the definition has been made unnecessarily over-extensive, or a technical mistake was made since that part of the definition would be given proper meaning if the words "or are exclusive intended for" were inserted before the word "advertising".

### Article 3 Point 2 – Definition of programming contents

The definition of programming contents can refer only to linear audiovisual services, and not to all types of media services. It is completely inadequate and causes confusion in the segment of print and new media. **If the actual aim was to cover everything in a single definition, the terms "media contents" or just "contents" would be far more adequate!**

### Article 3 Point 3 – Definition of electronic publication

The websites of media companies that publish printed newspapers and magazines are exempted from the definition. Having in mind the existing situation in which these media outlets, due to the manner of sale of their advertising space and the competition in the electronic media market, but also due to the differences in contents carried by the print and the electronic versions of the paper, there is no reason whatsoever for them to be given a status different from the status of the other web publications. Quite to the contrary, because of anti-trust legislation and to allow for proper determination of existence of media concentration, they have to be included in the definition. Knowing that the websites of TV and radio broadcasters are covered by the definition, it is a complete mystery why it exempts the web editions of the print media. The second problem lies in the fact that ONLY WEB publications are defined as electronic publications, omitting the other forms of publications that use internet protocols or other electronic means of dissipation, for example, IPTV portals (there is one such in Macedonia operated by Max TV), applications for portable devices in the form of readers with regularly updated contents, etc. **The definition is inadequate and we propose that it is extended to incorporate those elements listed above.**

### Article 3 Point 5 – Definition of “journalist”

*„Journalist shall mean a person who collects, analyses, processes, edits and/or selects information and is employed by the media publisher with an employment contract or is a person who has signed a contract with the media publisher to provide services as freelance journalist.“*

The definition of a journalist as a person holding valid employment contract or has signed contract with a media publisher is restrictive. Namely, such a definition defines journalists solely from the viewpoint of their social status, providing the narrowest possible parameters. The employment status of a journalist is transformed into determiner of his or her professional identity. The definition of journalists as persons who have signed prior employment opens the possibility for selective accreditation, prevents the freelance journalists from working and discredits all those who don't hold a valid employment with an employer. On the other hand, the international documents have defined journalistic profession and journalists solely and exclusively as an instrument for protection of their sources of information. From that point of view, the journalist is defined in widest possible terms, in accordance with the principle that the freedom of expression supersedes all other legitimate interests and can be limited only exceptionally, if deemed necessary in a democratic society. Therefore, Recommendation 2000(7) of the Committee of Ministers of the Council of Europe “On the right of journalists not to disclose their sources of information” is the only document with capacity of international standard that offers a legal definition of who shall be considered journalist. According to the Recommendation: The term “journalist” shall mean any natural or legal person that regularly or professionally works in collection and dissipation of information to the public via any means of mass communication.<sup>5</sup>

**We recommend that this definition is incorporated in the Law because it corresponds to the nature of journalistic work and is inclusive, i.e. it allows for exercise of the freedom of expression through the media, unlike the existing definition in the Law which ties the status of journalist exclusively to the employment or service contract with a media outlet. It also discriminates against the new trends of citizen journalism where a common citizen can appear in the role of media reporter and complicates the use of such material in the work of media outlets. It also discriminates the bloggers which are excluded from the definition although they often find themselves in the role of citizen journalists, i.e. it can prevent them from access to events that they would like to cover in their blogs, solely on basis of a definition that excludes them from the ranks of journalists. From that point of view, it is outdated and presents an obstacle to the freedom of expression set by the state in the form of a law. That is in direct collision with ECHR and the Constitution of the Republic of Macedonia. In fact, the whole definition is redundant and unnecessary, except as grounds for protection of the right of non-disclosure of sources of information. Unfortunately, later in the text of the Law, that definition is also used, among other things, to regulate the relations within an editorial office.**

### Article 3 Point 6 – Definition of “editor-in-chief”

The definition of “editor-in-chief” reflects the traditional understanding of media and doesn't correspond to the real management of contents in the media. The contemporary standards, including the EU Directive, operate with the terms “editorial responsibility” and “effective editorial control”<sup>6</sup> to define the responsibility over contents. The principle of effective editorial control recognizes that several different lines of editorial responsibility may coexist in the struc-

5 Recommendation R (2000)7 of the Council of Europe on the right of journalists not to disclose their sources of information, Annex to the Recommendations, Definitions, Paragraph 1, point (a)

6 Directive 2010/13/EU, Article 1, Paragraph 1, Line c

ture of the media outlet and the internal pluralism of the media. Furthermore, those terms can adequately cover the influence of the owners, programming directors, marketing directors or content managers. The definition offered by the Draft-Law aims to locate the responsibility for the contents in a media in a single person and, in order to allow for further organisation of the editorial office along the lines prescribed by this Draft-Law, which represents an unacceptable level of interference of the state in the internal affairs of the media and an attempt to impede the pluralism and private initiative. Later in the text, the Draft-Law attempts to use that definition as basis to ensure the editorial independence in privately-owned media, but in practice there is a great danger of allowing the state to interfere in internal structures and set-up of the media. That approach can't be used as a substitute for the problems of ownership, which are its main underlying reasons. Therefore, we propose for **this definition to be deleted and to introduce the term editorial control, in the form described in the EU Directive.<sup>7</sup>** The problems of the ownership structure of the media should be resolved by strengthening of anti-concentration provisions and pro-active approach by the market regulators.

### Article 3 Line 7 – Definition of “Audio/Audiovisual media service”

*“Audio/audiovisual media service shall mean:*

- i. *service provided by a provider of audio/audiovisual media service and shall include any form of economic activity with primary objective to provide audio/audiovisual programmes for the purpose of informing, entertaining and/or educating the wider public via electronic communications networks. Such audio/audiovisual media service shall mean either radio/television broadcasting or on demand audio/audiovisual media service;*
- ii. *audio/audiovisual commercial communication.*

*Audio/audiovisual media services shall exclude the following services:*

- *services which are, above all, non-commercial and are not competing with radio or television broadcasting, such as private web-sites and services comprised of provision or distribution of audiovisual content created by private users for the purpose of sharing and exchanging within the communities of interest;*
- *transmission services, that is, distribution of programmes for which the editorial responsibility is borne by third parties;*
- *any form of private communication, such as electronic mail send to limited number of recipients;*
- *services which primary objective is not provision of programmes, i.e., where each audiovisual content is random to the service and is not its primary objective, including:*
  - *web-sites containing auxiliary audiovisual elements, such as animated graphic elements, short commercials or information related to a certain product or non-audiovisual service;*
  - *games of chance which entail a monetary bet, including lotteries, betting services and other forms of gambling;*
  - *online games;*
  - *search engines;*
  - *electronic versions of newspapers and magazines;*
  - *individual text-based services.”*

The definition of audio/audiovisual media service is copied from the EU Directive. It is a combi-

<sup>7</sup> ‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided; Ibid

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nation of the integral text and the introduction in which the definitions of terms are listed. Specifically, sub-points i and ii are copied from Article 1, Paragraph 1, Line (a) of the EU Directive<sup>8</sup>, while the second paragraph of Article 3, Point 7 of the Draft-Law is a summary of paragraphs 21, 22 and 23 of the EU Directive.<sup>9</sup>

Upon closer reading, it become clear that the Directive doesn't refer to audio or radio services (point 23), it never mentions transmission services or distribution of programmes for which the editorial responsibility lies with third parties, or the electronic versions of newspapers and magazines. On the other hand, the Directive recognizes the discretionary right to edit independently standing text based services (point 23). Point 28 of the Directive states clearly that it shall not refer to the electronic versions of print newspapers and magazines.<sup>10</sup>

**For the reasons listed above, we believe that the added issues, other than those covered by the EU Directive, should be deleted.**

### Article 3 Point 43 – Definition of “Macedonian audio and audiovisual works”

The definition is based on the language of production and not the country of origin of the works. If that definition remains, due to the specific characteristics of Macedonia, it may happen for works in Serbian, Albanian, Romani or Bosniak languages, produced outside of Macedonia, to be included in the quotas for domestic audiovisual works, while works produced in Macedonia in other languages, to be excluded from those quotas. Such a definition of domestic production is restrictive for the domestic industry and, for no reason whatsoever, allow the providers of media services to meet the quotas with imported programmes. With that in mind, we propose: **That the definition is based on the principle of country of origin, which is the underlying principle**

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8 „1. For the purposes of this Directive, the following definitions shall apply:

(a) ‘audiovisual media service’ means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;“

9 „(21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on- demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non- economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

(23) For the purposes of this Directive, the term ‘audiovisual’ should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.“

10 „The scope of this Directive should not cover electronic versions of newspapers and magazines.“

used by the EU Directive, instead of the language of production of the given work.<sup>11</sup>

**Article 3 Point 45 – Definition of “Family members”**

„*Family members shall mean parents, children, siblings, foster parents and adopted children.*“

**The definition is too narrow in scope.** It omits the mention of marital and civil union partner (the latter, according to Macedonian legislation, has the same status and rights as marital partners), and it treats equally, as family members, both relatives in direct line of descent and laterally related persons. Also, persons who live in the same households, such as grandparents and in-laws, can be considered family members. For the reasons above, we believe that the definition in the Draft-Law needs to be extended and be based on the definition of family in the Law on Family.<sup>12</sup>

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<sup>11</sup> „The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market,” EU Directive, Introduction, Point 33

<sup>12</sup> Article 2 of the Law on Family states that: The family is a living community of parents and children and other relatives provided they live in a common household. The family shall come to existence with the birth of children and adoption.” Law on Family (revised text), Official Gazette of the Republic of Macedonia, No. 157/2008

I. General and common principles for media publishers (broadcasters, publishers of print and electronic publications)

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**Article 4, Paragraphs 2 and 3 - Freedom of Expression and Freedom of the Media**

*„(2) The freedom of the medial shall particularly include: freedom to express opinions, independence of the media, freedom to collect, research, publish, select and transmit information for the purpose of informing the public, supporting pluralism and media diversity, freedom of flow of information and openness of the media towards various opinions, beliefs and content, access to public information, respect of human individuality, privacy and dignity, freedom to establish legal persons for providing public information, publishing and distributing printed and other domestic and foreign media, production and broadcasting of audio and audiovisual programmes, as well as other electronic media, independence of the editor, the journalist, the authors and creators of programme content or programme associates and other persons in accordance with rules of the profession.*

*(3) The freedom of the media may be limited only when such action is necessary for protecting the national security, territorial integrity or public peace and order, for preventing unrests and offences, for protecting the healthcare or morals, as well as the reputation or the rights of others, for preventing disclosure of confidential information and for safeguarding the authority and independence of the Judiciary.“*

The Law offers a definition for a term that is otherwise not defined in any international instrument. The ECHR, in Article 10, defines the scope of the freedom of expression. The definition in the Draft-Law goes well beyond the freedom of expression. So, it includes the access of public information, respect of human individuality, privacy and dignity, freedom to establish legal persons for providing public information, production and broadcasting of audio and audiovisual programmes, independence of editors, journalists, etc. It is understandable that, in practice, the freedom of the media to include the principles listed in the offered definition and in the provisions of Article 5 that define the principles that media publishers and providers of audiovisual services should adhere to.

However, the problem with Article 4 lies in the fact that Paragraph 3 copies the grounds for restrictions listed in Article 10, Paragraph 2 of ECHR. Therefore, **the limitations to the freedom of expression, allowed by ECHR, in accordance to Article 3 can be used to restrict the freedom of the media, which incorporates a much wider scope of rights and freedoms.** Furthermore, the list of possible reasons for restriction of the freedom of the media is greatly extended with the term “punishable offenses”. It is not just criminal offenses, but also the misdemeanours that can be sanctioned. The ECHR sets the limit at “criminal offenses”.

We recommend that Paragraph 2 is deleted, thus eliminated the possibility for restrictions of a wide scope of rights and freedoms, while the freedom of the media should be protected in practice through adherence to the principles listed in Article 5 and implementation of criminal and civil law of the Republic of Macedonia, which provide sufficient legal grounds for effective protection of freedom of expression and freedom of the media.

We repeat that freedom of the media is not defined in any international instruments or documents. The Council of Europe states in its documents that, in practice, the freedom of the media should be understood as widely as possible and that it incorporates the freedom of expression and transmission of information. It calls for termination of licencing systems, with exception of justified cases referring to limited resources (for example, the electromagnetic

wave spectrum). At the same time, it calls for application of a differential approach to the media, taking into consideration their specific functions and potential effects and meaning in terms of promoting and ensuring good governance in a democratic society.<sup>13</sup>

At the same time, it has to be noted that the “freedom to establish legal persons for providing public information, printing and distribution of press and other media in country and abroad, production and broadcasting of audio and audiovisual programmes, and other electronic media” are part of the fundamental freedoms in the common European market - freedom of establishment and freedom to provide services. The recommendation to delete Paragraph 2 is also based on the Constitution of the Republic of Macedonia which guarantees, in Article 16, Paragraph 2, the freedom of establishment of institutions for public information. The limitation to the establishment of media outlets through clear obstacles, complicated procedure or insistence on overly formal establishment procedures can only lead to grave violations of the freedom of expression. In accordance with Article 10 of the ECHR, the restrictions shall be allowed only in the sense of issuing of licenses to perform broadcasting activities, television broadcasts and cinema screenings. Any venture over the allowed restrictions means making an inroad in the freedom of expression.

The proposed definition of the freedom of the media in the Draft-Law clearly opens the space to restrict many rights and it has to be deleted.

#### Article 4, Paragraphs 4, 5 and 6 - Freedom of Expression and Freedom of the Media

*„(4) It shall be prohibited to threaten the national security, to encourage the violent destruction of the constitutional order of the Republic of Macedonia, to call for war aggression or armed conflict, to encourage or spread discrimination, intolerance or hatred on the basis of race, nationality or ethnicity, gender, sexual orientation, disability or religious beliefs by way of publishing and broadcasting programme content via the media.“*

The bases for discrimination don't exclude the constitutionally defined basis in Article 9 of the Constitution: political and religious beliefs, social background, property and social status!

*„(5) The media shall be prohibited to publish information and/or pictures, which reveal the identity of minors involved in any forms of violence, irrespective of the fact whether the minors are witnesses, victims or offenders, or have tried to commit suicide, and may not reveal any details on their family relations and private life thereof.*

*(6) The media publisher shall be obliged to respect the right to identity protection of witnesses or victims involved in offences or violence, and may not reveal their identities without their knowledge and consent.“*

The proposed paragraphs 4, 5 and 6 offer fine solutions. Paragraph 4 copies the grounds for discrimination listed in Article 9, Paragraph 1, Line (c) of the Directive. **It has to be amended to include the constitutional basis listed in Article 9 of the Constitution of the Republic of Macedonia, i.e. social background, property and social status.**

Paragraph 5 could be amended to include the prohibition of broadcasts/publication of information that allow for disclosure of identity of minors, for example information reporting on events in smaller towns and communities.

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<sup>13</sup> Recommendation CM/Rec (2011)7 of the Council of Europe on the new notion of media, Point 7 and Annex to the Recommendation, Points 61 and 77

#### **Article 4, Paragraph 8 - Freedom of Expression and Freedom of the Media**

*„(8) Pursuant to this Law, the media publisher shall be independent in its editorial policy, that is, in the execution of the programme concept, and shall be responsible for the published programme contents.“*

This paragraph offers a fine solution, but it is limited by the provisions of Article 76, Paragraph 8, which state that the broadcasters shall be obligated to seucre prior consent by the Agency for any change exceeding 10% of the programming concept on basis of which they were awarded the licence for television or radio broadcasting.

#### **Article 4, Paragraph 10 - Freedom of Expression and Freedom of the Media**

*„(10) None of the provision referred to in this Law may be interpreted in a manner permitting censorship or limitation of the right to freedom of expression or freedom of the media, except in the cases mentioned in paragraph (3) of this Article.“*

Article 16 of the Constitution prohibits censorship. **The quoted paragraph introduces censorship and restrictions to the freedom of expression and freedom of the media in cases listed in paragraph 3 of the same article. That provision is clearly unconstitutional and the phrase “except in the cases mentioned in paragraph (3) of this Article” have to be deleted.**

#### **Article 5 - Principles**

*“Media publishers and audiovisual media service providers shall follow the following principles while conducting their business activities:*

- fostering and development of humane and moral values of human beings, and protection of the privacy and dignity of each person;
- equality of freedoms and rights irrespective of the sex, race, national, ethnic or social background, political or religious convictions, wealth and social status of the individual and the citizen;
- promotion of the spirit of tolerance, mutual respect and understanding of all individuals of diverse ethnic and cultural backgrounds;
- protection of the privacy and the dignity of each person;
- protection of the identity of violence victims;
- respect for the presumption of innocence;
- promotion of international understanding and cooperation, the public notion of fairness and the need to protect the democratic freedoms;
- openness of programmes to expressions of diverse cultures that are integral part of the society;
- preservation and fostering of national identity, linguistic culture and domestic creativity;
- objective and unbiased presentation of events, with equal treatment of diverse views and opinions, enabling the free creation of a public opinion on individual events and issues;
- respect for copyrights and related rights;
- respect of the confidentiality of sources of information;
- guarantees for the right to reply and correction; and
- autonomy, independence and accountability of editors, journalists and other authors involved in the creation of programmes and editorial policy.”

The Principles of conducting business for media publishers and providers of audiovisual media services are an important step forward for Macedonian legislation. They determine the princi-

ples of operation, regardless of the fact that the publishers and providers of audiovisual media services are given freedom of conduct of business, possibility to adopt ethical standards and engage in self-regulatory activities. **The only provision listed in Article 9, Line 3 of the Constitution missing here is the discrimination on grounds of “colour of skin”. The said article needs to be synchronized with the grounds for discrimination listed in the Constitution.**

#### **Article 6 – Obligation to publish certain information**

*„(1) Upon request from the competent state authorities, the media publishers and audiovisual media service providers shall be obliged to publish, free of charge, announcements and official statements of the competent authorities or bodies in the event of war or immediate danger to the independence and sovereignty of the Republic of Macedonia, in the event of large natural disasters, technological and environmental catastrophes and outbreaks, and when there is threat to the life and health of the people, to the safety of the country and to the public peace and order.*

*(2) The request mentioned in paragraph (1) of this Article shall be submitted in writing and must contain data proving its authenticity and legality.*

*(3) When transmitting service information of the weather and road conditions, as well as other information which may affect the lives of the citizens, the media publisher shall call upon the data from the competent institutions and organisations in the Republic of Macedonia authorised to provide such information.“*

This article restores back into the Macedonian legislation the solution of Article 36 of the 1997 Law on Broadcasting Activity.<sup>14</sup> The only difference is that the old 1997 Law obligated the broadcasters to publish public announcements in cases of natural disasters and epidemics, while the Draft-Law significantly extends the scope of cases covered by such an obligation, for example, a state of war, immediate threat to the independence and sovereignty of the Republic of Macedonia, the safety of the country, the public peace and order, etc.

The proposed solution is problematic for two reasons. First, it places all broadcasters in a position to function as instruments of information policies of the state. That obligation prevents the impartial reporting and presentation of information, for example, in cases of threats to the public peace and order and directs the media to rely exclusively on the official versions of events. Furthermore, the obligation introduces restrictions of the scope and schedule of transmission of such releases, allowing the authorities to make arbitrary decisions on the contents of offered media programmes. The sanctions prescribed in Article 162, paragraph 1, line 1 of the Draft-Law is unambiguous and practically reduces broadcasters to the role of transmitters of state's views and positions, in certain cases. It was because of the great capacity for abuses of that solution that it was removed from the 2005 LBA. The solution proposed in the Draft-Law is a classic case legislation taking one step backwards.

The second problem is evident if we ask the question, in a state of emergency and great unease and uncertainty in the population, will the state authorities be able to present the request in writing. Furthermore, Paragraph 2 requires for the request to contain data and information that will prove the authenticity and veracity of that request. In cases of utmost emergency, why shouldn't it be possible to present the request in another form (by electronic mail or by telefax), and in most urgent cases by phone, too? We should offer here the example of one such case, several years ago, when in the hottest day of the year, a huge swaths of the Republic of Macedonia suffered a major power outage.

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<sup>14</sup> “The Council shall be composed of nine members”, Article 23 of the 1997 Law on Broadcasting Activity (“Official Gazette of the Republic of Macedonia” No. 20/1997 of April 30, 1997)

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Then, the question is why should the media, in the cases listed in Paragraph 3, rely solely on the information coming from competent institutions and organisations (transmission of service information on weather forecasts, traffic reports and other information that may have influence on the daily life of the citizens). It introduces restrictions on the transmission of information which, in extraordinary circumstances and emergencies, may be of great importance to the citizens, while competent bodies may not present a request to broadcast or publish information, being prevented by objective reasons.

**We recommend several changes to this Article, i.e. delete paragraphs 1 and 2, while paragraph 3 should be rephrased and rewritten to prescribe that the media, when carrying service information, should clearly name the source of the information. Also, it is the provider of the information that should be held criminally liable for any eventual abuses.**

### Article 7 – Access to Public Information

This article is redundant and unnecessary in view of the fact that the obligation of state bodies and institutions, and other legal and natural persons with public empowerments to provide accurate, complete and timely information is already regulated in the Law on Free Access to Public Information.

### Article 8

*„(1) Each media publisher and audiovisual media service provider must appoint a Editor-in-Chief.  
(2) When appointing and dismissing the Editor-in-Chief, the media publisher and the audiovisual media service provider shall be obliged to request an opinion from the Editorial Board, unless stated otherwise in the Act referred to in Article 10, paragraph (1), of this Law. The Editorial Board shall be obliged to submit its opinion within five days from receiving the request.  
(3) The Editor-in-Chief shall be responsible for all published information in the media in accordance with this Law.  
(4) Macedonian Radio Television should have Editor-in-Chief for each of its programme services.  
(5) If one publisher publishes several printed media, it should appoint an Editor-in-Chief for each one.  
(6) Person, with immunity for criminal offence, due to the nature of the office it holds, may not be appointed Editor-in-Chief. “*

The first paragraph of this Article follows the logic of this bill, however, if the definition for the concept of editorial responsibility based on effective editorial control, mentioned earlier in this analysis is applied, the **whole article has to be rewritten and rephrased to reflect the legal responsibility and liability to align it with the new definition.**

Paragraph 2 of this article introduces internal procedures for selection and appointment of editorial staff which, in theory, should provide for and protect editorial independence and protect the journalists. We should, however, bear to mind the constitutional provisions in Article 55 of the Constitution of the Republic of Macedonia which guarantees the freedom of the market and entrepreneurship (paragraph 1), and prescribes that the restriction of that freedom can be imposed by law for purposes of defence of the Republic from outside threat, protection of nature, environment and human health (paragraph 3), and that anti-trust measures may be implemented to ensure equal conditions for all actors in the marketplace (paragraph 2). The proposed procedure for selection and appointment of editors in this Draft-Law is a potential violation of the Constitution of the Republic of Macedonia, since it prescribes the manner of appointment of

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editor-in-chief pursuant to Article 10 (see the comments on Article 10), in view of the fact that the whole responsibility for the management of the product falls on the editor-in-chief. It creates a situation in which, instead of applying the provisions of the Law on Commercial Companies which describes in detail the manner of management of companies on basis of invested capital and internal acts of the companies, the employees of the media may usurp the property rights in the company and have direct influence on its management. **Paragraph 2 should be deleted because it presents several problems regarding its constitutionality, while that matter is already regulated in the Law on Commercial Companies and the Law on Labour Relations.**

### Article 9 – Editorial Board

*„The Editorial Board of a Medium shall be comprised of Editor-in-Chief, and the editors, and may also include other programme associates, if specified in the Act referred to in Article 10, paragraph (1), of this Law. If the media publisher and audiovisual media service provider does not have editors, then the Editor-in-Chief shall conduct the function of the Editorial Board individually.“*

The Draft-Law introduces a mandatory institute inside the media. This article is totally unnecessary because it constitutes interference in the internal organisation of the media. Having in mind that the media are commercial companies – all internal acts need to be in line with the Law on Commercial Companies, on the basis of the principle of minimal regulation. The other internal acts of the companies are based on the founding acts and documents of the companies and are flexible, because they are based on the principles of guarantees for economic freedoms. **We propose that this Article is deleted.**

### Article 10 – Acts of a Medium

*„(1) Prior to commencing its business activity, the media publisher shall be obliged to adopt a general act which will regulate all issues related to the operations of the Medium, and especially:*

- the composition of the Medium's Editorial Board;
- rights and obligations of the Editor-in-Chief, the editors and the journalists;
- the mutual rights and obligations between the media publisher and the Editor-in-Chief, the editors and the journalists;
- the manner and procedure for appointing and dismissing the Editor-in-Chief, as well as the participation of the journalists in the procedure for appointment and dismissal of the Editor-in-Chief;
- the freedom in the work of journalists; and
- other issues related to the operations of the Medium.

*(2) The media publisher shall be obliged to make the Act referred to in paragraph (1) of this Article public.*

*(3) Prior to amending and/or supplementing the Act referred to in paragraph (1) of this Article, the media publisher may request the opinion of the Editorial Board.*

*(4) When ordering Articles from any person, the media publisher shall be obliged to sign contract with said person in accordance with the Law and the Act referred to in paragraph (1) of this Article. The contract shall also regulate the copyrights related to the Article.*

*(5) The media publisher shall be obliged to keep separate records of the contracts mentioned in paragraph (4) of this Article.*

*(6) The media publisher should respect the ethical rules of journalism which represent a self-regulatory act in accordance with Article 15 of this Law.“*

Paragraph 1 prescribes the adoption of a special act of the medium prior to the commencement of its business activities. Having in mind that the founding act is obligatory, pursuant to the Law on Commercial Companies<sup>15</sup>, such an additional founding act may present only an obstacle that could lead to the rejection of the registration of a medium or rejection to issue licence to broadcasters. From that point of view, the insistence on the adoption of such an act introduces the danger of state's meddling and interfering in the work and operations of the medium. **The elements listed in Paragraph 1 of this Article can be prescribed as additional obligatory elements that need to be included in the founding act of the medium. Otherwise, the existence of two types of founding acts may create legal confusion.** Further, it is evident from the contents of the proposed act that it should combine the elements of an act of internal systemisation and organisation and a collective bargaining agreement. In view of the fact that this act covers the introduction of a system of registration of electronic publications and print media and notifications for providers of audio and audiovisual services at the Agency for the Media, such a demand constitutes a further restriction of the freedom to establish institutions of public information (Article 16, paragraph 2 of the Constitution of the Republic of Macedonia).

At the same time, if the Draft-Law intends to guarantee the freedom of journalists, which it does in part in articles 12 and 13, the provision of Article 10, paragraph 1 line 5 prescribes too wide discretionary powers for the publisher of the medium and leaves ample space to put pressure on the work of the journalists. **That provision should be deleted.**

**Paragraph 3 should be deleted (see the comments on the previous paragraph above and the comments on article 8).**

The provision of Paragraph 4 doesn't correspond to contemporary needs of the media and journalistic profession. Namely, if accepted, the proposed solution shall mean that a media should be aware of the time and the location of events in order to be able to sign a contract with the author of the text in advance. On the other hand, this matter is already regulated in the Law on Personal Income Tax, the Law on Labour Relations and the Law on obligations.<sup>15</sup> The laws listed above prescribe that no payment can be made without a valid written agreement that regulates the rights of both parties. The insistence that the publisher of a medium should have a contract signed in advance for the payment to be made is fine, the same is true of the agreement before broadcasting, but the insistence on "commissioned works" and signed commissioned work contracts is simply inadequate for the purposes of performance of activity from the viewpoint of the "independent" or freelance journalists and photojournalists, or for the purposes of incorporation of citizen journalists and constitutes an unnecessary restriction of media freedoms. **Therefore, the paragraph needs to be changed in line with the points listed above.**

## **Article 11 – Right of a journalist to express his or her position**

- „(1) While doing his/her job, the journalist shall have the right to express its position on any event, occurrence, persons or activities, in accordance with the provisions stipulated in this Law.
- (2) The employment contract of the journalist may not be terminated, his/her salary may not be decreased or his/her position in the Editorial Board or Desk may not be changed, that is, the payment of the agreed compensation, in full or partially, may not be reduced nor terminated due to the expression of his/her position.
- (3) In case of dispute, if the journalist provides facts supporting the suspicion that the termination

<sup>15</sup> Article 85 of the Law on Copyright and Associated Rights (Off. Gazette of RM, No. 115/2010 of August 31, 2010); article 619 of the Law on Obligations (Off. Gazette of RM, No. 18/2001 of March 5, 2001); Articles 14, 14a and 15 of the Law on Personal Income Tax (Official Gazette of RM No. 80/93, 3/94-correction, 70/94, 71/96, 28/97, 8/01, 50/01, 52/01 and correction, 2/02, 44/02, 96/04, 120/05, 52/06, 139/06, 6/07-correction, 160/07, 159/08, 20/09, 139/09, 171/2010, 135/2011 и 166/2012).

*of the employment contract, reduced salary or changed position in the Editorial Board or Desk, that is, the reduction or termination of the payment of the agreed compensation, is a consequence of expressing his/her position, as mentioned in paragraph (1) of this Article, the burden of proof shall be borne by the media publisher.“*

The guarantee for the right of the journalist to express his or her position on all events, occurrences, personalities or activities, as pursuant to the proposed Draft-Law, reflects, on one hand, the bad position that journalists have in the current media sphere. On the other hand, the provisions of this Article reflect the efforts and intent to provide effective protection to media workers. Paragraph 2 guarantees employment contract, salaries/compensations and positions in the editorial board or editorial office. The problem with this paragraph is that the rights resulting from employment can't be reduced to the issues listed above, but also include the right to vacation, welfare protection, etc. Also, the penal provisions don't provide for adequate sanctions for violations of those provisions.

**A proper protection of the rights of journalists will be provided only if they have guarantees for their rights resulting from employment, i.e. we recommend a more general formulation of Paragraph 2 which will cover the wider area of labour rights of the journalists. Also, protection for journalists will remain only declarative if the current Draft-Law is not changed to introduce adequate sanctions in the penal provisions. The Law could insist for a publisher of a medium to sign a collective bargain agreement with the representative trade union which, in addition to the labour law rights, will elaborate in detail the specific problems related to journalistic freedoms, listed in Articles 11, 12 and 14 of this Draft-Law.**

Paragraph 3 regulates the burden of proof in civil litigations on labour disputes in cases when a journalist's labour rights have been violated. **In view of the fact that these provisions refer to judicial procedures, and in view of Article 98 of the Constitution and the case-law of the Constitutional Court<sup>16</sup>, this Law should be adopted with two-thirds majority vote or, alternatively, the provision should be incorporated in the legislation that regulates judicial procedures.** Otherwise, the incorporation of this provision while being aware that it will be stricken down by the Constitutional Court means that a conscious omission was made in the effort to secure protection for the journalists.

#### **Article 12 – Right of a journalist to refuse an order, that it, a task**

*„(1) The journalist shall have the right to refuse to prepare, write or participate in compiling an Article, which content is contrary to the ethical rules of journalism, and he/she shall submit a written statement to the Editor-in-Chief thereof.*

*(2) If the journalist refuses to perform the tasks, since it would constitute violation of the ethical rules of journalism, the media publisher shall not be able to terminate his/her employment contract, reduce his/her salary or change his/her position in the Editorial Board or Desk.*

*(3) In case of dispute, if the journalist provides facts supporting the suspicion that the termination of the employment contract, reduced salary or changed position in the Editorial Board or Desk is a consequence of the refusal to execute the order, that is, the task, as mentioned in paragraph (1)*

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<sup>16</sup> Amendment XXV to Article 98, paragraph 4 of the Constitution uses another clear formulation which states that the laws regulating procedures in courts need to be adopted with two-thirds majority of the total number of MPs (for ex. The Law on Civil Litigation, the Law on Criminal Procedures, etc.).

The Constitutional Court of the RM has already decided in the past on court procedures that, according to Amendment XXV are regulated by law adopted with two-thirds majority. With its decision No. 228/2007 and the Decision No.149/2008, the Constitutional Court of RM has already annulled three provisions in the Law on Banks (Off. Gazette of RM No. 67/2007). The provisions were deleted because they aimed to regulate court procedures, while the Law on Banks is not a process law and is not adopted with two-thirds majority.

*of this Article, the burden of proof shall be borne by the media publisher.*

*(4) The provisions in Articles 11 and 12 of this Law shall not preclude the responsibility of journalists in the cases stipulated in the Law on Labour Relations."*

On paragraph 2 and 3, the same remarks and comments apply as for Article 11 above.

One point of interest is the paragraph 4 which provides that the provisions of the Law on Labour Relations shall apply to journalists in terms of their responsibilities. It brings about the need to contemplate the responsibility of media publishers for any eventual violations of the right of journalists to present their positions or to refuse an order or a task. **In a situation in which the Penal Provisions of the Draft-Law don't prescribe sanctions for media publishers in cases of violations of legal provisions, there is little realistic expectation that the said guarantees will be implemented.**

#### **Article 14 – Protection of sources of information**

*„(1) The journalist shall not be obliged to disclose the source of published information or information pending publishing, except in cases referred to in the Criminal Law.*

*(2) The right referred to in paragraph (1) of this Article shall also apply to other persons who due to their relations with the journalist have been informed with the data that may reveal the source, by way of collection, editing and dissemination of said information.*

*(3) Prior to publishing information for which the source is not disclosed, the journalist shall be obliged to inform the Editor-in-Chief in compliance with the Statute of the Medium."*

Unlike the LBA which protects the sources of information in Article 162<sup>17</sup>, Article 14 of the Draft-Law prescribes, in Paragraph 1, that a journalist shall be obligated to disclose the source of published information in cases referred to in the Criminal Law. Such a formulation refers to any law that regulates criminal law matters, whether procedural or material. In that regard, we should note here that the Law on Criminal Procedures doesn't exempt journalists and protection of sources of information from the obligation to provide complete and truthful testimony, with exception of Article 197, paragraph 1, line 5 which prohibits confiscation of recordings of facts or statements provided by a source of information, recorded by journalists or their editors.

The proposed article constitutes a clear and unambiguous step back in terms of protection of media freedoms in the Republic of Macedonia. Finally, the provision is in violation of Article 16, Paragraph 6 of the Constitution of the Republic of Macedonia which guarantees the right to protect the sources of information in the means of public information.

**We propose that this article is replaced with the existing Article 162 of the LBA which guarantees protection for sources of information.**

#### **Article 17, Paragraph 9 – The Public and Media Operations**

Article 17, paragraph 1, guarantees the right of the public to be informed about the work and operation of media publishers. In paragraph 6, it obligates broadcasters to present to the Agency a written report on the implementation of their obligations defined in the licence for radio and television broadcasting, and in particular information on the programming concepts. We empha-

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<sup>17</sup> „This Law shall guarantee the secrecy of the sources of information used in the programmes of the broadcaster. The journalist shall be entitled to refuse to disclose the source of the information, i.e. the data that may disclose the source.

The right referred to in paragraph 2 of this Article shall also apply to other persons who, due to their professional relationship with the journalist, are informed about the data that may reveal the source.“

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size that the Agency should monitor the operations of broadcasters continuously, not wait for them to present reports on their work and operations. Furthermore, the question of the necessity for such a provision arises, knowing that Article 4, paragraph 8 states that media publishers are independent in their editorial policies, i.e. the implementation of the programming concept. **We propose that the provision of Paragraph 6 on the obligation to present information on implementation of programming concept should be deleted.**

Paragraph 7 provides for issuance of note of warning in cases of failure to provide the mandatory report, and Article 161, paragraph 1, lines 5 and 6 prescribe fines for such failure, while Article 17, paragraph 7 provides, as the most serious sanction, revokal of the license for television or radio broadcasting. It turns out that the broadcaster can be warned and at the same time a fine may be levied against the broadcaster to the amount of 2-3% of its annual income. The revokal of permit is the most serious sanction and, while we are on that matter, it seems that proper ranking of prescribed sanctions has not been implemented. **We recommend for paragraph 7 to be deleted, to be followed by proper elaboration and ranking of measures listed in Article 49.**

While paragraphs 2 to 8 obligate media publishers to provide detailed information on their ownership structure, sources of finances, income and average sales or viewer-ratings, paragraph 9 exempts the public broadcasting services from the obligation to present similar information to the Agency for Media and Audiovisual Media Services and publication of that information in at least one daily newspaper.

**The provisions of Paragraph 9 do not correspond to the defined purposes of the Law referring to transparent and accountable public service, listed in Article 2 of this Draft-Law!** The question is why offer legal protection for the confidentiality of operations of the public broadcasting service which, quite to the contrary, should be subject to far greater obligation for transparency of operations in view of the fact that it is funded with taxpayers' money.

**The consistence of underlined goals and principles in Articles 2 and 5 could be taken into true perspective only if paragraph 9 of Article 17 is reformulated to state that “the Public broadcasting service shall realize its obligations for transparency of operations in accordance with Chapter VI, of this Law”, and the appropriate provisions on accountability of the public broadcasting service, its sources of finances, income, expenditures and average viewer ratings should be incorporated in the section regulating the international organisation and operations of MRT (Chapter VI, articles 118 to 148). That will ensure that the principle of transparency of operations, as one of the general principles applying to media publishers shall also cover the operations of the public broadcasting service. That is also in line with the state purposes of the Draft-Law.**

### Article 18 - Prohibition of secret co-owner

*„The Medium may not have a secret co-owner, i.e., the secret co-owner may not participate with monetary or non-monetary share in the Medium.“*

This provision is copied from Article 16 of the Law on Broadcasting Activity. The defects already present in that provision re-emerge in the newly proposed Draft-Law. Namely, **the prohibition of a secret co-owner should refer to any type of investment, or it needs to use alternative instead of cumulative formulation, replacing “and” with “or”.**

## I.1 Protection of Pluralism and Media Diversity

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### Article 19 – Participation of a foreign natural or legal person

The proposed provisions offer a fine legal solution that reflects the fight against money laundering and illegal disposal of capital in the Republic of Macedonia.

### Article 20 – Related persons

*„(1) Related persons, in terms of this Law, shall denote persons mutually connected through the management structure, capital assets or in another manner, when such persons, due to their connections, are jointly involved in the creation of business policies, i.e. act in a coordinated way to achieve common goals, or when one person has the ability to direct or exert significant influence on the other person in its decisions on the financing, business operations or the programming concept of the medium.*

*(2) The following persons shall be considered related persons, as defined in paragraph (1) of this Article:*

- family members;
- persons in marriage and out-of-wedlock communities;
- members of the spouse's immediate family;
- share-holders or holders of other rights in a person, on basis of which they participate in the management of said person, with at least 25% of the voting rights;
- persons that hold a total share of ownership or other rights in the a person, on basis of which they participate in the management of each of those persons with at least 25% of the voting rights;
- related persons in terms of the Law on Trade Companies;
- persons who, on the basis of a marketing or another business cooperation contract, generate in excess of 30% of the advertising, teleshopping or sponsorship income in a quarter or a longer period in a year; and
- members of the managing or supervisory board of a given media publisher, as well as persons related to the members of the managing or supervisory board in a manner defined by this Article.“

Paragraph 1 of Article 20 is copied from Paragraph 1 of Article 18 of the LBA and amends it by including in the ranks of related persons the persons with influence of the “financing” of the medium. That is a good novelty and we praise it.

On the other hand, it is at this point that we realize how narrow the definition for “family members” in Article 2, point 45 really is. Also, Paragraph 3 line 3 restricts the related persons only to the “members of the family of the spouse”, disregarding the fact that Macedonia legal system allocated equal rights to marriages and civic unions. For that reason, the provision in line 3 should be amended to include the words “or the civic union partner”.

### Article 21 – Limitations on ownership acquisition

The provisions on limitations of ownerships in paragraphs 1 to 4 are almost identical to the provisions of article 14 of the LBA, with the only difference being that it now allows persons to hold shares of ownership in more than one broadcaster, with exception of broadcasters that broadcast programmes nationally. It means that the Law allows for one person to hold shares of ownership in two more regional or local broadcasters. Therefore, one person can hold shares of ownership in a total of three broadcasters.

*„(5) A natural or legal person that appears as a majority co-owner, share-holder, or related person, in a broadcaster may not found or appear as a co-owner or share-holder in a publisher of print media involved in publication of daily newspaper, news agency, advertising and propaganda company, market and public opinion research company, audiovisual distribution company, film production company or electronic communications network operator that provides broadcasting and transmission of audiovisual and/or radio programmes.“*

Paragraph 5 is a fine solution how to limit acquisition of ownership, **but it should also provide for the reversed situation:** Majority shareholders or co-owners of print media, news agencies, advertising agencies, etc. and persons related to them can't appear as founders/co-owners of broadcasting companies.

### **Article 22 – Special prohibitions on ownership acquisition**

*„Political parties, state bodies, bodies of the state administration, public enterprises, local self-government units, public office holders and members of their families, may not pursue broadcasting activity, nor appear as founders or co-founders or acquire ownership of broadcasters.“*

This provision is identical to the provision of Article 11 of the LBA. The logical question that arises is **why does the prohibition to acquire ownership covers only acquisition of ownership in a broadcaster, and not the other type of media, for example, print newspapers and magazines.** Also, the possibility to include the **persons that hold public empowerments to be covered by the prohibition should be considered.**

### **Article 23 – Illegal media concentration**

The first and the second paragraph of this article are identical to the second and the third paragraphs of Article 13 of the LBA, but listed in reversed order. One novelty is the third paragraph that is a step forward towards the prevention of illegal media concentration in cases when holders of managerial positions in broadcasters appear as owners or related persons in other media publishers.

### **Article 25 – Prior notification on changes in the ownership structure**

The LBA also provides, in Article 17, for the BC to take actions in cases of changes in the ownership structure. There are, however, several significant differences in the provisions of proposed Article 25. Namely, the LBA prescribes and obligation for broadcasters to inform the BC about any change in ownership structure, and in the cases where the acquisition refers to a share in excess of 10% of the founding principal, prior consent and approval from the regulatory body is required.

The Draft-Law prescribes that any change of the ownership structure shall be subject to prior consent and approval by the Agency for Media and Audiovisual Media Services. Having in mind the fact that no distinction is made between cases that ought to seek approval and consent by the Agency related to the amount of the share of ownership changing hands, such a solution could have a negative effect on the market and the freedom of disposal of property and assets. **We propose that the Draft-Law should incorporate the existing solution in the LBA to seek permission to change the ownership structure exceeding 10% of the founding principal.**

At the same time, **paragraph 6 of article 17 of the LBA has been excluded**, which regulated the decision to deny consent and approval to changes in the ownership structure in cases in which the transaction would lead to exceeding the share in total sold advertising time, the share of total viewer ratings or population coverage. Having in mind that omission from the article on the illegal media concentration, it opens legal opportunity to allow for one actor to acquire dominant position in the media market. **We propose to incorporate the existing solution in the LBA.**

Finally, paragraph 12 prescribes adoption of a by-law by the Agency that will regulate the form and the contents of the information about changes in ownership structure and the necessary documentation that needs to be submitted. That is yet another **example of excessive formality** which has been accepted as the underlying principle and can easily be abused in practice. **The contents of the information is important and media publishers should, in any case, act on demand presented by the Agency to present additional information and documents in cases when presented materials were deemed insufficient. We propose that Paragraph 12 should be deleted.**

#### **Article 27 – Initiating an ex officio procedure for determining illegal media concentration**

This article is a fine novelty in the fight against the illegal media concentration.

#### **Article 28 - Protection of competition among the media**

The existing anti-trust legislation also covers the competition-related issues in the media sphere, unless a given issue is explicitly exempted from the regulation or is regulated in a special law. For that reason, this article is completely redundant and needs to be deleted.

#### **Article 29 – Right to correction and to reply to published information and right to indemnity**

*„Any person shall have the right to correction and reply to published information and right to indemnity established in accordance with the law.“*

A single provision in the Draft-Law replaces a whole chapter of the LBA (article 152 to 158) which cover the right to correction and reply. This article of the Draft-Law actually refers to Article 188 of the Law on Obligations and Article 14 of the Law on Civil Liability for Defamation which don't regulate the procedure for publication of correction or reply in as much detail as the existing LBA (free of charge publication without changes or alterations in the text of the correction/reply, the right to receive a copy of the recording of published information, the right to judicial protection in case the correction/reply was not published/broadcast).

It has to be noted here that **the Constitution of the Republic of Macedonia, in Article 16, paragraphs 5 and 6, guarantees the right to correction and reply via the mass media.** That guarantee imposes an obligation on the state to prescribe the procedure and the manner to ensure effective exercise of those rights. At the same time, the ECTT, in Article 8, prescribes that the states need to provide for the timing and other arrangements for effective exercise of that right! Also, the EU Directive, in Article 28, paragraphs 1-5 regulates the right to reply in television broadcasting.

**The Directive prescribes adoption of measures and procedures to ensure the exercise of the right to reply, and especially to define sensible deadlines for publication of a reply, and that disputes related to the right to reply are subject to litigation in the courts (paragraph 5). This provision is currently in force in Article 157 of the LBA. The Recommendation of the European Parliament and the Council offers appropriate directions for effective exercise of the right to**

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**reply. In particular, it recommends definition of deadlines and procedures that would ensure expedient reply to the disputed published contents.<sup>18</sup>**

The elimination of the detailed elaboration of the possibility to correct or reply to published information provided by the LBA opens the door for strong abuses of the media by a variety of persons. Furthermore, that solution doesn't fully respond to the demands for responsible media that will work transparently and open to the public, committed to the idea for correct and truthful reporting. Finally, that solution denies the citizens from exercise of their right to protect their rights and interests.

We recommend that the whole chapter of the LBA on the right to correction and reply is copied into the Draft-Law.

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<sup>18</sup> Recommendation 2006/952/EC of the European Parliament and of the Council, of December 20, 2006, on the protection of minors and human dignity and on the right to reply in relation to the competitiveness of the European audiovisual and on-line information industry, Annex I

## II Competent Authority

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### Articles 30-51

Unlike the LBA, which provides that the regulatory authority shall be financed from the funds collected from the broadcasting fee and the license fees for performance of broadcasting activities, the Draft-Law significantly extends the circle of sources of finances for the Agency to include donations, loans and other financial and technical assistance. The Donations could be an instrument of influence over the regulatory body that would question its independence! The other possibilities for fundraising: the technical and financial assistance – means that anybody could appear as a funder of the Agency. The phrase income from compensations can also include accrued interest on time deposits, which is illegal.

The Draft-Law defines the procedure for allocation/revocation of licence, but Article 33 also prescribes that those matters should be regulated more precisely with by-laws that are to be adopted by the Agency. It opens the door for feelings of insecurity and uncertainty among the broadcasters and opportunities for abuses.

The Article 34, on the accountability of Agency's operations, prescribes that an audit report prepared by the State Audit Office OR an independent auditing institution shall be submitted to the Parliament. The existing provisions in the BLA stipulate the submission of two reports to the Parliament, the report prepared by the State Audit Office and a report prepared by external independent auditing institution. Furthermore, the proposed solution in the Draft-Law misses the option, listed in Article 35, paragraph 4 of the LBA, for the Parliament to detect omissions or irregularities and to charge the Agency to present a new financial report. We should note here that the **expert Jakubowicz greeted the possibility for the Parliament to react in a case of noted irregularities and proposed for the BC to publish its annual budget as a part of its activities aimed to increase the transparency of its operations**.<sup>19</sup>

**We propose that the Draft-Law should prescribe an obligation to present both audit reports to the Parliament; the legislators should be able to demand from the Agency to present a new financial report if it notes irregularities in the initial report; and a provision is needed that shall obligate the Agency to release its Budget to the public.**

In accordance with Article 35 of the Draft-Law, the transparency efforts of the Agency are reduced to the obligations to hold at least two public meetings per year. Unlike the proposed solution, the existing provisions in Article 33 of the LBA prescribe explicitly that the work of the BC is public and prescribe an obligation for the BC to hold public session at least once every quarter, which is double the amount of open public sessions prescribed by this Draft-Law.

**We propose for the Law to prescribe that the work and operations of the Agency are public, and its sessions open to the public should be held at least once every three months, as prescribed in the existing legislation.**

Furthermore, Article 35 of the Draft-Law is problematic in Paragraph 4 which stipulates the adoption of a by-law which will define the procedure for reception of proposals submitted by the stakeholders, the manner of announcement of the procedure for allocation of licenses, and especially the data and information that the Agency will publish and the access to said data and information. The principle of excessive formality again applies through formalisation of com-

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<sup>19</sup> European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, p.12

munication with all stakeholders, which can have only negative effects. **A note of reminder, the Council of Europe recommends that the regulatory authorities can review complaints on the activities of broadcasters and publish their conclusions regularly.<sup>20</sup> The proposed organisational set-up of the Agency and the formal procedure for review of proposals are hardly convincing that the proposals and complaints filed by the citizens will be reviewed by the Council in a timely fashion and that it would act accordingly on all submissions. We propose that Paragraph 4 of this Article should be deleted.**

We believe that the solution in Article 36 of the Draft-Law, which prescribes a public debate on the by-laws within a period of no less than 30 days to be much better and more useful solution! It will allow for greater involved of the stakeholders and the general public in the debate. Of course, the constructive position on cooperation and openness should be even more prominent in legal texts.

Articles 37 and 38 bring about significant changes in the composition of the regulatory authority, i.e. its bodies through which it acts on its competences. The first question that needs to be asked is whether a proper analysis of the work and operations of the BC was conducted. What were the bases for the decision that there is a need to create a new body with fewer members that will be paid larger honoraria – after all, they won't be professionally engaged in the authority!!! What will be their responsibilities pursuant to the Law on Commercial Companies if the proposed Agency is a body that holds public empowerments?

Unlike Article 33 of the LBA, the Draft-Law in Article 39 doesn't provide for public access to the sessions of the Council! In accordance to Paragraph 4, persons who are not members of the Agency can sit in its sessions in accordance with the Book of Rules and Procedures - which means that the access is limited, permissions need to be sought, etc. **We propose that the Draft-Law should introduce the principle of public operations of the Agency and for Paragraph 4 of Article 39 to be deleted.**

At the same time, of great interest is the Paragraph 5 which provides that the Council shall decided in cases when the Council decides on matters of (in)direct interest for a member of the Council, on the existence of personal interest and the participation of the concerned member of the Council in the decision making process. The proposed solution is in collision with the commitments in the fight against the conflicts of interest, having in mind that whenever a member of a body holds personal interest in a matter that is being considered or decided, he or she, in accordance to the law, shall be excluded from the decision-making process, i.e. they should seek an opinion from the State Commission on Prevention of Conflicts of Interests and exempted from the decision-making process.<sup>21</sup> **We propose that Paragraph 5 should be rewritten to state that, in cases of conflicts of interest, the State Commission for Prevention of Conflicts of Interest shall rule, in accordance with the law, on the existence of conflict of interest and the participation of the interested members in the concrete procedure.**

One good solution offered in Article 39 of the Draft-Law is that it prescribes a timeframe for publication of the agenda, the decisions and minutes of the meetings on the website. However, the listed documents don't include the entire list of documents in Article 33 of the LBA, i.e. the open calls for job vacancies and allocation licenses, as well as the lists of applicants are not among the information for which publication is mandatory. We should remember here that, in accordance

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20 Recommendation REC(2000)23 of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, point 21

21 Law on Prevention of Conflicts of Interests (Off. Gazette of RM, No. 128 of October 22, 2009), articles 7, 11, 12, 13

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with the Law on Free Access to Public Information, the Agency as a holder of public information should, among other things, inform the public about proposed programmes, programmes, strategies, positions, opinions, studies and similar documents referring to the acts within its set of competences, all public procurement tenders and procedures and the related documentation defined by the Law, as well as information on the Agency's legal competences.<sup>22</sup> **Consequently, we propose to amend Article 6 with an obligation for publication of competitions, applicants, proposed and accepted agendas.**

Article 40 introduces changes in the list of authorized nominators of Council members. So, compared to Article 26 of the LBA, the following have been removed from the list of authorized nominators: MANU, the Inter-University Conference, the President of the Republic of Macedonia, the Commission for Protection of Competition, and the State Commission for Prevention of Corruption. Unfortunately, the proposed solution means that six out of seven members of the Council shall be nominated with clear political influence. Of the six, three are nominated by a Parliamentary committee, and three by ZELS. Currently, in accordance with the LBA, five of the total of 15 members of the Council are political nominees (three are nominated by Parliamentary committee and two by the President of the Republic of Macedonia).

**We propose a review of provisions on the manner of nomination of Council members, i.e. to exclude the political influence in the nomination process, in accordance with the recommendations made by foreign experts. We note that, before the adoption of the LBA, in his analysis of the proposed Draft-Law, the expert of the Council of Europe Karol Jakubowicz, invoking the Recommendation (2000)23 of the Council of Europe, recommended that politicians should play no role in the nomination of candidates for members of the regulatory authority and clearly noted that the Parliament, through its commissions, should play no role in the nomination process.<sup>23</sup> Therefore, the best solution would be for non-political institutions to make the nominations and for the Parliament to elect the members of the Council.**

At that, we should note that the term of the members of the Council, in accordance with Article 41 of the Draft-Law, is equal to the terms of constitutional judges! The question is, if the term is equal as the term in office of constitutional judges, why the Law doesn't prescribe that the members of the Council are selected with the same majority vote - majority of the total number of MPs present - necessary to vote a constitutional judge into office??? The appointment requirements remain the same as in the LBA, with the additional requirement of at least 5 years of past working experience. Still, we believe that **amendments need to be made to the terms and requirements for appointment, i.e. to prescribe that a person elected or appointed to some office by the Government shall not be appointed a member of the Council.** This for the reason that it is not sufficient to prescribe that it shall refer only to persons that head a body of the state administration, which would then cover only Government ministers and not, for example, the state secretaries appointed by the Government.

The terms listed in the LBA for termination of the term in office of a Council member are amended with the requirement for a Council member to not be able to perform that office for more than six months continuously. However, the problem is that Paragraph 1 prescribes that the term could be terminated by Law. We emphasize that **a formal solution needs to be adopted to define the termination of term of Council members to ensure the right to seek protection in a court of law and the possibility to protect the rights arising from employment relation!**

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22 Law on Free Access to Public Information (Off. Gazette of RM, No. 13/2006, 86/2008 and 6/2010), Article 10

23 European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, p.10

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The competences of the regulatory bodies listed in Article 37 of the LBA are more numerous, in spite of the fact that, at first glance, it seems that Article 44 of the Draft-Law significantly extends the competences of the Agency. Namely, the Draft-Law lists all decisions that the Agency should adopt and it omits the coordination of activities with AEC, adoption of a strategy, informing the competent authority in the area of protection of copyrights, filing misdemeanour and criminal charges, reviewing of submissions filed by citizens, etc. Article 50 prescribes an obligation for the Agency to cooperate with other bodies, to provide information on copyright related issues, etc. **HOWEVER**, if that is not made an explicit competence of the Council, it means that **EVERYTHING** will depend on one person - the Director of the Agency!

At the same time, Article 44, line 13 of the Draft-Law (competences of the Council) provides an opportunity for time-limited restrictions of transmissions and reception of audiovisual services originating from other state, without listing the concrete conditions under which such a measure can be adopted.

The organisational set-up of the Agency, which seems to be copied from AEC(!), is further regulated in Articles 45 and 46. It places too great authority concentrated in the hands of one person - the Director of the Agency. **The Draft-Law proposes a solution which was effective before the adoption of the LBA, and which met the clear opposition of the expert engaged by the European Commission who demanded that all members of the Council are put on an equal footing and, at the same time, demanded to reduce the authority and competences of then proposed Director of the BC.**<sup>24</sup>

Of special interest is the provision in Article 47, paragraph 2, which prescribes that the director should be informed in advance about any suspicions surrounding his work and to allow him to defend the Council. Undoubtedly, it opens the space, in cases of suspected abuses, for the director to cover up all possible traces and to apply pressure to eliminate all suspicions! The procedure for removal from office should certainly allow the director to present his positions on any given allegations, but not to be informed in advance about possible suspicions. **We propose that the proposed paragraph should be deleted.**

Article 49 lists the prescribed measures to be applied in cases of violations of regulations. It is interesting that the list of measures has been reduced, and temporary bans on airing advertising have been omitted from the list. **There are no clear definition of the procedure which measure shall be apply in which case. We remind that the Council of Europe recommends that the sanctions are proportional to the offense and that no decision should be made before a broadcaster has been allowed to make its case. Also, the decisions of the regulatory authority should offer a rationale, should be accessible to the public and the broadcasters should be entitled to seek protection from the courts.**<sup>25</sup>

### Article 51 – Social Inclusion and Media Literacy

The proposed provisions in Article 51, paragraph 1 seem to offer a fine legal solution. **We recommend a further elaboration and amending of provisions referring to the public broadcasting service, with concrete obligations to make its contents more easily accessible to the persons with impaired sight or hearing (for example, certain contents should be available for two hours every day, and the obligation should be extended progressively with every coming year).**

<sup>24</sup> European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, p. 13

<sup>25</sup> Recommendation (2000)23 of the Council of Europe on the independence and functions of regulatory bodies for the broadcasting sector, points 23 and 27

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Regarding the second paragraph, it is questionable if the raising of media literacy should be on the list of competences of the Agency. Namely, the media literacy<sup>26</sup> is a question that gets increasing amounts of attention in the EU. The Recommendation of the European Parliament and the Council proposes a list of measure for promotion and advancement of media literacy, as well as continuous education of teacher, especially education on the internet for children and parents, organisation of national campaign to raise the citizens' awareness, etc.<sup>27</sup> The raising of levels of media literacy includes, above all, measures and activities in the education process and, for that reason, **we propose that the issue of media literacy is placed fully within the scope of competences of the Ministry of Education and Science.**

Also, paragraph 3, which provides for cooperation with the interested parties and stakeholders is, in our view, a positive solution. It has to be noted, however, that the **adoption of the by-law mentioned in Article 35, paragraph 4 to define the manner in which proposals shall be taken into consideration throws a shadow on the desired cooperation.**

### Conclusions on Chapter II

The regulatory authority plays an important role in ensuring the freedom of media. It has to provide for media pluralism, competition and equal conditions in the market of media services for all participants. On the other hand, the regulatory authority needs to be independent from the state power to prevent any violations of the freedom of expression. The regulatory authority plays an important role in every democratic society. It has to ensure that the media will meet their public function of impartial reporting which ultimately is a function of the citizens' right to access information and exercise democratic control of government.

**We remind here that the Council of Europe recommends clear definition of competences of regulatory bodies, procedures for appointment of its members and its accountability, as well as transparency of its financing. It calls for adoption of rules aimed to avoid political influence over regulatory authorities, i.e. appointment and removal from office of its members and to ensure its financial independence.**<sup>28</sup>

**We emphasize that the concept of regulatory authority as proposed in the LBA was accepted by the expertise of the Council of Europe and the European Commission in 2005.<sup>29</sup> We propose that the existing concept of a regulatory authority remains in place and to intervene in the legislation in order to ensure that it is fully harmonized with Jakubowicz's recommendations, i.e. the nomination of members of the Broadcasting Council to be free from any form of political influence. We believe that the draft-law should also preserve the existing concept of transparency, strengthen the financial independence and provide legal grounds for improved cooperation with other state bodies and institutions.**

**The concept offered by this Draft-Law is dangerous and unsuitable for media regulation. It is a copy of regulatory systems in telecommunications, a field that follows quite different logic of**

26 „Media literacy’ refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely.”, in EU Directive, point 47 of the Introduction

27 Recommendation (2006/952/EC) of the European Parliament and the Council, of December 20, 2006, on protection of minors and human dignity and the right to reply in relation to competitiveness of European audiovisual and online information industry, Annex I

28 Recommendation (2000)23 of the Council of Europe on the Independence and functions of regulatory bodies for the broadcasting sector

29 European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005

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regulation than the media sector. The idea to place the whole of media regulation in the hands of one person, appointed for a 9-year term and holding extensive competences, moreover, elected by a Council that itself has been politically appointed, demonstrates a clear tendency to establish unacceptable levels of political control over the media sphere. The whole concept, furthermore, eliminates all guarantees for the independence of the body provided by the existing law – a collective body, nomination process free of political meddling, working in sessions open to the public, staggered terms in office for the Council members, ban on collective dissolution of the body, etc. From that point of view, the law fails to meet even the minimum requirements for independence listed in the Recommendation on the independence of regulatory authorities. We propose to the legislators to abandon the whole concept completely, to strengthen the existing legal guarantees for independence of the regulatory authority and for the Draft-Law to restore, in its concept, the solutions in that area adopted in the 2005 LBA.

### III. Print and Electronic Publications

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#### **Articles 52-54**

One of the essential novelties of this Draft-Law is that it introduces regulation of print and electronic publications. The arguments of the sponsor of the bill are that the publishers of print and electronic publications will only be required to register with the regulatory authority, without other (possible) negative effects. However, **upon careful reading of the said articles, we are lead to the conclusion that they introduce a licensing system.**

The first paragraphs of articles 52 and 54 first set the requirement for entry of print and electronic media publishers in the central registry. While it is written with small letters<sup>30</sup>, we do believe it refers to the Central Register of the Republic of Macedonia. The question is, why use a cumulative formulation that sets as a requirement for the registration that both the seat and the editorial office to be located in the Republic of Macedonia.

The proposed solution implies a much larger restriction. Namely, in accordance with Article 4 of the Law on Commercial Companies<sup>31</sup> (LCC), the information, publishing, printing activities, production of audiovisual recordings, etc. are all activities covered by the term “commercial trader”. According to the LCC, all persons that perform the activities of a commercial trader need to register, i.e. the legal persons need to be registered as commercial companies, while natural persons need to register as individual traders or “One person limited company” (Macedonian abbreviation is DOOEL).<sup>32</sup> Such a read of the Draft-Law implies that all publishers of print media will have to register as some form of commercial trader. That presents a clear obstacle for NGOs which want to publish print and electronic publications, since they are registered in accordance with the Law on Associations and Foundations and are non-profit organisations. Also, the Ministry of Culture announced the preparation of a Law on Publishing and creation of Agency of Book Publishers which further formalizes and complicates the procedure of registration of publishers of print and electronic publications.<sup>33</sup> **We propose that Paragraph 1 of this Article should be deleted.**

Furthermore, in addition to the registration in the Central Register of the Republic of Macedonia, they are required to enter the registries kept by the Agency for Media (Article 52, paragraph 2 and Article 54, paragraph 2). The registration shall require them to submit a lot of information, among other, the ownership structure and the physical location of the computer system on which the electronic publication is hosted.

Also, the application to the Agency has to contain an excerpt from the Central Register, but, far more interesting fact is that the print publishers need to present a statement certified by Notary Public that they are not in violations of the provisions in Chapter I of the Draft-Law.<sup>34</sup> On the other hand, Chapter I covers the general and common principles for media publishers (broadcasters, publishers of print and electronic publications). Therefore, **all provisions in that chapter**

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30 It is a matter of nomenclature and interpretation of law. If a word is written with small letters, it refers to all relevant cases. For example, “law” refers to all relevant laws that regulate one matter, and if it says “Law” it refers to one concrete law. In this case, central registry with small letters can be understood as a registry that is kept on central level by a competent body, without specific mention of the actual body.

31 Law on Commercial Companies (Off. Gazette of RM, Nos. 28/2004, 84/2005, 25/2007, 87/2008, 42/10, 48/10, 24/11 and 166/12)

32 Limited liability company established by one person

33 Ministry of Culture, available on the link <http://www.kultura.gov.mk/index.php/legislativa/2011-03-04-10-39-07/826-predlog-na-zakonot-za-izdavacka-dejnost>, accessed on April 16, 2013

34 In the text of the Draft-Law published by the Ministry of Information Society and Administration, Article 54, paragraph 1 invokes “Chapter I.1”. We believe the Arabic digit “1” there to be technical mistake.

**referring to the freedom of expression and freedom of the media, introduction of censorship and possibility to restrict the work of the media as well as the obligations for transparent operations, i.e. presentation of precise information about operations also cover the publishers of print media. The obligation to present such statement is not imposed on the publishers of electronic publications (Article 54, paragraph 4), but they are mentioned in the title of Chapter I, therefore, they have to adhere to the provisions of that Chapter.**

Here, again, the Agency is authorized to adopt a by-law that will regulate and prescribe the form and the contents of the application. It is problematic, however, that the regulation of the necessary documentation that needs to be presented will be prescribed by a by-law. That means giving a regulatory body an excessive authority. Although paragraphs 6 in both Articles 52 and 54 prescribe that the Agency shall not refuse to register print and electronic publications publishers, they are conditioned with presenting complete applications in a manner and form defined by the Agency.

Furthermore, the Draft-Law in principle upholds the principle that “silence means consent” by prescribing that, if the Agency fails to issue a certificate within five, i.e. three working days from the day the application was submitted, it shall be deemed that the certificate was in fact issued. However, if we read the penal provisions in **article 161, paragraph 1, lines 15 and 18**, it turns out that publication of print and electronic publications without such certificate is subject to high fines of 2 to 3% of the total annual income for legal persons and from 1000 to 3000 euro for natural persons (**article 163, lines 1 and 2 of the Draft-Law**). Also, the publishers of print and electronic media are obligated to report any change referring to paragraph 9 of Articles 52 and 54 respectively, or sanctions shall follow (article 161, paragraph 1, lines 16 and 19, respectively).

**The deletion of publishers of print and electronic publications is prescribed to be conducted without an actual decision for deletion and without the right to seek remedy in a court. That provision needs to be amended in view of the fact that operation without proper certificate results in sanctions.**

One positive solution offered by the Draft-Law is the restrictions on pornographic press (Article 53) and the obligation for publishers of electronic publications to adhere to the rules for protection of underage audience (Article 54, Paragraph 13). The latter authorizes the Agency to adopt rules for protection of underage audiences of electronic publications, which has to be prepared with utmost care to avoid possible violations of the right of children to access information. This solution needs to be accompanied with an obligation to increase the information culture of the general population, and especially of children, parents and teachers.<sup>35</sup>

**We emphasize that the interpretations of Article 10 of the ECHR state that the requirements for licenses for broadcasting activities, television broadcasts and cinema screenings don't cover internet radio or web-television and that they should not be subject to national licenses, but should be treated as internet newspapers or websites carrying text, pictures and sound.<sup>36</sup> As early as 2008, the Parliamentary Assembly of the Council of Europe adopted a Resolution demanding from member-states to exempt print and electronic media from their licensing systems, with exception of registration for taxation purposes.<sup>37</sup>**

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<sup>35</sup> The Recommendation CM/REC(2009)5 of the Council of Europe recommends translation and dissemination of the Manual of the Council of Europe on Media Literacy, see [http://www.coe.int/t/dghl/standardsetting/internetliteracy/hbk\\_en.asp](http://www.coe.int/t/dghl/standardsetting/internetliteracy/hbk_en.asp)

<sup>36</sup> Recommendation 1855 (2009) of the Council of Europe on regulation of audiovisual media services, Paragraph 4

<sup>37</sup> Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe on indicators for media in a democracy, Point 8.15

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**The Council of Europe puts constant emphasis on the value of internet as a public service<sup>38</sup> and asks for co-regulation and self-regulation of electronic media with the aim to ensure effective exercise of the right to free expression.**<sup>39</sup>

We also remind that the existing legislation in the Republic of Macedonia offers sufficient and effective protection for the rights and interests of the citizens from the contents in print and electronic media. The Criminal Code incriminates a large number of actions, and the Law on Civil Liability for Defamation has been adopted. The state is also party to numerous conventions and treaties referring to protection from electronic contents, for example, The Convention on Cyber Crime of the Council of Europe, the Convention of the Council of Europe for Protection of Individuals from Automatic Processing of Personal Data, the Convention of the Council of Europe for protection of children from sexual exploitation and abuse, etc.

**In that sense, the international organisation Article 19 considers the internet to be a public good<sup>40</sup>, while filtering, blocking, removal and other technical and legal restrictions of contents are considered to be grave restrictions of freedom of expression. Such actions are justified only if they pass the three-part test, in accordance with international law, of proportionality and application of filtering under strict conditions and by a competent body, the right to challenge the implemented restrictions in court and sanctioning of abuses of filtering.<sup>41</sup>**

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38 "Internet and other ICT services have high public service value in that they serve to promote the exercise and enjoyment of human rights and fundamental freedoms for all who use them, and that their protection should be a priority", Recommendation CM/REC (2007)16 on the measures promoting the public value of internet, p.2. Also see the Recommendation CM/REC(2011)8 on protection and promotion of universality, integrity and openness of the Internet

39 Recommendation CM/REC (2007)16 on the measures promoting the public value of the internet and Resolution 1877(2012) of the Parliamentary Assembly on protecting the freedom of expression and information on the internet and online media

40 "The Internet is a public good which has become essential for the effective exercise and enjoyment of the right to freedom of expression", in: Article19, The Right to Share: Principles of Freedom of Expression and Copyright in the Digital Age, 2003, Principle 1.2.

41 Article19, The Right to Share: Principles of Freedom of Expression and Copyright in the Digital Age, 2003, Principle 9

IV. Provision of audio and audiovisual media service  
(broadcasters and providers of on-demand audio and audiovisual media services)

IV.1 General provisions

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**Article 55 – Freedom of transmission and reception**

This article of the Draft-Law guarantees the freedom of transmission and reception of audio and audiovisual media services by the EU member-states, and other European states parties of the European Convention on Transfrontier Television. Article 55 also provides that the transmission and reception of audio and audiovisual media services can be restricted in some cases, in accordance with the Law and international agreements. The limitations prescribed in Article 4 of the Draft Law, invoked by this Article 55, leave space for censorship and filtering.

**Article 56 – Limitations of transmission and reception of audio and audiovisual media services**

*“(1) The Agency can provisionally limit the freedom of transmission and reception of audio and audiovisual media service from other countries in the territory of Republic of Macedonia pursuant to the provisions of this Article.*

*(2) The Measure for limitation of freedom of reception and retransmission of program services of broadcasters from other countries, can be enforced in the following cases:*

- *If the program services of the broadcasters from other countries, seriously or gravely violate the provisions of Article 99 of this Law and incite racial, gender, religious or ethnic hatred and intolerance;*
- *If at least twice during the past 12 months the broadcaster has violated the provisions of paragraph (2), indent 1 of this Article;*
- *If the Council has in writing notified the broadcaster and the European Commission on violation and measures to be undertaken in cases of reoccurrence of violation;*
- *If the consultations with the state from which the broadcaster is transmitting and with the European Commission had not resulted in amicable resolution within a period of 15 days following the day of written notification, whereas the violation persisted.*

*(3) The Measure of paragraph (1) of this Article shall be enforced in relation to the on-demand audio and audiovisual media service, provided the following requirements have been met:*

- *The Measure is necessary for protection, research, disclosure and prosecution of criminal acts, including the protection of minors and the fight against incitement of racial, gender, religious or ethnic hatred; also against violation of human individual dignity, safeguarding public health, public safety, including the safeguarding of national security and defence; also protection of consumers including the investors. The Measure is to be enforced against on-demand media service endangering the objectives of paragraph (2), indent 1 of this Article and against those who represent a serious and grave threat to the afore-stated objectives.*
- *The Measure is proportional to the objectives of paragraph (2), indent 1 of this Article;*
- *The Agency, prior to enforcement of the Measure, and not contesting the court proceedings, including the previous procedures and activities in the criminal investigation, has asked the member state under which jurisdiction is the Provider of media service to enforce measures not enforced or inadequately enforced by the relevant member state; and*
- *The Agency has informed the European Commission and the member state under which jurisdiction is the Provider of media service, of the attempt to enforce measures.*

*(4) In some emergencies, the Agency can digress from the requirements stipulated in paragraph (3), indents 4 and 5 of this Article, and in such occurrences shall in the shortest time possible notify the European Commission and the member state under which jurisdiction is the Provider of*

*Media Service, about the enforced measures, stating the reasons behind which the case has been considered an emergency.*

*(5) The Agency shall immediately terminate the enforcement of the Measure of paragraph (1) of this Article, if the European Commission claims lack of conformance to the regulations of the European Commission."*

The provisions in this article have been copied from Article 3 of the EU Directive. However, unlike the EU acquis which prescribes a general prohibition on limitations to audiovisual media services and a set of exceptions, the Draft-Law doesn't provide for such a prohibition. **It is recommended to amend the Article with a prohibition on limitations of transmission and reception of audiovisual services because it will imply responsibility for the abusers.** The remaining provisions in this Article need to be rewritten and reformulated as exceptions from the general prohibition. **Also, Article 49 of the Draft-Law which defines the measures that the Agency may implement needs to be amended with the measure for temporary limitation of transmission and reception of audiovisual media services. At the same time, the timing and the contents covered by the limitation need to be defined.**

Paragraphs 2 and 3 of Article 56 of the Draft-Law were copied from Article 3, paragraphs 2 and 4 of the EU Directive.<sup>42</sup>

Having in mind that video services such as YouTube are on-demand video services, paragraph 3 allows for filtering of contents of such services. **This provision need to be specified further and the procedure for implementation of such limitations needs to be elaborated further to avoid abuses of the provision. A straightforward copying of a paragraph from the EU Directive is not sufficient to implement this provision without danger of censorship.** In view of the fact that many such servers are global, crowd-sourcing efforts, this provision will be impossible to implement in many cases if it is not subjected to further specification. A note of reminder, EU's directives are documents that need to be implemented in national legislations, and not just copied.

Knowing that the quoted article prescribes the need to inform the European Commission, we assume that the delayed implementation of concrete provisions of Article 164 refers to this article, i.e. that a technical mistake was made in the final and transitional provisions that needs to be corrected.

**In accordance with Article 4 of the ECTT, the Republic of Macedonia as a party of the Convention has to guarantee the freedom of reception and not engage in limitation of rebroadcasts of programmes originating from countries that adhere to the provisions of the Convention on its territory. In a case of violation of provisions of the Convention, a proper procedure for interruption of transmission and resolution of disputes is prescribed (in articles 24, 25 and 26 of ECTT).**

**It has to be said that the limitation of audio or audiovisual media services constitutes filtering of contents which is a form of limitation of freedom of expression. In view of the value of inter-**

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42 „2. In respect of television broadcasting, Member States may provisionally derogate from paragraph 1 if the following conditions are fulfilled:

- (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 27(1) or (2) and/or Article 6;
  - (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in point (a) on at least two prior occasions;
  - (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
- consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists“

net as a public service, the Council of Europe calls for full assurances for the right to expression and information, the right to private life and confidentiality of personal correspondence. In that regard, it officially recommends that the filtering of contents is implemented exclusively on the bases listed in Article 10, paragraph 2 of the ECHR, and to be proportionate and necessary in a democratic society. At that, it demands that the contents that may be subject to limitations of transmission need to be clearly defined, the decision for filtering has to be adopted by a competent state institution and it should be possible to challenge it in a court of law, in accordance with Article 6 of the ECHR. Also, it recommends introduction of provisions on prevention and sanctioning of abuses of filtering that restricts the access to contents for citizens.<sup>43</sup>

The EU Directive, too, provides that the implemented measures for limitation of transmission and reception of audiovisual services should be proportional to their goals, and that the right to challenge them in courts shall not be questioned, a position confirmed in the text of the Draft-Law (Article 56, paragraph 3, lines 3 and 4). For those reasons, the provisions on judicial protection in Article 160 need to be amended and to specify that any action by the Agency needs to be backed by a formal document (decision/resolution).

### **Article 57 – Obligation for separate accounting**

The provider of audio and audiovisual media services that provides different types of audio or audiovisual media services in accordance with this law is obligation to keep separate accounting and bookkeeping for each individual service.

This is a new provision, i.e. the LBA prescribed the obligation for separate accounting only for MRT, specifically for the funding coming from the Budget of the Republic of Macedonia.

The obligation to keep separate accounting for each type of service originates with the providers of services in telecommunications, i.e. in that field, with the aim to prevent creation of monopolies, providers of telecommunication services are obligated to keep separate accounting for each individual service. Consequently, **this provision makes no sense at all because it doesn't refer to telecommunications service that is subject to anti-trust price regulations. It doesn't take into account the manner in which media generate income, but is based on the principle of collection from the end user – typical for the telecommunications sector. In essence, this provision is an unnecessary burden without any rational effect and needs to be deleted.**

Especially if we know that in this case, the sanction for the failure to keep separate accounting is too high, set at 2-3% of the total annual income of the legal person.<sup>44</sup> **It is recommended to delete this provision and to reinstate the same provision as the one in the LBA, i.e. the obligation to keep separate accounting to cover only MRT, and only for the funds from the Budget of the Republic of Macedonia.<sup>45</sup>**

### **Article 58 - Jurisdiction**

This article is identical to Article 5 of the LBA.

However, Article 164 of the Draft-Law prescribes that the provisions in paragraphs 3 and 4 of this Article shall enter into force after Macedonia's accession to the EU. We believe that a technical mistake has been made, because it is not logical for provisions that already are in force and reg-

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43 Recommendation CM/REC(2008) of the Council of Europe on promoting the respect for freedom of expression and information in relation to internet filters

44 Article 161, paragraph 1, line 21 of the Draft-Law on Media and Media Services

45 Article 116, paragraph 6 of the Law on Broadcasting

ulate this matter (article 5 of the LBA) should be introduced in the Draft-Law with provisions on delayed entry into force. **It should be checked if Article 164 refers exactly to this provision and if not, it should be changed.**

### Article 59 – Record-keeping of broadcast programme

This Article prescribes that broadcasters shall keep daily records of broadcast programmes and shall record the output signal of their programmes. The recordings have to be kept for a period of 90 days. The LBA prescribes the same obligation, but for a shorter period of safekeeping of 30 days.

The reason for the increased time of safe-keeping of recorded programmes could be found in the legal deadlines for filing a lawsuit for slander and libel.<sup>46</sup> **Nonetheless, we recommend to reconsider the said period of time and if it is not related to the provisions in the legislation on defamation, or the deadlines related to the right to correction and reply, it should be restored to the length of 30 days in order to avoid occurrence of additional unnecessary costs. In fact, if anything is missing from the Draft-Law it is the provisions on the obligation for archiving and safekeeping of audiovisual works in relation to their significance as parts of cultural heritage. That is, an obligation to provide a copy or the original work to a competent institutions, in accordance with the legislation that regulates the area of cultural heritage.**<sup>47</sup>

### Article 60 – Obligations concerning cinematographic works

This article prohibits the providers of audiovisual media services from broadcasting or transmitting cinematographic works outside of the period determined in the contracts they have with the holders of rights, which is in accordance with the Law on Copyrights. This article, however, provides the basis for the fine, listed in Article 161, paragraph 1, line 23, of 2-3% of the total annual income of the legal person for violations of its provisions. The sanction invades the system for protection of copyrights that is valid and the same in the whole world, which provides protection in both criminal and civil courts. Therefore, the Agency for Media is practically given an instrument to be able to use copyrights to discipline media and it allows it to make arbitrary decisions.

**This article is redundant because that matter is already regulated in the Law on Copyrights.<sup>48</sup> In addition, the agreements covering copyrights are subject to judicial protection, which means that this article is devoid of meaning and just burdens the whole text. We propose that it should be deleted.**

### Article 61 – Protection of minors in the audience

The text of Article 61 seems to be copied from Article 27 of the EU Directive. The first paragraph which states a general prohibition on transmission and broadcasts of harmful contents **operates with the term “unjustified violence”<sup>49</sup>**. We believe it to be a technical omission in the translation, having in mind that no violence is justified, and the article should use the phrase “excessive

<sup>46</sup> The deadline for filing a lawsuit, in accordance with this Law expires three months from the day the plaintiff learned or should have learned about the slanderous or libellous statement and the identity of the person causing the harm, but no later than one year counting from the day the statement was made in front of a third person (article 20 of the Law on Civil Liability for Defamation).

<sup>47</sup> Law on Protection of Cultural Heritage (Off. Gazette of RM, No. 20/04 of April 2, 2004), Articles 22 and 23.

<sup>48</sup> Article 91 of the Law on Copyrights and Associated Rights

<sup>49</sup> The translation into English, provided by the Ministry of Information Society and Administration, uses the terms “gratuitous violence”, which is also the case with the LBA. The Macedonian original, however, uses the term “neopravdano nasilstvo”, which is usually translated and has the meaning of “unjustified violence”, rather than “excessive” or “gratuitous”.

violence”, also used and defined in Article 70 of the LBA.

One positive novelty in the Draft-Law is that, in accordance with the EU Directive, it allows for broadcasts of contents harmful to the general well-being of children, provided that their access to such programs is restricted. On the other hand, the providers of audiovisual media services are given an option between two alternatives regarding the warning prior to broadcasts of such contents, i.e. should air an acoustic or visual warning. All the other measures for protection of minors from harmful contents is left to the Agency to regulate them further through adoption of by-laws. The violations of the rules for protection of minors in the audience provides the grounds for the sanction listed in Article 161, paragraph 1, line 41.

Lamentably, **the proposed legal solution is a step back in the area of protection of minors and underage audiences**. Namely, the EU Directive prescribes the minimal standards and harmonisation criteria, which doesn't imply that individual states can introduce higher standards for protection of rights and interests. The existing provisions in Articles 70 and 71 of the LBA goes one step beyond and also prescribe the times for permitted broadcasts, and the obligation to issue warnings is cumulative and includes both acoustic and visual warnings. The protection of minors and underage audiences is further enhanced in a by-law adopted by the BC.<sup>50</sup>

## Article 62 – Information accessible to users

*„(1) Providers of audio and audiovisual media service shall allow its users an easy, direct and continuous approach to at least the following data:*

- *Name of Provider of Audio and Audiovisual Media Service, i.e. the title, trademark or the abbreviated identification sign (aviso, logo etc.);*
- *The address of the Head Office of the Provider of Audio and Audiovisual Media Service;*
- *Contact information with the Provider of Audio and Audiovisual Media Service (phone number, email or website, contact person for a prompt, direct and efficient communication);*
- *If technically feasible, data on the competent regulatory body.*

*(2) Identification signs shall be continuously featured in all programs, i.e. shall be broadcasted at least once per clock hour of radio program.*

*(3) The providers of audio and audiovisual media service can use only their own identification signs.*

*(4) Providers of audio and audiovisual media service shall notify the Agency and submit a sample of any change of sign.“*

Paragraph 1 was copied from the Directive on Audiovisual Media Services. Paragraphs 2, 3 and 4 are new and they refer to the identification signs in radio programmes and the obligation to inform the Agency for any change in the identification signs. In the penal provisions, for a violation of provisions of Paragraph 1 of this Article a fine of 2-3% of the total annual income of the legal person can be levied, while violations of paragraph 4 shall result in fines of 2% of the total annual income. The fine of 2-3% of the annual income for a failure of the provider of audio and audiovisual services to provide easy, direct and continuous access to its logo, address, etc., is too high and should be reduced.

## Article 63 – Obligations concerning provision of prize competitions or various forms of prize contest participation.

*„For the prize competitions or various forms of prize contest participation for the listeners or*

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<sup>50</sup> Rulebook on Protection of Minors from Programmes that May have Harmful effect on their Physical, Psychological and Moral Development, Off. Gazette of RM, No. 21 of February 22, 2007

*viewers of audio or audiovisual program, the Provider of Audio and Audiovisual Media Service shall provide an unambiguous announcement of rules pertaining to such content and to publicly declared prize in a manner stipulated by the Agency.”*

First of all, this provision contains a technical mistake, i.e. the beginning of the sentence needs to be rephrased to refer to “When providing...”. It is a novelty provision compared to the LBA, which regulated just games of chance, not prize competitions. This provision is redundant and needs to be deleted, having in mind that prize competitions, as a form of games of chance, are regulated in the Law on Games of Chance and Entertaining Games.<sup>51</sup>

The provision of Article 14, paragraph 3<sup>52</sup> clearly prescribes that the rules of the games of chance, ergo, of prize competitions, need to be publicly announced and the repetition of that provision is redundant.

#### **Article 64 – Audiovisual commercial communication**

This article has been copied from Article 9 and Article 22 of the EU Directive, with the difference that the Draft-Law provides a wider definition that includes bans on audiovisual commercial communications for sales of firearms, pyrotechnics, etc., political parties (for the public broadcaster). Paragraph 7 of the Article places a ban on advertising alcohol, with exception of wine and beer. The same provisions are listed in the LBA, in Article 101. Although the EU Directive doesn't restrict the advertising of alcohols only to wine and beer, the Republic of Macedonia has placed a reservation on the ECTT to reserve the right to rebroadcast programming services that contain advertisements for alcoholic beverages which are not compliant to the national legislation of the Republic of Macedonia.<sup>53</sup>

In view of the fact that the provisions of this Article are almost completely copied from the Directive, to make it clearer, we recommend that they are listed in the same order as in the EU Directive.

**The listed bases for discrimination in Article 4 need to be harmonized with the other bases for discrimination mentioned in the law.**

The Article 64 of the has been copied from Article 64 and Article 9 of the EU Directive, with the difference that the Draft-Law provides a wider definition that includes bans on audiovisual commercial communications for sales of firearms, pyrotechnics, etc., political parties (for the public broadcaster).

#### **Article 65 - Sponsorship**

- „(1) Sponsored audio and audiovisual media service shall not directly incite purchase or rentals of goods or services, especially by the means of their special promotion recommendation.
- (2) In the sponsored audio and audiovisual media service, the program shall be clearly identified as sponsored program. The Sponsor shall be clearly identified under the name, logo and/or any other sponsor sign such as reference to the Sponsor's services or products or the Sponsor's characteristic sign.
- (3) Rules of sponsorship shall be regulated in a secondary legislation adopted by the Agency.

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51 Law on Games of Chance and Entertaining Games, Official Gazette No. 24/2011, 51/2011 and 148/11)

52 Article 14, paragraph 3 of the Law on Games of Chance and Entertaining Games prescribes:

„(3) The rules of games of chance, i.e. the rulebook of the casino should be posted in a visible location on the premises on which games of chance are organized and should be accessible to the participants in the games of chance”.

53 The Reservation was made on May 30, 2001, and confirmed at the time of depositing of the ratification instrument, on November 18, 2003. See more on the link <http://conventions.coe.int/Treaty/Commun>ListeDeclarations.asp?NT=132&CM=8&DF=4%2F24%2F2006&CL=ENG&VL=1>

- (4) *Sponsorship of news or up-to-date informative programs shall not be permitted.*
- (5) *Audio and audiovisual media service shall not be sponsored by legal entities or natural persons whose main activity is manufacture or sale of cigarettes or other tobacco products.*
- (6) *No sponsorship shall be permitted of audio and audiovisual media service on behalf of natural persons or legal entities whose main activity is manufacture or sale of products or provision of services, for which advertising is hereby prohibited in accordance with this Law.*
- (7) *As an exception to paragraph 6 of this Article, natural persons or legal entities whose activities include manufacture or sale of medical products and/or medical treatments can sponsor audio and audiovisual media service. In such cases, only their name or image can be promoted, however not specific prescription-only medical products or medical treatments.*
- (8) *During children, documentary or religious programs, the display of the Sponsor's logo shall not be permitted."*

This article is almost the exact copy of Article 10 of the EU Directive<sup>54</sup>. The only difference is in the fact that the Draft-Law left out point (a) of paragraph 1 of Article 10 of the EU Directive, which bans the sponsorships to influence the editorial independence of the provider of media services! The Paragraph 4 of this article is present in the LBA, with the difference that it replaces the words **programmes of political or religious character (Article 107 of the LBA) with current affairs information programmes (the Draft-Law)**, as prescribed by the EU Directive. The paragraph 6 of this article is identical to Paragraph 2 of Article 107 of the LBA. The penal provisions propose a fine for violations of provisions of this article of 2-3% of the total income. However, having in mind that this is an area (advertising and sponsorship) in which providers of audiovisual services have demonstrated tendency of non-adherence to legal provisions, **additional sanctions should be prescribed, for example, temporary prohibitions to broadcast advertising or carry sponsorship.** Currently, sponsorship is further regulated with a by-law adopted by the Broadcasting Council.<sup>55</sup>

## Article 66 – Placement of products

- „(1) *Placement of products shall be prohibited.*
- (2) *As an exception to paragraph 1 of this Article, placement of products shall be permitted in the following programs: feature film program, documentary and entertainment program, situation comedy television program recorded in front of a studio audience, comedy shows and series, sports programs and matches of high production value.*
- (3) *Placement of products shall be permitted in cases when it is free of charge, meaning when goods and services are provided free of charge surpassing their "significant value" for the purposes of their placement as prizes or production props in the following types of program:*
- *In contests of low production value, quizzes, prize competitions or lottery games and*
  - *In reality shows as production props.*
- (4) *Exceptions of paragraphs (2) and (3) shall not apply to programs for children.*
- (5) *The rules for placement of products and the amount of the "significant value" shall be prescribed by the Agency.*
- (6) *The programs in which products have been marketed shall not incite direct purchase or rental of goods and services, especially not through their special promotion recommendation.*
- (7) *Programs in which products have been marketed shall not put exaggerated attention to the marketed products (emphasis or reference) of products therein.*
- (8) *Programs in which products have been marketed should clearly denote the fact that they*

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54 Article 10 of the EU Directive

55 Rulebook on manner of identification of sponsors in radio and television programmes, Off. Gazette of RM, No. 72 of June 11, 2007

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*contain marketed products. Such programs should be adequately designated at the beginning and the end of the program and following each advertising block in order to avoid confusing the viewers.*

*(9) Placement of cigarettes or other tobacco products shall not be permitted as well as placement of products of natural persons or legal entities whose main activity is manufacture or sale of cigarettes or other tobacco products.*

*(10) Placement of prescription only medical products and medical treatments shall not be permitted.*

*(11) The provisions of this Law regulating the placement of products shall apply to programs produced after this Law has entered into force.”*

This article has been copied from Article 11 of the EU Directive. One major difference in the proposed Draft-Law is the exception from the ban on product placement which allows placement in wider scope of programmes than the one defined by the EU Directive, for example, sports matches of high production value.<sup>56</sup> **We propose that this provision is fully synchronized with the provision of Article 11, Paragraph 3 of the EU Directive.**

Paragraph 3, which goes well beyond the framework provided by the EU Directive, allows for placement of products or services exceeding certain “significant value” in competitions with low production value, games of chances and reality show-programmes. Also, it authorizes the Agency to define the rules for placement of products and limits of the said “significant value” (Paragraph 5). We emphasize that, in the cases for which the Law doesn’t define the “significant value”, the authorisation given to the Agency to further regulate the matter with a by-law could open the way for outside influence on the placement of products. Furthermore, fines of 2-3% of the total income are prescribed if placement does not comply with provisions of this article (Article 161, paragraph 1, line 27 of the Draft-Law).

**The most important aspect here is that the EU Directive doesn’t allow for placement of products exceeding the “significant value”, which could prove to be a major deviation from the general ban on product placement. Therefore, we propose that the proposed provisions should be deleted.**

## IV.2 – Provision of on-demand audio and audiovisual media service (non-linear audio and audiovisual media service)

### **Article 67 – Provision of On-Demand Audio and Audiovisual Media Services**

The new Draft-Law prescribes the creation of a special registry for the providers of on-demand audiovisual media services. **The title of this article doesn’t correspond with the subject it regulates**, and needs to be changed and rephrased. Having in mind that the proposed registry will be used only as instrument to keep record of the work and activities of providers of on-demand audio and audiovisual media services and no equality sign needs to be drawn to the licences, the fine for provision of audiovisual media services without certificate of registration, or failure to inform the Agency about any change of data, at 2-3% of the total annual income is set too high and needs to be reduced.

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<sup>56</sup> „3. By way of derogation from paragraph 2, product placement shall be admissible in the following cases unless a Member State decides otherwise:  
(a) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes;“

### **Article 68 – Registry of On-Demand Audio and Audiovisual Media Services**

The EU Directive doesn't provide for such a special registry for providers of that type of media services. Therefore, the actual need for such a registry that would be intended exclusively for providers of on-demand audiovisual media services should be reconsidered.

### **Article 69 – Removal from the Registry of On-Demand Audio and Audiovisual Media Services**

*„The Agency shall remove the Provider of On-demand Audio and Audiovisual Media Service from the Registry of Article 68 of this Law in the following cases:*

- If the Provider of On-demand Audio and Audiovisual Media Service has notified in writing the Agency on termination of delivery of activity;
- If the Provider of On-demand Audio and Audiovisual Media Service no longer meets the technical requirements for broadcasting of audiovisual and audio programs;
- If the Provider of On-demand Audio and Audiovisual Media Service has not initiated activities within three months following the date of start of provision of service stated in the Application of Article 67, paragraph (3) of this Law;
- If an effective court decision has banned activities of the Provider of On-demand Audio and Audiovisual Media Service, and
- *If the Provider of On-demand Audio and Audiovisual Media Service has ceased to exist.“*

The listed cases in which the Agency may delete a provider of on-demand audio and audiovisual services are very similar to the listed cases for revocation of broadcasting license in Article 92, which is a mistake, because the license should never be equalized with the registration, i.e. keeping records of the providers of on-demand audio and audiovisual services. Furthermore, this Article doesn't include the terms and criteria listed in articles 12 and 13 of the EU Directive, referring to the contents of on-demand audiovisual services. Therefore, the article needs to be rewritten and rephrased by adding all cases in which a provider of audiovisual services could be deleted from the registry, **in accordance with principles listed in the European Convention on Transfrontier Television.**

The three articles (67, 68 and 69) constitute and attempt to introduce, using a back door, an unnecessary regulation for the providers of audiovisual services. Namely, the philosophy of soft regulation of this type of services requires that minimal demands related to protection of minors from pornography and gratuitous violence, as well as the legitimate ban on contents inciting to violence, are met. From that point of view, the creation and operation of such a registry, the removal of a provider of services from such a registry (which has the power of ban to perform activity) and the penal provisions related to these articles transform the registration into a system of clandestine licensing. That approach is contrary to the spirit of the EU Directive. In this case, a minimal regulation would prescribe an obligation for the provider to inform the regulatory authority about the commencement of provision of the service and to allow access to the programme libraries and the auxiliary elements (electronic guides, subtitles, etc.), notification about the contents of the libraries (without entry or deletion from any registry) as information necessary to the regulator to inspect and test the contents from the point of view of legitimate targets for protection listed above. The violations of provisions that ban airing of contents that fall within the said categories should be subject to sanctions proportionate to the harm they caused to the society, and not to the income earned by the provider of services. Finally, the provider of services should disable the access to the contents on basis of decision adopted by the regulator, not to prevent him from future performance of activities through deletion from the registry.

### **Article 71 – Promotion of Production and Access to European Works**

The rules pertaining to European audiovisual works are listed in the LBA. However, the LBA lists the terms and conditions referring to European audiovisual works that need to be met by broadcasters, while the Draft-Law offers a solution that is not well elaborated. It remains to see the proposed rulebook that needs to be adopted by the Agency to be able to give proper comments on this provision. The matter is already regulated with a by-law – the Rulebook on European Audiovisual Works – adopted by the BC.<sup>57</sup>

#### IV.3 Provision of television and radio broadcast (linear media service)

##### IV.3.1 Basic principles

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### **Article 72 – Requirements for provision of television or radio broadcasting**

This article provides general definitions for the requirements that need to be met by broadcasters to perform television and radio broadcasting. Chapter V of the LBA also lists such provisions on requirements.

Further in the article, it prescribes that the Agency shall adopt a by-law that will regulate in greater detail the terms and conditions for minimal technical, spatial, financial and human resources requirements, depending on the programming format, that need to be met by a broadcaster. It provides the Agency with clear discretionary powers to influence who may survive in the market and who not!

For that reason alone the article needs to define precisely the contents of the by-law that will be adopted by the Agency. Also, the term “human resources” need to be exempted for the reason that the state can’t impose on a private entity requirements in terms how many people to employ, especially knowing that those requirements change with every cycle of allocation of licenses.

### **Article 74 – Types of Broadcasters**

The provisions of Article 74 of the Draft-Law are identical to the provisions in Article 7 to 10 of the LBA, with the exception of the last paragraph 6 that allows the universities to establish their own radios that will not have the status of legal person. In view of the fact that there are both state and private universities in the Republic of Macedonia, there is a very real question how the supervision of those radio stations will be conducted and what sanctions shall apply for any eventual abuses.

### **Article 75 – Bankruptcy and Liquidation of a commercial broadcasting company**

The provisions of this article provide the same possibilities for bankruptcy or liquidation of a commercial broadcasting company as articles 12a and 12c of the LBA. The only difference is that the provision of Article 12b, which states that liquidation procedure for a broadcaster shall commence upon revokal of its license to perform broadcasting activities, is missing. **We believe that**

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<sup>57</sup> Rulebook on European Audiovisual Works of December 15, 2006. available on the link [http://www.srd.org.mk/images/stories/Pravilnik\\_za\\_evropski\\_audiovizuelni\\_dela.pdf](http://www.srd.org.mk/images/stories/Pravilnik_za_evropski_audiovizuelni_dela.pdf), accessed on April 15, 2013

**the provision from the LBA that the entity shall be liquidated upon revokal of license should be incorporated in the Law, because it refers to a specific function in the state.**

#### **Article 76 – Broadcaster's Programme Concept**

*„(8) For any amendment or modification to the Program Concept on the basis of which the Broadcaster has been granted the license for a television or radio broadcast exceeding 10%, the Broadcaster shall obtain a prior Consent by the Agency. Together with the request for obtaining the Consent for amendment or modification to the Program Concept, the Broadcaster shall submit the Opinion of paragraph (7) of this Article. The request for obtaining the Consent shall be submitted by filling out a Form prepared by the Agency and published on its website.“*

This article is in direct collision with the provision of Article 4, paragraph 8 of this Draft-Law, which states that a media publisher, as pursuant to the Law, shall be independent in its editorial policies and implementation of the programme concept, as well as with Article 10, paragraph 1 of the ECHR.<sup>58</sup>

**This article authorizes the Agency to interfere in the general editorial policies of the media – the programming concept should be exempt from the list of documents that are subject to Agency's regulation. We remind that the request to attach a programming concept to the application for license, according to expert Jakubowicz, could suggest that the Agency dictates the contents of programmes, which could constitute a violation of the freedom of expression of a broadcaster.**<sup>59</sup>

The Agency can only be interested in the format of the media, in terms of ensuring pluralism of the media, but not in the programming concept. Then, the instruction to prepare a special by-law as an authority granted on the Agency adds to the already unacceptable level of interference by the Agency in the media freedoms. Finally, we could conclude with the provision that allows the Agency to approve the programming schedules of the broadcasters, *de facto* transforming it into an editor-in-chief of the media.

#### **Paragraph 8 of the Article allows for direct influence on the editorial policies of a broadcaster.**

The format of the programming service offered by a broadcaster (general or specialized) and the basic fundamental directions of a broadcaster's operations are defined in the programming concept of the broadcaster. The article also provides a list of mandatory contents of the programming concept. At the same time, it notes that the broadcaster shall be obligated to implement at least 90% of the programming concept on basis of which a broadcasting license was issued.

The Agency shall prepare the form for the programming concept, and it is the editor-in-chief that shall be held responsible for the implementation of the programming concept.

Similar to the solution offered by the LBA, the Agency should be able to regulate programming service formats in more detail with a by-law. Paragraph 14 provides that MRT shall be exempt from the obligations listed in this Article.

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58 Article 10, Paragraph 1 of ECHR – Freedom of Expression: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

59 European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, p.14

#### IV.3.2 – Manner and procedure for issuing License for television or radio broadcasting

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##### Articles 77 - 95

The Draft-Law ties, in Article 77, the license to a limited geographic area, unlike articles 41 and 42 of the LBA which tie the decision to issue license to a specific programming service. The plan for distribution of capacities for digital terrestrial multiplex of an operator of a public electronic communications network, provided for in Article 78, paragraph 5, has already been adopted by the BC.<sup>60</sup>

Just as in the LBA, the Draft-Law provides for allocation of license to perform broadcasting activity upon publication of a public call for applications. Prior to the decision to open a public call, the Agency shall conduct a study and a survey of the public (Article 79, Paragraph 3), similar to the provisions of the LBA that the BC shall conduct survey of the public and analysis (article 45 of the LBA).

The provisions covering the contents of the decision to open a public competition create additional burden for the procedure, making it too formal and more expensive. For example, Article 80, line 9 prescribes the “time and the place for collecting the competition documentation, the amount and the manner of payment of the documentation fee”. At the same time, **the demand that the application should be submitted with attached programming concept constitutes an excessive interference in the work of the Agency (see above, Jakubowicz’s comments on Article 76).**<sup>61</sup>

Also, the deadlines for submission of applications and adoption of decisions make the whole procedure too long. Namely, the deadline for application provided in Article 50 of the LBA (not less than a month and not longer than three months) has been extended significantly (60-90 days, Article 80, line 13 of the Draft-Law). One fine solution is that it prescribes legal deadline for the adoption of decision, but it was left rather long at up to 30 days (Article 80, line 16 of the Draft-Law).

Unlike Article 49 of the LBA, the Draft-Law, in Article 82, prescribes that to the application, which has to be presented in a special form provided by the Agency, the programming concept should be attached together with additional three statements certified by a Notary Public – that the applicants shall adhere to the offered technical, spatial, financial and human resources requirements, that they accept the terms and conditions listed in the competition documentation, and that there are no conflicts of interest on their behalf, in accordance with the law. That is too formal and incurs additional and unnecessary costs on the broadcasters. The very fact that they apply in the competition means that they accept the terms and conditions and will adhere to the terms and conditions they offered. Naturally, in the opposite case sanctions and punitive measure shall apply.

Also, Article 82, paragraph 3, line 5 prescribes that an applicant can present a statement certified at a Notary Public that it faces no bankruptcy or liquidation procedure. That should not be allowed, knowing that everywhere in the world such affidavits are issued by a competent body or institution, which is clear from the first sentence of that line which prescribes that, for foreign legal persons, the affidavit shall be issued by the competent body of the domicile state.<sup>62</sup>

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60 "Official Gazette of RM, No. 168 of December 27, 2012

61 European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, p. 14

62 In our legal system, the term “the state in which the seat is registered”. The term “domicile state” has not been accepted in legal terminology at this time.

## ANALYSIS OF THE DRAFT-LAW ON MEDIA AND AUDIOVISUAL MEDIA SERVICES

Regarding the evaluation and assessment criteria, it is not clear why the past experience of the applicant in broadcasting has been made a criterion (Article 83, paragraph 1, line 10). **It clearly favours the older broadcasters and places additional barriers to increased competition, greater variety of media offer and fresh ideas. That criterion ought to be deleted.**

The public competition shall be deemed successful if at least one application was received (Article 84, paragraph 1 of the Draft-Law). The extension of the deadline for unsatisfied candidates to file lawsuits challenging the decision to 30 days (LBA provided a 15 days deadline for appeals in Article 54) is a good solution. However, if the intention is for creation of an urgent procedure, the extended deadline is not in favour of that intent, especially in view of the fact that the filing of an appeal or lawsuit shall not delay the execution of the decision. In such a case, the legal remedy shall lose its efficiency.

The length of the period covered by the license of television or radio broadcasting remains the same as the period prescribed in Article 58 of the LBA, and a possibility to renew the license is also provided. The deadlines for submission of request to renew the license and the decision on that request have been provided, but the provisions of Article 67 of the LBA on the terms and conditions for renewal of license have been omitted, especially in view of the fact that no legal remedy has been provided for a decision to reject the request.

The calculation of the licence fee follows the same formula as provided by Article 60 of the LBA, the only change being that point H in Article 2 has been redefined in accordance to the newly arising conditions for digital broadcasting. The only real difference is that no additional charges are prescribed for programmes broadcast in encrypted form (article 60, Paragraph 5 of the LBA).

The list of occurrences that could lead to revokal of a license for television or radio broadcasting was copied from Article 63 of the LBA, with four new reasons being added to the list, and the provisions allow broadcasters additional time to bring their activities in line with the legal obligations (Article 93, lines 6 to 8 of the Draft-Law).

We believe that the termination of the licence upon opening of bankruptcy/receivership procedure should be deleted from the list of options. Namely, the bankruptcy or receivership procedure doesn't aim to close or terminate a legal person, but to ensure that its creditors will be compensated through restructuring and consolidation of the company that will then continue its work, if there is such a possibility.<sup>63</sup> **We propose that the line 5 of the first paragraph should be deleted.**

**The start of the procedure for revokal of license, in accordance with Article 93, paragraph 1 of the Draft-Law is an exclusive discretionary right of the director of the Agency, different from the provisions of the LBA which stipulated that the procedure could be initiated by any member of the BC or the head of its technical and administrative services (Article 64, paragraph 1 of the LBA). That gives to great discretionary powers to the director. The other provisions on the deadlines and the necessary majority for the decision to be adopted remain the same as in the LBA (Article 64, paragraph 2 and 3). This expertise determined previously that the composition and the methodology of operations of the Agency, its authorities and power and legal set-up are unacceptable from the viewpoint of independence and autonomy of the regulatory authority. Therefore, this provision needs to be rewritten and rephrased to correspond to the other proposed solution.**

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<sup>63</sup> Law on Bankruptcy (Off. Gazette of RM, No. 34/2006, 126/2006, 84/2007 и 47/2011), Article 3

**On the issue of revokal of license, Jakubowicz emphasized that “the revokal of license is an extreme measure that should apply only when absolutely necessary and other measures failed to achieve the desired effects... the BC shall acquire excessive arbitrary powers to violate the freedom of expression of a broadcaster... It should be clearly stated that the revokal of license shall follow only after all other sanctions failed to remedy the situation”.**<sup>64</sup>

Judicial protection against the decision to revoke the license is guarantee, in an urgent procedure, and the lawsuit shall not delay the execution, as prescribed by the existing provision in Article 65 of the LBA. One fundamental difference is that **no deadline for filing lawsuit to challenge the decision has been specified, which brings about legal uncertainty.**<sup>65</sup>

The Draft-Law provides for the expiration of the licence in accordance with the Law, listing, among other cases, the revokal of license and occurrence of bankruptcy/receivership or liquidation procedure. It is prescribed that in such an occurrence, the Agency shall not adopt an appropriate decision and the broadcaster shall be deleted from the Registry Book. We believe that the Agency has to adopt a proper decision to determine the termination of a license because of the constitutionally guaranteed right to judicial protection from acts adopted by bodies holding public powers and the right to challenge such decisions in court, guaranteed by the ECHR. This provision also prescribes, in case of revokal of licence, that the Council shall not be required to adopt the proper decision, contrary to Article 93 of the Draft-Law itself.

#### IV.3.3 Programme principles, rights and obligations

##### **Article 97 – Defining the list of events of great significance**

The issue is regulated the same as in the LBA. The Agency shall define the list of events that it deems to be of great importance and also determines if those events should be fully or partially available for live broadcasts or delayed broadcasts.

Also, the Draft-Law stipulates that the Agency shall inform the European Commission and the states signatories of international agreements obligatory for the Republic of Macedonia about the list of events. There is currently a Decision for confirmation of a list of events of great significance for the Republic of Macedonia which has been submitted to the Council of Europe, i.e. to the competent body for implementation and achievement of the goals of ECTT, the Permanent Committee.<sup>66</sup>

The Article is incomplete, for the reason that it has to note precisely the exact schedule of review of the list, and it also needs to specify the areas in which the events shall be selected to avoid the existing situation in which the list is almost exclusively populated by sports events, while culture and arts events and marking of other events of importance to the Republic of Macedonia are not included, thus undermining the right of the public to access the events.

This to prevent that the right to broadcast events of great importance for the population of the Republic of Macedonia is acquired by a broadcaster that doesn't cover the prescribed coverage of the population or to charge additional fees for that event.

<sup>64</sup> European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, p. 17

<sup>65</sup> Once revoked, the licence can be restored at any point of time if the a lawsuit was filed and the Court ruled positively.

<sup>66</sup> The Decision on approval of list of events of great importance for RM of April 7, 2006, available on link [http://srđ.org.mk/images/stories/Odluka\\_za\\_listu\\_na\\_nastani\\_od\\_golemo\\_znacenje.pdf](http://srđ.org.mk/images/stories/Odluka_za_listu_na_nastani_od_golemo_znacenje.pdf), accessed on April 15, 2013

### Article 98 – Right to a short report

The Draft-Law prescribes in this Article that every broadcaster shall have the right, under fair, sensible and non-discriminatory conditions, to present a short report on events of great importance for which the exclusive broadcasting rights are held by another broadcaster in the Republic of Macedonia. If the broadcaster holding exclusive rights is not from the Republic of Macedonia, the terms and conditions of access to the information need to be presented in advance, allowing the other broadcasters sufficient time to exercise that right. The right to access to events of great importance shall be guaranteed by the Agency, which will also prescribe the manner of access to the transmitted signal, upon prior opinion submitted by AEC.

The article prescribes that the short report shall not exceed 90 seconds in length.

In addition to the fact that this article is identical to Article 160 of the LBA, the right to a short report is also regulated in the Instructions on the Right to Short Report, adopted by the BC.<sup>67</sup>

#### IV.3.4 Programme standards

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### Article 99 – Duration of Daily Broadcasts

*„(1) The broadcasters performing the business activity on national level shall be obliged to broadcast at least 18 hours of radio programme per day and at least 12 hours of television programme per day.*

*(2) By derogation of paragraph (1) of this Article, the additional programme services of the Public Broadcasting Service, defined in Article 121, paragraph (5), of this Law, shall be permitted to broadcast less hours of programme per day.*

*(3) The broadcasters performing the business activity on regional level shall be obliged to broadcast at least 12 hours of radio programme per day and at least 8 hours of television programme per day.*

*(4) The broadcasters performing the business activity on local level shall be obliged to broadcast at least 10 hours of radio programme per day and at least 6 hours of television programme per day.*

*(5) The non-profit broadcasting organisations shall be obliged to broadcast at least 4 hours of radio programme per day.*

*(6) The daily programme shall exclude the broadcasting of still pictures, test signal and other types of audio and audiovisual material not covered in the definitions for audio and audiovisual programme in Article 4 of this Law.”*

This article is basically identical to Article 72 of the Law on Broadcasting Activity. In the provisions of paragraph 6 that define what shall not be considered a daily broadcast, the Draft Law offers a wider scope of items than the one offered in Article 72 of the LBA, i.e., in addition to still pictures and test signals, it includes the “other types of audio and audiovisual material not covered in the definitions for audio and audiovisual programme in Article 4”. Clearly, a technical mistake has been made in the fact that the provision should invoke Article 3, not Article 4 of the Draft-Law. Also, the provision is too general in scope to include matters not covered by the definitions of this Draft-Law. Paragraph 2 of this article leaves space for different interpretations, stating that the additional programming services of the public broadcasting service defined in Article 121, paragraph 5 (it refers to MRT’s satellite broadcast service), can broadcast fewer hours of programming daily, but it doesn’t specify the minimal time of broadcasts. The fewer hours

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<sup>67</sup> Instructions on the right to a short report on events on which exclusive rights were acquired of June 9, 2006, available on link [http://srd.org.mk/images/stories/Upatstvo\\_za\\_pravo\\_na\\_kratko\\_izvestuvanje.pdf](http://srd.org.mk/images/stories/Upatstvo_za_pravo_na_kratko_izvestuvanje.pdf), accessed on April 15, 2013

can mean just one hour of programming daily, therefore, **this provision needs to be rewritten in order to provide more precise regulation and set a minimum number of hours of broadcasts, or alternatively, to be deleted completely.**

#### **Article 100 – Obligations for the broadcasters to broadcast European Works and works of independent producers**

In this article, the Draft-Law prescribes an obligation for the broadcasters that broadcast nationally to include in their programmes at least 51% share for European audiovisual works of the total programmes broadcast annually. For the Public broadcaster, that limit is set hither at 60% of total annual programmes.

This matter is regulated in Articles 73 and 74 of the LBA, but Article 100 of the Draft-Law differs in the fact that the broadcasters are not absolutely obligated to meet those requirements, but only when it is viable and when they are in a situation to meet those standards with appropriate means.

This article 100 of the Draft-Law again prescribes that the Agency shall regulate in more details the rules for meeting the obligation for broadcasts of said audiovisual works in a special by-law. The Draft-Law also stipulates that in addition to the public broadcaster (as stipulated in Article 125 of the LBA) the other broadcasters broadcasting nationally shall be obligated to leave aside 10% of their annual budgets for procurement of European audiovisual works and works of independent producers. This matter is already regulated with a by-law – the Rulebook on European Audiovisual Works – adopted by the BC<sup>68</sup>.

#### **Article 101 – Obligations for the broadcasters to broadcast music and programmes originally created in Macedonian**

In this article, the Draft-Law defines the minimal percentages of shares of music and programmes originally created in Macedonian language in the total broadcast programmes. This is a restrictive provision, having in mind that all quotas present additional obligations. Also, such requirements should refer only to the public broadcasting service, not to the privately-owned broadcasters.

This obligation is also in violation of the EU Directive, which never mentions a language in relation to creation of audiovisual works, but operates with the principle of country of origin, stipulating that that principle should apply to all audiovisual media services with the aim to ensure free flow of information and audiovisual programmes in the internal market.<sup>69</sup>

Therefore, although Article 74 of the LBA already prescribes at least 30% of programmes originally created in Macedonian language or the language of non-majority communities, the Draft-Law prescribes the same 30% threshold, starting in 2014. Another provision is added to increase that threshold to 40% in 2015 and 50% in 2016.

The shares of total programming are still higher for MRT, i.e. the public broadcasting service which is obligated, on at least one television and one radio programming service in Macedonian language, and in the television and radio programming service in the language of ethnic communities that are not majority in the Republic of Macedonia, to ensure at least 45% of the total

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68 Rulebook on European Audiovisual Works of December 15, 2006, available on the link [http://srd.org.mk/images/stories/Pravilnik\\_za\\_evropski\\_audiovizuelni\\_dela.pdf](http://srd.org.mk/images/stories/Pravilnik_za_evropski_audiovizuelni_dela.pdf), accessed on April 15, 2013

69 Point 33 of EU Directive 2010/13

broadcast vocal and vocal-instrumental music to be in Macedonian language or in the languages of the non-majority ethnic communities. Starting in 2014, the minimum increases from 45 to 50 percent.

It is also prescribed that the Agency shall adopt an act that will define the rules for implementation of obligations of this article in more detail.

**Furthermore, this article provides for obligatory broadcasts of music and programmes in Serbian, Albanian, Turkish and other languages, although it may not be originally created in the Republic of Macedonia, but in the countries in which the respective languages have the status of official language (Serbia, Albania, Turkey, etc.).**

**Therefore, we could conclude that this article should be deleted from the Draft-Law and the obligations to broadcast music and programmes to be regulated in accordance with the obligation to broadcast European audiovisual works. Alternatively, they should be aligned to the principle of country of origin mentioned in the EU Directive, although in that case the problem of illegal restrictions of the market place and undermining of the common European market may remain. In the least, this Article may remain in effect until the day Macedonia joins EU as full member.**

#### **Article 102 – Use of Value-Added Telephone Services and Televoting**

*„(1) The broadcasters may use value added telephone services, including televoting, except during the news, during informative and educational programmes, during religious services and ceremonies and children programmes.*

*(2) The programmes of the non-profit broadcasting organisations may not use value added telephone services.*

*(3) The rules for using value added telephone services in other programme types shall be prescribed by the Agency.“*

This article has been copied from Article 75 of the LBA. While similar in contents, the Draft-Law offers somewhat different formulation. In fact, the LBA operates with the term “special tariff telephone services” while the Law on Audiovisual media services uses the term “value-added telephone services”. Article 102 paragraph 1 of the Draft-Law that lists the programmes that may and may not use telephone services, lists the religious services and sermons among the latter, which is a positive development.

On the other hand, this provision, unlike the provision of the LBA, doesn’t provide for prohibition of use of special tariff telephone services by the public broadcasting service. **The existing prohibition in the LBA<sup>70</sup> should continue to be in effect, in order to prevent the commercialisation of the public service, while legitimate exemptions like the Eurosong contest and similar events should be introduced. Therefore, those exceptions should be defined in great detail.**

Finally, the Agency is given freedom to regulate the use of value-added telephone services in other types of programme with by-laws! A much better solution would be if the provision remained the same as the one used by the LBA and to add religious services and sermons in Article 102 paragraph 1. Especially in view of the fact that this matter is already regulated with a by-law adopted by the Broadcasting Council.<sup>71</sup>

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<sup>70</sup> Article 75, paragraphs 1 and 2 of the Law on Broadcasting Activity

<sup>71</sup> Rulebook on use of special tariff telephone services in the programmes of radio and television programming services, Off. Gazette of RM, No. 72 of June 11, 2007

### **Article 103 – Broadcasting games of chance**

This provision is identical to the provision of Article 76 of the LBA. In cases of broadcasts of games of chance organized by entities that don't hold a valid license to organize games of chance issued by a competent body, and in cases of organization and broadcasts of sports betting programmes, this Draft-Law prescribes fines of 2% of the total annual income.

### **Article 105 – Following an election campaign**

The Article clearly refers to the solutions offered in the Election Code. If the sponsor of the bill intended to adopt a general and comprehensive media law, the question is why doesn't it prescribe provisions to regulate the behaviour and activities of broadcasters during elections. On the other hand, the LBA lists a number of provisions that regulate that matter (articles 80, 88, 93, 95 and article 121, paragraph 1, line 8). Also, two by-laws regulating that matter have already been adopted.<sup>72</sup>

The Rulebook for the conduct of the broadcasters in the period before the start of the election campaign and the Rulebook for equitable access to the media presentation during the election campaign were adopted pursuant to Article 75, paragraph 1 of the Election Code. However, the very provision that prescribes the adoption of those acts is in collision with the 2005 LBA (adopted one year before the Election Code), which states in Article 80, paragraph 5 that the Parliament of the Republic of Macedonia shall hold the competence to adopt decisions on the rules of media presentation in the election campaign via the broadcasters.

**The adoption of a comprehensive media law justifies the incorporation of the provisions on media presentation in elections in the proposed Draft-Law. However, we have to bear in mind the conflict of jurisdictions mentioned above to clearly define the matters of importance for the following of election processes (presentations, advertising, etc.).**

### **Article 106 – Broadcaster Identification**

In this article, the Draft-Law defines in detail the identification of broadcasters and manners of use of identification and its presentation.

This is a new provision and there was no similar provision in the LBA. The identification sign is mentioned in several provisions in the LBA, but not as explicitly as in this provision of the Draft-Law. The proposed solution is a positive development.

## IV.3.5 Advertising, teleshopping and sponsorship

### **Articles 107-114 – Advertising, teleshopping and sponsorship**

Article 107 and 108 of the Draft-Law list the terms and conditions for broadcasts of advertising and teleshopping spots. Paragraph 1 of Article 107 was copied from Article 19, paragraph 1 of the EU Directive. Also, the provisions of Article 108, which regulate the manner of broadcasts of

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<sup>72</sup> Rulebook for the conduct of the broadcasters in the period before the start of the election campaign (Off. Gazette of RM, No. 60 of April 27, 2011) and the Rulebook for equitable access to the media presentation during the election campaign (Off. Gazette of RM, No. 60 of April 27, 2011).

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advertising and teleshopping spots are copied from Articles 20 and 21 of the Directive, but not in their entirety. Namely, Article 108, Paragraph 7 states:

*„The television and cinematographic movies may be interrupted for broadcasts of advertising and/or teleshopping spots, not more than once for each 30-minute timeslot.“*

This provision is not identical to the provision in the EU Directive. In fact, Article 20, paragraph 2 of the Directive prescribes that, in addition to television and cinematographic films, it is possible to interrupt news programmes to air advertising and teleshopping spots. On the other hand, the same article of the Directive excludes from the definition feature series and documentary programmes.<sup>73</sup> **Those segments of the Directive need to be incorporated in this provision to ensure that it is fully compliant with the Directive's provisions.**

A provider of audiovisual services that airs advertisements and teleshopping spots that are not clearly identifiable as such, a fine of 2-3% of the total annual income may be levied against that provider. The remarks given on the provisions on sponsorship apply equally in this case.

Regarding the length of time taken by advertising and teleshopping sports in the programmes of broadcasters (Article 109) - both for the public broadcasting service and commercial broadcasters, the Draft-Law and the LBA prescribe the same lengths of time. Article 110 prohibits depiction of certain persons in advertisements and teleshopping sports, in line with the EU Directive, and the same provision was also listed in the LBA. A fine of 2-3% of the annual income applies to violations of this provision, too. The remarks made in the section on sponsorship also refers to the length of advertisements and to the violations of terms and manner of broadcasting of advertising and teleshopping spots. I.e., in addition to this fine, the Law should provide for temporary bans on airing advertisements.

The provision in Article 111 of the Draft-Law is new<sup>74</sup>, and there were no similar provisions in the EU Directive or the LBA. It provides that a special line in the Budget of the Republic of Macedonia shall be set-up to fund the activities to inform the public about the activities of the Government. The obligation to inform the public is mentioned in both the Constitution and the Law. On one hand, it is clear that public procurements of state bodies and institutions are conducted in accordance with relevant regulations and, from that point of view, this provision is redundant. On the other hand, the provision may stimulate the state bodies to engage in unnecessary advertising. **We propose that this provision should be deleted.**

Article 112 that regulates the teleshopping time-slots doesn't prescribe a maximum uninterrupted length of teleshopping windows, similar to the provisions of Article 94 in the LBA.<sup>75</sup>

On the other hand, the Draft-Law states, in article 112, paragraph 1: „The teleshopping windows must be clearly indicated with optical and acoustic means and shall run uninterrupted for at

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73 Article 20, paragraph 2 of the EU Directive: The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.

74 “State bodies, administrative authorities, public enterprises, local self-government units, public institutions and organisations, as well as legal persons with public empowerments shall be obliged to spend their budget for informing and acquainting the public of their services or activities, if any, in a non-discriminatory, objective and transparent way in accordance with the procedure defined in the Public Procurement Law.”

75 Article 94 of the Law on Broadcasting Activity states: Teleshopping windows may last, without interruptions, for a minimum of 15 minutes and maximum of 40 minutes. The maximum number of windows shall be eight per day. The total duration of teleshopping windows shall not be longer than three hours per day.”

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least 15 minutes“, but doesn't place any limit on the total length of the total number of allowed timeslots per day. In addition, Article 94, Paragraph 6 of the LBA states that “radio stations can broadcast only teleshopping spots. On that matter, the Draft-Law states that “the radio broadcasters and the Public Broadcasting Service may broadcast only teleshopping spots”. In order to avoid any confusion, misunderstanding or abuses, the words “and the public broadcaster” should be deleted from that provision”, because the term radio broadcasters also covers the public radio broadcasting service. The Draft-Law prescribes a fine of 2-3% of the total annual income for violations of the provisions of paragraphs 1 and 2 of this article.

Article 113 regulates the length of advertising time-slots in the programmes of the public broadcasting service, and that provision has been copied from Article 91 of the LBA, but not in its entirety. In fact, the provisions that regulate the advertising on the public broadcasting service don't prescribe explicit ban on political party advertising, as prescribed by the LBA. However, having in mind that Article 64, paragraph 12 of the Draft-Law, which regulates audiovisual commercial communications, prohibits the public broadcasting service from airing audiovisual commercial communications commissioned by political parties, and Article 3, paragraph 1, line 22 of the Draft-Law prescribes that advertisements are a form of commercial communications, it implies that the public broadcasting service is prohibited from airing advertisements or entering sponsorship deals with political parties.

Viewed from another vantage point, we shall see that audiovisual commercial communications, according to the EU Directive, don't include the programmes aired on radio. Therefore, in order to eliminate any possibility for abuses, we recommend that a new paragraph should be added to prohibit the public broadcasting service from airing advertisements for political parties.

V. Retransmission of programme services through public electronic communication networks

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**Articles 115-117**

The proposed provision on this matter offer no essential changes, with exception of the compensation for supervision in Article 116. Article 109, paragraph 4 is identical, in terms of its contents, to article 111 of the LBA, while article 117 of the Draft-Law is completely identical to Article 113 of the LBA.

The retransmission of programming services on basis of regulated copyrights and associated rights is again allowed. The procedure of registration with the Agency is much more formal, although the existing regulation also obligates the operators to register with the BC (Article 109 of the LBA). At that, no affidavit from the Ministry of Culture is required to prove that copyrights and associated rights have been regulated (Article 109, paragraph 2 of the LBA), but a statement certified by Notary Public is required as proof (Article 115, paragraph 7 of the Draft-Law). No judicial protection is provided for cases of termination of a programming service and its removal from the register (article 109, paragraphs 14 and 16).

The compensation fee charged on the operators that retransmit programming services and providers of on-demand audiovisual media services is set at 0.5% of the total annual income (Article 116 of the Draft-Law). In that regard, **the problem that may arise is that the payment will be made on a presented bill**, because in that case the tax on transactions has to be paid, too (paragraph 4). Furthermore, **in cases of suspicions surrounding the earned income, the Agency may request an assessment to be made by an external independent auditor (paragraph 5)**, for which information should be provided by the competent state body (the Public Revenue Office).

We propose changes in paragraph 4 in view of the fact that the payment of the fee has to be made on basis of a decision adopted by the Agency as a body holding public empowerments. No taxes can be levied on the decisions of state bodies. Also, paragraph 5 needs to be rephrased having in mind that, in cases of suspicions surrounding the earned income, the data should be received from the state body competent to control and record the earned income in Macedonia.

## VI. Performing programme and expert monitoring

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### Articles 155-160

Unlike the LBA which describes the different competences the BC, AEC, the Ministry of Transport and Communications and the Ministry of Culture have in matter of monitoring of implementation of the law in three provisions (articles 163, 164 and 165), the proposed Draft-Law elaborates the matter of monitoring in great detail. At that, it eliminates any competence of the government ministries, and several other issues are of questionable nature.

The programme monitoring, according to the Draft-Law shall be conducted by a special organisational unit that will be established under the auspices of Agency's technical and administration offices (Article 155 of the Draft-Law), and the expert monitoring will be conducted by persons authorized by the director (Article 157 of the Draft-Law).

The broadcasters are informed about the findings of the expert monitoring over a relatively long period of time (not less than 7 days from the day the written report was presented). During the monitoring activities, the authorized persons shall complete minutes, which can be completed on the premises of the Agency and shall be presented only to the Director (Article 158 of the Draft-Law). On the other hand, keeping minutes is not necessary in view of provisions of Article 31, paragraph 3 that prescribe that the Agency shall conduct its operations in accordance with the Law on General Administrative Procedure.

Another questionable provision is the permission to the authorized persons to enter private homes, if necessary, with proper court order (article 159 of the Draft-Law). Fines are prescribed for attempts to prevent the conducting of expert monitoring (Article 161, paragraph 1, line 60). Article 160 guarantees, in principle, the right to judicial protection, but only if there is a corresponding act of the Agency. It is also problematic that the Agency is not required to adopt appropriate acts in cases of legal expiration of validity of certain issues. In such cases, the right to judicial protection does not apply.

The Regulator Impact Assessment (RIA), on page 7, in the section on performance of monitoring activities by the regulatory body, proposes the definition of a monitoring procedure that should be harmonized with the Law on Inspection and Supervision.

**We recommend a review of the whole chapter. Having in mind the fact that the provisions of the Law on General Administrative Procedure regulate the keeping of minutes, Article 158 of the Draft-Law should be deleted. Also, the possibility for an authorized persons to be able to enter private homes needs to be eliminated, in view of the fact that the Law on Criminal Procedures defines who shall be authorized to conduct investigations.**

**Finally, a provision needs to be inserted charging the Agency to adopt formal decision for any action taken (removal from the registry, limitation of transmissions, etc.) in order to ensure the full exercise of the right to judicial protection.**

## VII. Penal provisions

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Considering the fact that it prescribes only misdemeanour sanctions, the headline of this chapter could be changed into “Misdemeanour provisions”. Far more important, however, is that there are no sanctions prescribed for violations of rights of journalists; the amounts of the fines that can be levied on some issues are problematic; and similarly bad solution is the provision on sanctions for publication of print and electronic publications without prior registration at the Agency.

Also, **an appropriate classification and ranking of sanctions needs to be conducted**. Namely the proposed provisions prescribe the same sanction –fine – for actions that vary great in terms of how serious they are: for example, the same fine is prescribed for the failure to appoint editor-in-chief, for failure to report information; and for illegal acquisition of property or share of ownership (Article 161, paragraph 1, points 1, 4, 5 and 9, respectively).

## VIII. Transitional and final provisions

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Jakubowicz, in his expertise, invoking the Recommendation (2000)23 on the independent and functions of regulatory authorities for the broadcasting sector and its Explanatory Memorandum, emphasizes that a regulatory authority needs continuity, which means that the suspension of its work should not mean that the whole body stopped working, but its individual members.<sup>76</sup> **We have to bear that remark in mind in regards to article 168 of the Draft-Law which regulates the selection of the Agency as the competent regulatory authority.**

**We also propose that the Transitional and final provisions should be amended with a defined deadline for the Agency to adopt the by-laws within its scope of competences and authority.**

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<sup>76</sup> European Commission, DG for Information Society and Media (Department of audiovisual and media policies), Analysis and assessment of the Draft-Law on Broadcasting Activity, prepared by the Ministry of Transport and Communications, ATCM (2005)005, Pp. 25 and 26

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