**AGENCY’S OPINION ON THE OCTOBER 2017 DRAFT LAW ON AMENDING AND SUPPLEMENTING**

**THE LAW ON AUDIO AND AUDIOVISUAL MEDIA SERVICES**

The Draft Law on Amending and Supplementing the Law on Audio and Audiovisual Media Services does not warrant improvement of the situation in the media sphere. In its Stances and Opinions publicly announced in July this year, the Agency underlined that, in order to make true reforms in this sphere, one should place the focus on increasing media professionalism; improving the conditions for performing this business activity; fortifying labour and professional rights of the journalists and other media workers, as well as their dignity, safety and security, and on strengthening media self-regulation.

Instead of the above, what remains in the focus of the amendments proposed are staff changes within the regulatory authority and the public broadcasting service. The current law specifies accurately the rules for guaranteeing professional integrity, independence from political and economic pressure, conflict of interests and responsibility for one’s work. Hence, the practice of changing the composition of the regulatory authority when amending the law should be discontinued. If the managers have adopted any harmful decisions, i.e. acted contrary to the positive legal regulations, they should be called to responsibility, and not be “absolved” by terminating their mandates.

Regardless of the fact that the amendments propose an increase in the amount of finances allocated to the broadcasting activity, we still consider that this jeopardizes the Agency’s independence, particularly because the amount (which varies depending on the State Budget) and the way in which the funds shall be paid may be used as an attempt to possibly exert political influence.

This Draft, too, manifests a tendency to discredit the Agency’s work and depict it as unprofessional, and is based on false claims. The Agency is accused of failing to act upon issues over which it either has no legal competence whatsoever (e.g. government advertising), or is not given any mechanisms to do so (political pluralism, hate speech).

In principle, we are protesting because of the standpoint expressed in the first part of the Draft Law’s Introduction, which gives an appraisal of the situation and, in this, claims that “the Agency for the Media is merely a silent witness” of the absence of political pluralism in the media and of the hate speech. On the contrary, the Agency is the only institution that has been dealing with these issues in the past years. Proof of this can be found in the *2013-2017 Strategy for the Development of Broadcasting Activity in the Republic of Macedonia* and in the *Guidelines for Monitoring Hate Speech* (which the Agency Council adopted in December 2014), as well as the series of trainings, workshops and supervisions conducted both concerning political pluralism (especially during electoral processes) and respect for the professional standards, and concerning the appearance of discrimination and hate speech among the broadcasters. Then, there are our written requests to the Public Prosecution and the Commission for Protection against Discrimination, in an attempt to obtain their reaction and appropriate sanctioning (in the cases where violations were detected), considering the fact that the 2014 Law on Audio and Audiovisual Media Services no longer included the previously existing punitive measure against discrimination and stirring of hatred. After all, these facts have all been clearly acknowledged in the publication titled “Media Regulatory Authorities and Hate Speech”, prepared as part of the project titled “Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe” (JUFREX), which the Council of Europe published in July 2017. In it, the national regulatory authorities pointed out, as part of the recommendations, that “in particular, when determining the potential cases of hate speech, it is advisable to consider all possible angles of the case, as has been shown with the examples of Macedonian cases” (*Media Regulatory Authorities and Hate Speech*, p. 88).

In addition, as regards amendments to Article 6 and Article 8, Paragraph 1, relating to the transfer of the jurisdiction to impose measures from the Director onto the Council – regardless of whether this jurisdiction will be transferred onto the Council or will remain with the Director – it is necessary to react against the way in which the need for such a change has been explained in the Rationale of the proposed amendments, i.e. against the position that this is being done in order to “avoid possible abuse of the discretionary right on the part of the Director, should he/she continue to impose them,” and in order to “overcome the current deviations and inappropriate conditions in this sphere”. First of all, there is no discretionary right of the Director in this case, as the decisions on imposing measures are not made based on the Director’s personal conviction. This also means that the Council will not be able to impose measures based on its own conviction, either. Measures are imposed on the basis of a supervision report or some other type of document prepared by the Professional Service, envisaged by the Law. As regards regular programme and administrative supervision, there are annual supervision plans, devised in advance, adopted by the Council and publicly known, which are based on publicly announced bylaws, in accord with the relevant ISO procedures and following publicly known methodologies. Or, these can be measures arising from obligations (and deadlines) prescribed directly in the Law on Audio and Audiovisual Media Services (LAAAVMS) or the Law on Media, or the Electoral Code or some other law. Moreover, practice shows that the Director has not abused this right; on the contrary, the Agency is more efficient in imposing the measures. On the other hand, it can be seen (most simply from the work reports of the Agency, i.e. the former Broadcasting Council) that, at the time when it was the Council that used to impose the measures, there was less efficiency, as, it often took more time to impose the measures and situations used to occur where different measures were imposed against different media for the same type of violation and under the same conditions (for instance, the same number of previously imposed measures for that violation). In addition, should the Director abuse this or any other of his/her competences, they are accountable in line with the law and will bear responsibility, i.e. may be replaced. The same applies to the members of the Council.

1. With regard to the proposed amendments concerning the **measures in case of violation of the provisions**, it is necessary to supplement Article 9, which proposes amendment to Article 23, Paragraph 1, Indent 2, so as to prescribe the time span within which it shall be established if the entity has continued to commit the same infringement that provoked the imposing of the public warning. For instance, will it be in the course of one year (12 months) from the day the public warning was imposed? Or in the course of one calendar year, or, alternatively, within a shorter period of time? In this context, it is advisable to define Article 23, Paragraph 1, Indent 2, more precisely, so as to define clearly if the initiation of a misdemeanor procedure following a previously imposed public warning completes the process of imposing a measure for that particular violation, as this will eliminate the dilemma, i.e. specify clearly, if each subsequent violation of the same kind in the course of the period we propose to be defined (one calendar year or 12 months) would mean initiating a new misdemeanor procedure?
2. The amendments proposed concerning **expert supervision over broadcasters,** or,more precisely, Article 10, envisage that Article 30, Paragraph (1), shall be amended in such a way that professional supervision over broadcasters is performed on the part of persons employed in the professional service of the Agency, only for the purpose of verifying if the technical and programming conditions have been met, as stated in the broadcasters’ applications to be granted television broadcasting licenses. We wish to stress hereby that fulfillment of the programming conditions cannot be the subject of expert supervision, but only of programming supervision, and that this Article should be supplemented by the following phrase: “… *and in accord with the application to participate in the public competition*”.
3. We welcome the amendment proposed in Article 11 of the Draft Law, which increases the number of **prohibited grounds for discrimination in Article 48 of the Law**. In this, we would like to note that the grounds should also include “sexual orientation and gender identity,” i.e. that the way of formulating the list should be harmonized with that of the Draft Law on Preventing and Protection from Discrimination, which is currently being prepared. We also welcome the reinstatement of the fine for disregarding the specific prohibitions (Article 40, on amending Article 147).
4. Article 12 amends Article 61 of the LAAAVMS, so that broadcasters “shall be obligated” to obey the **principles (i.e. professional standards)**, while Article 38 introduces a fine for disregarding this Article. In respect of this issue, the Agency already presented its opinion to the public on the occasion of the policy paper of the Media Development Centre, *Professional Standards Between Regulation and Self-regulation.* Below*,* we are conveying the key points:

One has to bear in mind that professional standards are an object of self-regulation and it should stay this way, because it is the representatives of this profession that should decide about the observance of journalistic principles. In this context, it is not the position of the regulatory body that should be strengthened, but of the self-regulatory mechanisms.

Media professionals should develop the need for ethical and professional journalistic standards independently and observe the latter out of their own free will, instead of these being imposed on them by means of law. In our situation, perhaps one should consider solutions that are not unknown to practice. For instance, in Belgium, apart from the mechanisms motivating acceptance and the membership in self-regulatory instruments, the law prescribes as an obligation for every commercial broadcaster airing information programme that:

* These programmes should be produced by professional journalists;
* The broadcasters should establish rules for objective treatment of information and undertake to observe the same, and
* Membership in the self-regulatory body on journalistic ethics is obligatory.

This would also influence the increase in responsibility among broadcasters and the strengthening of the self-regulatory body’s legitimacy.

It is also necessary to work on creating optimal conditions for functioning of the self-regulatory mechanisms, starting out from increasing their legitimacy, i.e. their acceptance by the majority of media outlets, through strengthening the autonomy in the work of their members that finance them; providing adequate financial conditions to perform all of their functions; reducing the pressures due to dissatisfaction with their decisions, up to strengthening their sanctioning capacity. The tie between self-regulation and regulation may be achieved, possibly, by specifying the competences of the regulatory body to act in cases where self-regulation would not be successful, e.g. when a broadcaster repeatedly fails to observe the professional standards and measures imposed by the self-regulatory body. In this, the regulator would not look at the cases, but would act only upon the self-regulator’s request, based on the latter’s opinion.

As part of the public debate on self-regulation, also discussed was the idea that media should be adopting and publishing their own codes or conduct or announce which code they will be abiding by. The Agency considers this as a good idea, particularly in terms of the need that media outlets should reconsider their own editorial independence and policies and upgrade (in certain cases even institute) their professional editorial culture.

1. As regards the proposed provisions concerning the **granting of licenses without publishing a public competition,** i.e. Article 13, which envisages that, in Article 76, Paragraph (1) should be followed by two new Paras, (2) and (3), we deem it unclear as to whom of all the interested parties that will have submitted their applications to obtain a license – after the Agency has notified them of this possibility – the license shall be granted. Should it be to the bidder who has stated the best conditions or to all those who have submitted applications, as Paragraph (7) of this Article stipulates the following: “The Agency shall adopt a decision on granting the license mentioned in Para (1) of this Article within three months from the day the application, duly filled-in, was received, should it establish that the applicant meets the conditions and obligations specified by this law and the regulations adopted thereof, and if the applicant has not had its television or radio broadcasting license withdrawn in the past five years”. Further on, if the license should be granted to the applicant who has offered the best conditions, then there is no difference between this and the procedure for granting a license via a competition.

If licenses should be granted to all those meeting the conditions, then the preparation of an analysis is pointless and there is no difference whatsoever between the proposed and the existing solution. And, finally, should the analysis show that there is no justification to grant a license, which article shall be taken as the grounds for not granting the license, when the applicant meets the conditions?

1. Article 15, which refers to Article 92 of the existing Law (**the quotas for originally made programme, music and the production of domestic documentary and feature programme),** eliminates the obligation to air music for all broadcasters, as well as the obligation for the terrestrial televisions to produce domestic documentary and feature programme on an annual basis, while the formulation offered regarding the obligation to air originally made programme is unclear.

As we have declared before, protection of cultural identity is an important goal of media policy and regulation, and is particularly important for countries with small production capacities and languages spoken at geographically limited areas. However, quotas should be changed in a way that this would not jeopardize editorial freedom and would not constitute an excessive burden for the broadcasters. In addition, a new way should be found to stimulate domestic production.

Deleting the obligation regarding music cannot be justified with the explanation that “the current situation on the market in this sphere marks a declining trend, i.e. the obligation imposed so far cannot be met.” If a ‘declining trend’ means that there is not enough domestic music, then the explanation is actually a counter-argument, i.e. it indicates a necessity to retain this measure, as the latter would stimulate and protect the production of music in the Republic of Macedonia.

This is an argument in favour of:

* reducing the obligation to air domestic music for the radio stations within feasible limits, which the Agency has been striving for (according to the existing solution, 40% on a daily basis is about 8 hours daily if the per cent is calculated on the basis of 20 hours of aired music daily – the remaining four hours go to talk contents and advertising);
* abolishing the obligation for the television programming services to air music, as this constitutes interference in their editorial independence, i.e. the obligation should refer only to the days in which the television stations decide to air music themselves, and
* removing the provisions requiring presence of folk and pop music, as they are discriminatory and discourage the production of other genres of music.

As regards the solution offered concerning originally created programme, it would be clearer if the following formulation were used:

*“Broadcasters and the Public Broadcasting Service are obligated to daily air at least 30 % and 40 % of originally created programme, respectively, by authors from the Republic of Macedonia, in the Macedonian language and/or the languages of the non-majority ethnic communities. The obligation is met in the language/s in which the particular programming services are aired.”*

1. As regards Article 28, which removes Article 103 of the existing Law that sets the advertising limits for the Public Broadcasting Service (MRT), it is not clear if this envisages abolishment of **advertising on the MRT’s programming services**, particularly if one bears in mind that Article 29, amending Article 105 of the LAAVMS, will retain the reference that the Public Broadcaster is also financed by audio and audiovisual commercial communications? Commercial communications include advertising, teleshopping, sponsorship and product placement. The Agency considers that, realistically, there are no arguments in favour of restricting the Public Broadcaster’s advertising opportunities.
2. In addition, Article 27 of the Draft Law deletes Article 102 of the existing Law, the Rationale of the Draft Law being that this shall eliminate the possibility for **advertising on the part of the state authorities**, i.e. the possibility that the Government be the dominant advertiser in the media, which in turn eliminates the possibility for influencing their editorial policy.

Deleting this Article from the Law is fine, because its place is not in the Law on Audio and Audiovisual Media Services and it does not concern the media at all, but explains to the state authorities, state administration bodies, public enterprises, local governance units, ………… that they should utilize their projected funds for informing the public in a non-discriminatory manner, through a procedure laid down in the Law on Public Procurements.

Deleting Article 102 without additional interventions within the Law does not abolish advertising by the state authorities.

Namely, now, the Law establishes two key reasons for which audio or audiovisual commercial communications have been created (Article 3, Paragraph 1, Point 5, of the LAAVMS):

1. Direct and indirect promotion of products, services or the image of the physical or legal entities performing economic activity, or
2. Popularization of an idea or activity or for achieving a certain other effect.

According to the definition of the term ‘advertising’ - one of the forms of commercial communications (Article 3, Paragraph, Point 19, of the LAAVMS) – political advertising, just as advertising of the public institutions, is defined as a form of announcement, aired, i.e. published for money or some other type of compensation, or for self-promotional purposes by a physical or legal entity with the aim of popularizing a certain idea or activity or for achieving some other effect. This type of advertising, as well as advertising of the persons that perform economic activities, should be in accordance with the principles established by the Law and be aired within the frameworks of the permitted limits for advertising – 12 minutes with the commercial media outlets and 8 minutes in the case of the Public Broadcasting Service, per each real hour.

The formulation “popularizing a certain idea or activity or for achieving some other effect,” refers to all entities – both the public institutions and the political parties, and the civic sector…

If the effort is to abolish advertising by the state authorities, then this issue should be regulated as in the case of the Public Broadcasting Service, in Article 53, Para 12, of the existing Law (“*The Public Broadcasting Service is not permitted to air audio and audiovisual commercial communications by political parties, coalitions and their representatives, independent candidates and holders of political office)*, by means of a special paragraph in the indicated provisions or by means of a new provision, so as to specify the entities that are not permitted to advertise (for instance, the Government, the local governance units, the public enterprises, etc.).

1. Along with the amendment proposed in Article 37 of the Draft Law amending Article 143, Paragraph 3, which states that “**should programming services that are retransmitted via public electronic communication networks be subtitled in a language different from the language in which they have been made originally,** they must be subtitled in the Macedonian language, except for teleshopping and the commercials,” also valid remains Paragraph 2 of Article 64 of the existing Law, according to which subtitling may be in Macedonian or in the language of the community that does not constitute a majority but is spoken by at least 20 % of the citizens in the Republic of Macedonia. **With this, two contradictory provisions will be in force.**
2. The proposals to amend and supplement the LAAVMS do not cover **Chapter 4 – Protection of Pluralism and Diversity of the Audio and Audiovisual Media Services** of the existing Law. Based on the LAAAVMS’s implementation so far, it has been realized that it is necessary to improve these provisions, which refer to the restrictions on obtaining ownership and preventing illicit media concentration, so as to make sure that they are clear and unambiguous, and avoid the possibility of these being interpreted differently.
3. Indent 16 of the first paragraph of Article 6 of the LAAVMS, and the entire second paragraph, should be deleted, as **measuring the viewership and listenership of the programmes**, i.e. broadcasters’ programming services, should not be under the competence of the regulatory authority.