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**ЦЕНТАР за
РАЗВОЈ на
МЕДИУМИ**

FUTURE

INTERVENTIONS

IN MEDIA LEGISLATION

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INTRODUCTION

Macedonia launched the process of reforms of media and the media sector, process that arises from the recommendations of the group of senior experts commissioned by the EU, the so-called "Priebe Report", and the urgent democratic reforms document prepared by the European Commission. The reform process has two main components. The first included that necessary interventions in the media legislation – the Law on Audio and Audiovisual Media Services (LAAMS) and the Law on Media. The second component will consist of the internal reforms in the media and editorial offices, all with the aim to get to a situation in which we have a free, open, democratic, pluralist and sustainable media sector.

For quite some time now, the Parliament has been discussing, in the Second Reading stage, the Draft-Law on the Changes and Amendments to the LAAVMS. The Draft-Law, while submitted after a prolonged and rather comprehensive public discussion, including a series of talks and negotiations on certain changes with the directly concerned stake-holders (promotion of national music production, copyrights, etc.), is only a fine start to a prolonged process of intervention in several areas covered by the LAAVMS.

Namely, to ensure proper framework for the reforms which, in essence, should primarily be implemented at the level of media and editorial offices, we need to intervene in the legislation in the effort to eliminate the circumstances that contribute to the high level of exposure and vulnerability of the media to all forms of pressure. Such pressures and influences are mainly manifested, regardless of the motivation, as economic pressures which have high passing rate because of the unsustainability of the oversaturated market.

One of the main issues with the existing Draft-Law is the fact that, in addition to focusing on changes to the composition and manner of appointment of the two key implementing bodies and the efforts to ensure financial independence and stability of the public broadcasting service, it touches on, in a rather superficial manner, to several individual aspects of some areas covered by the legislation. Changes in those areas, in accordance with the identified needs, need to be more substantial, cover all burning issues and approached holistically.

MDC discusses several such issues, mainly in the series of comments to different versions of the Draft-Law, but also in older policy documents. This short document aims to present additional details on the directions that future necessary changes to the legislation should take, both at legislative and media policy levels, and the plan is to elaborate all such open issues in individual, dedicated policy briefs and documents.

The preparation of the document included a public discussion with the interested stakeholders, held on June 25, 2018 at the "Best Western Tourist" Hotel in Skopje. MDC invited representatives of all stake-holders - the media, CSOs working in the field of media, professional associations, international organisations present in Macedonia and representatives of the decision-makers, the two Government bodies that have competences in the area of media, to present their views and positions on the points presented in the draft-document.

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responsibility of the Media Development Centre and shall not be understood to represent, in any way or fashion, the views and positions of Civica Mobilitas, the Swiss Agency for Development and Cooperation or implementing organisations.

REGULATORY BODY

The regulatory bodies in any field are established for a number of reasons. The main reason, however, is to eliminate the influence of the formal executive power and daily politicking in the regulated fields, in order to protect the public interest, prevent the abuse of, for instance, pricing policies in the field of energy for political aims, or to ensure fair and transparent distribution of some public resource, such as the segment of the electro-magnetic spectrum used for broadcasts of radio and television programming services.

The proposed changes in the legislation on audiovisual media services focused on some aspects of the very concept of regulation and regulatory body. The proposed changes restore the concept of the Council of the Agency for Audio and Audiovisual Media Services (AVMS) as a small, expert body, the members of which shall be appointed on bases of public competition, replacing the current concept of semi-representatives body with members nominated by so-called authorized nominators.

The future rounds of changes to the legislation should lead to conclusion of that process of transformation of the concept by making the Council the only and real regulatory body. The existing Council of the AVMS is a combination of a board of directors and board of supervisors that doesn't make the decisions but formally confirms the decisions prepared and proposed by the Director of the Agency, or adopts decisions ex officio. One clear sign of that transformation should be the formal change of its name, from Council of the Agency into Council for Audiovisual Media Services. The Agency, on the other hand, should only provide technical, expert and administrative support to the Council in the performans of its competences.

The process of adoption of the Draft-Law on change and amendments to the LAAVMS, ie. The fact that it is more or less stuck in the second reading stage in the Parliament, indicates that some of the proposed changes do open the room for political wheeling-dealing and eventual influence over the work of the regulatory body. Namely, the high threshold for definition of the short-list of candidates for members of the Council who, according to the proposed Draft-Law will be selected with a qualified, two-thirds majority, gives an opportunity to the opposition to use the need to secure that majority to ensure that it will have influence on the regulatory body (and the Programming Council of MRT) through trading for guaranteed seats for its candidates, but also through informal quotas for opposition presence in all management and steering bodies. Although the qualified majority for selection of members of AVMS Council and the Programming Council was a useful instrument at the time it was devised, namely, during the efforts to limit the power of the authoritarian rule of the previous parliamentary majority in the context of the coming early

elections¹, today it is turning into an obstacle to the process of appointing a truly independent, expert regulatory body.

We believe there is an evident need to amend the Law with much more specific instructions on election criteria, the necessary qualifications and even the scoring of the candidates in the process of appointment of members of the Council of the regulatory body. In fact, we need to introduce as many formal obstacles, if necessary, to assist in the elimination of the danger of politically motivated meddling and influence over the selection of candidates and later, of course, over the work of the Council. Also, we need to reconsider the proposed system of mandatory presentation of endorsement letters from CSOs and other organisations and entities by the candidates. First of all, that is nothing more than a variation of the system of authorized nominators that we want to abandon and, second, introduces another filter for the candidates where there should be none.

REGULATORY BODY COMPETENCES

The Draft-Law that is now in the Parliament proposes transfer of some competences from the Agency's administration, that is, the Director of AVMS, to the Council. With the change of concept of the regulatory body, we believe that the change needs to go deeper and the division of competences and decision making power between the Council and the Director needs to be eliminated. The new concept in which the Council is a small, expert body in which the members will perform their office professionally, in a full time salaried position, the role and the position of the Director of the Agency needs to change. We believe that the chief executive office in the regulatory body needs to be tied to the Council, that is, its chairperson should also hold the position of the Chief Executive Officer - the Director (to represent the Agency), and to introduce the position of head of technical administration who will manage the daily operations and will act as a liaison between the administration of the Agency and the Council.

The competences of the regulatory body shall have to be reviewed at a more general, conceptual level. The essence of the future changes should include legislative interventions that will make the regulatory body an "interpreter" of the law and policy-maker in the area of audiovisual media services. The regulatory body needs that role in order to be able to truly perform its work. It should be the sovereign body, because of its expertise and competences, in the definition of trends in audiovisual media sector, both at the level of business and at the level of satisfying the programming and content-related needs of the public.

The regulatory body should be the only institution in charge of development of strategic documents in the area of audiovisual media services (the general media strategy, on the other hand, usually is an obligation of the government. In most countries, that task of

¹ This refers to the proposal from March 2016, the so-called "Van Haute Law", submitted to the Parliament for adoption before the Early Parliamentary Elections which were, at that point in time, scheduled to be held on April 24, 2016.

preparation of media strategy belongs to the ministries of culture, because of the natural position of the media industry as a part of the greater cultural industry. In Macedonia, however, the lead in that area may be given to the Ministry of Information Society and Administration which is already given the competences in the area of media). Then, on basis of the strategy for development of the audiovisual media services the regulatory body will prepare, adopt and implement media policies, codified in adequate primary and secondary legislation.

Here we have the question if the regulatory authority should be vested with the power to submit legislative proposals to the Parliament? We believe that, if regulatory bodies are established to ensure independent management and governance of the respective area of regulation free of the influence of executive power, which is the reason why regulatory bodies report only to the Parliament and are, in that regard, equal to the Government, why shouldn't they be equal in the power to propose bills and legislative solutions. That in view of the fact that, in their respective areas, they have the greatest competences, qualifications and capacities to analyze the situation and propose adequate solution, without mediation from the executive branch.

ALLOCATION OF RESOURCES

The new trends in broadcasting, the increasing importance of "on demand" television services, the streaming platforms on the internet, the declining importance of "free to air" platforms, they all demand review of policies of allocation of available broadcasting resources.

Macedonian media market is generally assumed to be lagging behind the global trends. Macedonia does, however, lead among all European countries in the trend of moving audiences away from access to television contents over an aerial antenna to access through cable or IPTV subscription. The high penetration of pay TV platforms – cable and IPTV networks – which in Macedonia reaches 90 percent according to some surveys², has resulted in declining importance of broadcasting over a limited public resource, or "free to air" broadcasting over the digital terrestrial multiplexes.

The "free to air" broadcasting over the digital terrestrial multiplexes cannot be seen anymore as a privilege that guarantees broadcasters access to almost all population in the country, a privilege that broadcasters pay handsomely for in the form of broadcasting license fee. The fact is, terrestrial broadcasters on all levels of coverage – national, regional or local – mostly

² According to the "Survey of Audience's Public Opinion" („Истражување на јавното мислење на публиката"), commissioned by AVMS and published in December 2017, available (in Macedonian) on the address <http://avmu.mk/wp-content/uploads/2017/06/Истражување-на-јавното-мислење-на-публиката-17.04.pdf>, 89% of the polled citizens said that their main access to television contents was through the catalogues of cable and IPTV operators, while additional 3 percent said that they access TV contents with a satellite dish. Just 7% said that they access TV contents over aerial digital antenna, which allows them access only to Macedonian channels that broadcast over the digital terrestrial multiplexes.

rely on public electronic communication networks to reach the audiences. That situation remains source of one of the fundamental conflicts in the audiovisual media services sector in Macedonia. It wouldn't be totally unexpected if broadcasters move to completely give up on terrestrial digital television.

In practical terms, it means that we are getting close to a situation in which the main reason for regulation of broadcasting may disappear, that is, the fact that it takes care of allocation of a limited public resource, the broadcasting frequencies. Such trends will surely warrant a reconsideration of regulatory approaches.

Cable networks, IPTV platforms and streaming services use commercial resources for which the need for regulation is much more difficult to justify. Macedonia had very specific approach to regulation of broadcasting over the cable networks, allocating licenses on territorial principle, on local, regional and national levels, primarily to ensure the survival of local and regional broadcasters that couldn't really afford the costs of digital switchover. It colides completely with the logic of commercial television where broadcasters pack together programmes - whether purchased or produced in-house - and should be free to enter agreements with cable or IPTV distributors to carry their programmes if there is sufficient interest in the audience for the programmes they offer, regardless of their geographic area of origin.

All novelties and new trends in transmission of audiovisual media services should imply the need for review of existing policies for broadcasting of audiovisual programming services over cable or IPTV networks. On the other hand, the role of regulation is not limited only to allocation of broadcasting resources, but is equally focused on the needs of citizens to get access to diverse programming that will inform, educated and entertain them. To what extent we shall expect that such needs will be met by the public broadcasting service and to what extent we shall expect from commercial radio and TV broadcasters, especially those that broadcast over public electronic communication networks, to meet certain public service obligations shall largely dictate the future policies for allocation of broadcasting licenses.

Another issue may have significant influence on those policies, that is the fact that there is a huge number of media in the oversaturated, fragmented market who were not established with commercial interests in mind, but by the desire of their owners to achieve political influence or to provide support for their other business ventures. In addition, the rule that cable and IPTV catalogues are primarily populated by specialized format broadcasters doesn't apply in Macedonia, as most of them are general interest programming services.

All of the above indicates that the answers to the questions how can we make the broadcasting sector more sustainable, more resistant to economic pressure and better suited to the rather limited market of roughly 560,000 households will have to be well thought out and the solutions will have to be more or less radical. At the least, the new regulatory body should declare a moratorium on the entry of new players in the terrestrial television market until the process of culling, already under way and caused by the elimination of government advertising and other sources of public funds previously accessible to the media, is not completed. Only then, and in line with new policies that will give rise to clear

criteria based on the needs of the audience and the ability of the market to preserve sustainability can we think of further allocation of available resources. We should also take into consideration the question if we need to incorporate such solutions in the primary broadcasting/audiovisual legislation or in the secondary legislation that is to be adopted by the regulatory body.

Finally, Macedonia shall have to start preparing, under the auspices of its integration into the European Union, for the entry into the single European market in the area of audiovisual media services, too. It would demand a completely new regulatory policies, having in mind the overlapping of competences and the possibility for licenses to broadcast programmes in Macedonian language to be issued by the regulatory bodies of other countries. It remains to be seen how that new challenge may influence the license allocation policies and the situation in the Macedonian audiovisual media services market. We believe that the review of that aspect of audiovisual media policies should start as soon as possible.

AUDIOVISUAL MEDIA OWNERSHIP AND LIMITATIONS

The ownership structure of media and transparency of ownership are explicitly mentioned in the “Priebe Report” as one of the key issues of the process of media reforms. The noted phenomenon where media in Macedonia are established not with the aim to make a return on the investment but to achieve political influence that can secure participation in lucrative government tenders for owners’ other businesses, combined with the past liberal policies that allowed entry into the market regardless of its capacities, make the media in Macedonia susceptible to external influences.

The situation is further complicated by the strict rules for cross-ownership and the implementation of principle one broadcaster-one programming service. Namely, the legislation prohibits simultaneous ownership of more than one TV channel in the same zone of coverage, or simultaneous broadcasting of radio and television programming services by one broadcasting company, as well as ownership over broadcast and print media. All those situations are considered to be prohibited media concentration. For that reason, there is general absence of the practice in Macedonia of mergers and takeovers of media companies that would otherwise contribute to consolidation of the market. It is for the same reason that the Macedonian market is not attractive for significant foreign investment by serious international media companies.

We believe that we will need to engage in serious review of this area, too, and to move to eliminate some of the restrictions of ownership with the aim to consolidate the market. Namely, we believe that Macedonian audiences will be better served if broadcasters are allowed to operate multiple channels in digital terrestrial broadcasting, one of which would be a general interest channel, and the other channels would be specialized formatted channels. That approach would also contribute to increased quality of programming offer and eventually, increased quality for domestic audiovisual production. At the same time, the

more protected position in the market would increase the resilience of the media to political and economic pressure.

Of course, no review in this area should even think of liberalizing the rules that prohibit and direct relationships between politicians, political parties, elected or appointed officials and media companies, that is, rules that prohibit them from acquiring or holding sole ownership or share of ownership in commercial broadcasting companies.

SUPPORT FOR DOMESTIC AUDIOVISUAL PRODUCTION

The media industry is a part of the cultural or creative industry. The abuses of the programmes for financing of domestic production of feature and documentary television programmes by the previous government - to serve the needs of the effort for identity-related and ideological reshaping of Macedonian society - should mean that we need to approach this issue with utmost care. On the other hand, it is clear that Macedonia, as a small linguistic and cultural community, including the non-majority groups, needs to take care to promote and stimulate the national creative industry that would otherwise struggle to survive because of its weak commercial potential.

While the bulk of such obligations certainly belong with the public broadcasting service in its role as the pillar of national cultural and creative industry, we could consider the role that commercial broadcasters need to play in the building and nurturing of domestic production. First of all, we should consider the question if, in addition to the obligation for broadcasting of the mandatory quota of European works that arises from the EU Audiovisual Media Services Directive, need to impose an obligation on the commercial broadcasters to air mandatory quotas of domestic feature and documentary works. If we find it necessary, then such quotas for domestic (and in-house) production should include other types of programmes (entertainment, variety programmes, talk shows, etc.), and we should certainly secure some form of subsidies for the broadcasters engaged in production in the form of a special fund, reduction of annual compensation for the broadcasting license, etc. In any case, we believe that the Agency for Film should extend its coverage and, in addition to production of cinematographic works, should provide assistance to all types of audiovisual production.

The audiovisual regulatory authority shall have to bear its share of responsibility in the area of broadcasting of such audiovisual production, that is, the various mandatory quotas for broadcasting of European and domestic audiovisual works that need to be met by Macedonian broadcasting companies. On the other hand, the regulatory body should be charged with a number of tasks and responsibilities if a special fund for media production is to be established - a media pluralism fund or fund for financing of public interest projects, which exist in many European states, including states in our immediate region³.

³ It has to be noted that the experiences with the former programme for financing of projects of public interest, introduced with the first Law on the Broadcasting Activity of 1997 and terminated with the 2nd Law on

The same applies to the obligation to air quotas of domestically produced music, an area in which the broadcasters are expected to practically subsidize the promotion of domestic music production.

PUBLIC BROADCASTING SERVICE

MDC has published several policy documents and reports on the work, status and positioning of the public broadcasting service. However, we should note that we need to continue to work on the issue of its financing, having in mind the fact that all of its obligations that arise from its remit, the international standards, the legal obligations, the task to inform, educate and entertain in many languages. All those obligations present the public broadcaster with serious financial demands and will require significant financial support which current proposals don't succeed covering, not by far.

Briefly, we will finally have to undertake the long postponed effort to subject the future of the public broadcasting service, its formats, programming services and obligations, as well as its financing, to a comprehensive public debate that will include all groups and actors in Macedonian society. Only such an approach will help us determine what kind of public broadcasting service we need, what are we to expect from it, how much it will cost and how to secure the necessary funding.

OTHER ISSUES

Another question raised repeatedly by the commercial media refers to advertising regulation, especially advertising of alcohol and alcoholic beverages that could represent a significant income generator for the broadcasters in their struggle for sustainability. The existing Macedonian legislation goes well beyond the obligations prescribed by the EU Audiovisual Media Services Directive and is far more restrictive. That approach means that, due to their more liberal policies for advertising of alcohol and alcoholic beverages, a significant share of advertising budgets that advertisers may otherwise decide to spend in Macedonia, are going to broadcasters from the region. We believe that this issue needs to be reconsidered, naturally, taking into account all healthcare and societal aspects that the issue touches on.

LAW ON MEDIA

As far as the Law on Media is concerned, there seems to be a pressing need to ensure some level of regulation of the internet. That need is well indicated by the decisions of courts that don't accept online media as proper media outlets and, consequently, in their view,

Broadcasting of 2005, were mostly negative because of numerous abuses, mainly by the users of the programme themselves.

journalists working in online news media are not proper journalists. At the start of 2015, MDC published a policy document on the regulation of online media, an issue that is only to gain importance with the growing domination of internet platforms as means of accessing news and information and all sorts of contents in general. That is already evident in the current era of post-truth and the role that internet domains play in spreading of misinformation, black propaganda and other aspects of what is called with the generic, if somewhat misleading name "fake news".

We may also consider the possibility, following the examples of Denmark or Austria, to engage in a more comprehensive review of the Law on media and its transformation into a law on media liability (such legislation exists in aforementioned countries) that gather in one piece of legislation the provisions that refer to the liability and responsibility of the media as commercial companies or CSOs, in the areas of right to reply and correction, as well as provisions from the defamation legislation that cover activities of media and media professional, but also the systems for self-regulation or co-regulation of professional standards of journalism and media reporting.

CONCLUSIONS

It is evident that the proposed changes to the media legislation, especially the Law on Audio and Audiovisual Media Services won't suffice to facilitate the process of reforms of media sector in Macedonia. It would be prudent to start the discussion of the future changes in the legislation, that absolutely need to follow, as soon as possible.

The approach adopted to the proposed changes to LAAVMS is largely inadequate to the proposed aims. The changes focused on the personal composition of the Council of AVMS and the Programming Council of MRT and the manner of appointment of their members. The future changes of the legislation will have to cover all aspects of functioning, institutional set-up, competences and authority of the two bodies, issues on which the capacity of those bodies to perform their duties and responsibilities will depend.

The Draft-Law touches on other aspects of audiovisual media services, focusing on certain issues related to financing of media, promotion of domestic musical and audiovisual production, etc. We believe that those issues needed to be left for the future rounds of review of legislation, and that each of them deserves to be subject to serious comprehensive public debate on all related matters.

One issue that needs due attention and proper public debate, with highest levels of inclusion of all segments of Macedonian society, is the public broadcasting service, that is, the mapping of needs and expectations of the citizens, international standards and legal obligations arising from its remit, so that we can determine what kind of public broadcasting services we need and which programming services and contents it has to provide and offer. Only then we may be able to do the math about its costs and how to secure the necessary funds.

The future reforms will also need for us to make a decision - related to the question of competences and authority of the regulatory body, which aspects shall be regulated in a primary legislation, and which will be left to the regulatory body, the policies it shall adopt and transform into proper secondary legislation.

All of the above, in addition to ensuring that we shall have free, democratic and pluralist media system, will have to prepare us for the entry into the common European market, primarily in the audiovisual media services, but also in other areas of the media sector.

PUBLIC DISCUSSION

The preparation of the document included a public discussion with the interested stakeholders, held on June 25, 2018 at the "Best Western Tourist" Hotel in Skopje. MDC invited representatives of all stake-holders - the media, CSOs working in the field of media, professional associations, international organisations present in Macedonia and representatives of the decision-makers, the two Government bodies that have competences in the area of media, to present their views and positions on the points presented in the draft-document.

The participants in the discussion presented a series of remarks on the process of media reforms so far, including the changes to the existing legislation, that is the proposed changes to the LAAVMS that are now stuck in debate on proposed amendments in the competent Parliamentary committee.

For most of them, the main objection refers to postponements and prolongation of the whole process and the absence of any real changes compared to the period between the 1st and the 2nd Priebe Report. They did note - a position that MDC supports - that the current proposal for changes to the legislation was created in a specific historical moments and its primary goal was to limit the power for abuses of the media of the previous government in the context of the early parliamentary elections that were then scheduled for April 2016.

Therefore, they noted the difference between urgent interventions and systemic reforms and, in that context, the importance of a general media strategy that needs to be prepared and adopted in an inclusive process, and will serve as basis for all future interventions and the systemic reforms in the media sector in general. The accent was placed on the fact that the legislative reforms can't cover only LAAVMS, having in mind that a number of laws hold provisions that cover various aspects of functioning of the media. They added the general impression that the debate on the systemic reforms mainly takes place in the civil sector.

The participants noted the focus of the proposed changes to the legislation on the regulatory body. They agree that the efforts should be limited to its composition and manner of appointment of the members of AVMS Council, but we should undertake a review of its duties, obligations and competences. Several participants noted that those competences have to include both the commercial audiovisual sector and the area of public service broadcasting.

Discussing the regulatory body, the participants presented the view that special attention needs to be paid to the interactions and coordination of activities between the regulator and other public and state institutions, especially in the area of strategic planning and implementation of resulting strategic documents.

According to the participants, the idea for a moratorium on allocation of new broadcasting licenses is fine, but it necessarily has to be accompanied by parallel work on policies that will set the necessary criteria and measures that will provide the instruments for their implementation.

Several participants were interested in the provisions on prohibited media concentration. In their view, the current provisions – copied from the previous 2005 Broadcasting Law - are not adequate to the contemporary situation and pose serious impediment to the consolidation of the broadcasting market and, indeed, to the interest for any serious investment in the broadcasting sector, domestic and foreign likewise. The opinion prevails that the review of those provisions will have to include increased responsibilities for media owners. The general conclusion, however, was that those provisions need to be liberalized, both in terms of vertical integration and in terms of ownership of media across sectors - that is, simultaneous ownership of broadcasting company and a daily newspaper, for example.

Several participants were more interested in the Law on Media than in LAAVMS. Internet is in the focus of their interest, that is, the issue of regulation of certain aspects of functioning of online media. A comment was voiced that the existing positions of the Association of Journalists of Macedonia and some foreign actors, such as OSCE, are too rigid⁴.

They mentioned the new trends to talk not of "registration", but of "notification" of the online media with a body that will ultimately be charged to keep the proper registries.

Finally, the majority of the participants in the discussion agreed that the future reforms of the media legislation will have to include a more intensive debate, both on expert level and on the level of the general public, on each of the issues that need to be considered, to ensure that Macedonia will get a democratic, open, pluralist and sustainable media system.

⁴ The rigidity of those positions and the refusal to enter the online media in the existing system of regulation that covers the print media is due, partially, to the tendency to interpret any mention of the word "regulation" as an assumed effort to legislate issues related to professional standards of journalism or standards of media reporting. To the contrary, all past initiatives in that area dealt with issues related to the functioning of legal entities (registered as either commercial companies or as CSOs), and some obligations related to regular reporting of their financial results and operations to the public and transparency of ownership. In that context, it doesn't help that the proponents of the idea for regulation of obligation to declare ownership and editorial structures of online media usually argument their position with the need of the citizens to "know who was responsible and who they can hold legally liable and sue in court" in cases of violations of some of their rights.