IV MONITORING OF THE WORK OF REGULATORY BODIES, STATE AUTHORITIES AND COLLECTIVE ORGANIZATIONS FOR THE PROTECTION OF COPYRIGHT AND RELATED RIGHTS

REGULATORY BODIES

1. Republic Broadcasting Agency (RBA)

We have elaborated on the activities of the RBA in the section of this Report concerning the implementation of the Broadcasting Law.

2. Republic Agency for Electronic Communications (RATEL)

In June 2013, RATEL continued its activities aimed at suppressing unauthorized TV and radio program broadcasting. RATEL said that in the last two years, in cooperation with the Department for Combating High-Tech Crime of Serbia's Interior Ministry, six illegal radio stations were closed down. Furthermore, RATEL continued to publicly release the lists of the remaining pirate TV and radio stations that illegally broadcast their programming. However, a particular concern is the fact that the number of illegal broadcasters has not changed in the last couple of years, in spite of the efforts of regulatory agencies and the competent state authorities. An example is one of the most notorious pirate stations, Radio Raka Esinger from Lazarevac, which was closed down twice – on March 14 and on May 14. The fact that the authorities had to close down the same station twice in a two-month period is evidence of the lack of deterrent effect of that measure for the pirates: Radio Raka Esinger merely changed its premises and continued to operate illegally. Radio Balkan is also a case in point, due to the fact it has been broadcasting for years at the national level, from multiple locations. Pirates do not even refrain from illegally taking over frequencies, despite not having any program at all. Hence, Radio Balkan is merely rebroadcasting the program of Radio Fokus from as much of 13 locations throughout Serbia. RATEL's lists of pirates also include an increasing number of TV stations. On the list released on June 4, there were four of them, including a number of stations that had continued broadcasting after their licenses were removed, thus becoming pirates.

A related question is what to do in order to combat piracy more effectively. First of all, it seems that the capacity or regulatory bodies must be strengthened by entrusting them with inspection powers. The aim is to regroup all the anti-piracy activities in one hub, so as to bring about greater effectiveness. We remind that, according to the current regulatory framework, two regulatory agencies and one inspectorate hold powers in relation to pirate RTV program broadcasting. Essentially, the procedure is that the RBA first establishes which broadcasters are operating without a license; RATEL goes on with establishing the locations and the frequencies used for broadcasting, after which the Inspectorate of Electronic Communications (part of the competent Ministry of Foreign and Domestic Trade and Telecommunications) acts, as the only body empowered to take the proper measures. In an ideal scenario, this system could work. However, the aforementioned Inspectorate lacks the funds and the manpower to work. Therefore, inspection powers could be transferred to regulatory bodies, the precondition being to amend the Law on Electronic Communications and the Law on State Administration. Such a concept would also be compliant with the European Electronic Communications Regulatory Framework from 2009, whose effectiveness is evidenced by the success achieved in some regional countries, such as Slovenia and Croatia. Moreover, criminal liability should be provided in the law for unauthorized TV and radio broadcasting by natural persons and misdemeanor responsibility for legal entities. Amendments to the Advertising Law should also provide for penalties against advertisers using the airwaves of illegal broadcasters. Finally, the judiciary should be streamlined, in order to avoid pirates benefiting from the statute of limitations due to foot-dragging by the courts. The enforcement of all these measures combined could yield success. The alternative is to wait for the digital switchover, which could technically stifle analog pirates, in a situation where the legal system has failed to produce the same result. However, since the digital switchover in radio is not even being considered, it is obvious that the second, “alternative” solution, would hardly resolve anything in the foreseeable future.

STATE AUTHORITIES

3. Commissioner for Information of Public Importance and Personal Data Protection

3.1. The Commissioner for Information of Public Importance and Personal Data Protection issued a press release saying that the European Court of Human Rights (ECHR) had passed a verdict on June 25, determining that the Republic of Serbia had breached Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF) in the context of access to information of public importance. The verdict was passed in relation to the petition submitted by the Youth Initiative for Human Rights (YIHR). In October 2005, the YIHR requested from the Security Intelligence Agency (BIA), to provide information in accordance with the Law on Free Access to Information of Public Importance about the number

of persons the communications of which had been intercepted during the course of that year. BIA had denied the request, invoking Article 9, paragraph 5 of the Law, stipulating that access to information could be denied. In December 2005, the Commissioner passed a decision ordering the Agency to fulfill the request. BIA ignored that order, while the Government failed to pass a measure forcing the Agency to bow down to the Commissioner's order. In September 2008, BIA informed the YIHR that the requested information was not in its possession. The case before the ECHR was initiated in 2006. The Court unanimously determined that it was a case of violation of Article 10 of the ECHRFF, finding that the freedom of receiving information also involved the right to access to information. The Court's opinion was that the YIHR had been engaged in legitimate gathering of information of public interest, with the aim of communicating it to the public and thereby contributing to the public debate. The Court ruled that freedom of expression was interfered with. Although freedom of expression could indeed be restricted, the Court found that such restrictions ought to be in accordance with national legislation. Denying the right to free access to information of public importance by BIA was not, however, in line with the national legislation of Serbia. Regarding BIA's claim from 2008 that the requested information was not in the Agency's possession, the Court branded it "unconvincing, bearing in mind the nature of the information requested", but also BIA's initial response, where the Agency had first invoked grounds for restricting access to information of public importance. The Court concluded that the "stubborn refusal by BIA to proceed in accordance with the order issued by the Commissioner for Information of Public Importance and Personal Data Protection" was arbitrary and in contravention of the Serbian Law and hence in contravention of Article 10 of the ECPHRFF.

The significance of the above verdict is substantial, since it demonstrates that the ECHR creates case law according to which access to information of public importance is a constitutive part of the right to freedom of expression. This is the third verdict in a relatively short time span (after the verdicts in the cases Hungarian Civil Liberties Union v. Hungary and Kennedy against Hungary), where the ECHR has found that the public has the justified interest to learn about information held by a state authority; furthermore, the obstacles set in order to obstruct receiving such information may discourage those working in the media or generic fields in performing their vital function of "public watchdogs" and hence affect their capacity to provide accurate and reliable information and so, these obstacles should be removed. Meanwhile, an encouraging fact is that the verdict has justified the practice of the Commissioner, who found, back in 2005, that information about the numbers of eavesdropped persons at the annual level should not be confidential. Perhaps the most striking and forward-looking was the opinion of two judges of the ECHR, András Sajó from Hungary and Nebojsa Vucinic from Montenegro, who have noted that, in the Internet era, the difference between journalists and other members of the public, has faded and that there can be "no democracy without transparency, which should serve the benefit of all citizens".

3.2. Acting in the proceedings for determining the constitutionality of the provisions of the Law on Electronic Communications, initiated in 2010 right after the adoption of that Law by the Ombudsman and the Commissioner for Information of Public Importance and Personal Data Protection, the Constitutional Court declared unconstitutional the provisions concerning access to so-called information withheld without a court decision, as well as to those pertaining to the powers of the competent ministry to enact a bylaw aiming at regulating more closely the requests for such information. On the same grounds – the guarantee of the confidentiality of letters and inviolability of other means of communication referred to in Article 41 of the Constitution of the Republic of Serbia – the Constitutional Court also challenged the relevant provisions of the Law on the Military Security Agency and the Military Intelligence Agency, the Law on Security Intelligence Agency and the Code of Criminal Proceedings. Withheld information is information about communications that does not concern the content of communications, but is relevant to the type thereof, its source, destination, start, duration and end, communication devices and the location thereof. The disputed provisions of the Law on Electronic Communications have violated the guarantees provided for in Article 41 of the Constitution of the Republic of Serbia, saying that divergence from the inviolability of the confidentiality of letters and other means of communication shall be possible only for a certain period of time and on the basis of a court order, if necessary for conducting criminal proceedings or protecting the security of the Republic of Serbia, in accordance with the Law. In June 2012, the Constitutional Court declared unconstitutional the provisions of the Law on the Military Security Agency and the Military Intelligence Agency, under which access to withheld information was possible in certain cases, with the order of the Director of the Agency or a person authorized by him. It should be noted that the Constitutional Court is yet to declare itself about the constitutionality of the aforementioned two laws, but it is fair to expect it to declare certain provisions unconstitutional. Namely, under the Criminal Proceedings Code, access to telephone call records (listings), access to data about the base stations use or locating the site where communication takes place from, shall be made on the basis of a public prosecutor order and not that of the court. Meanwhile, the Law on the Security Intelligence Agency provides for the possibility to access withheld information on the basis of a decision of the Director of that Agency, with prior consent of the President of the Supreme Court of Cassation, without a detailed procedure provided for such a situation.

The decision of the Constitutional Court to declare unconstitutional the provisions of the Law on Electronic Communications (which allowed access to so-called withheld information without a court decision and authorized the competent ministry to regulate more closely, by a bylaw, the requests for such access) is particularly important because, as indicated in the comment posted on the website of the Commissioner for Information of Public Importance and Personal Data

Protection, it raises up questions concerning the relationship between the Constitution and international regulations, more specifically the Universal Declaration on Human Rights, the International Treaty on Civil and Political Rights and the ECPHRFF. The Constitutional Court has concluded that, as far as the protection of the confidentiality of letters and means of communication is concerned, the Serbian Constitution "ensures higher inviolability standards than those provided for by international acts". Hence, "if in certain cases the state has already provided for guarantees higher than international standards, it has the obligation to enforce these standards", the Commissioner said in his comment.

Although these decisions pertain primarily to the protection of the right to privacy, namely the confidentiality of communications as a component of the said right, they also have implications on the right to freedom of expression, since the contested provisions have threatened not only the privacy of citizens, but also the confidentiality of journalist sources.

4. The Ministry of Culture and Media

In June, the Ministry of Culture and Media allocated the funds for the co-financing of projects/programs from the field of public information for 2013. This year, a total of 28.146.774 dinars were allocated for 118 media projects, which is almost 20% less than last year's 34 million dinars for 83 projects. The Ministry received 248 applications, of which 130 were denied. The Minister of Culture and Media has passed decisions on the allocation of funds under the Law on State Administration and the Law on Public Information, on the basis of the motivated proposal of the Commission he has established himself, as well as on the basis of direct insight in the projects. From the formulation stating that the Minister has, in addition to the proposal by the Commission, made the decision on the basis of "his own insight in the projects", it stems that the Commission's proposal was not entirely respected. The reasons behind the Minister's "own insight in the projects" remain unclear. Whatever the case may be, the competitions the Ministry of Culture and Media calls on regular basis are probably the least disputed way in which the state (according to the currently applicable regulations) finances the media. Direct budget financing, circumventing open competitions and competition commissions, under different rules for different levels of government, is actually always arbitrary, insufficiently transparent and far more problematic. It has been under sharp criticism for years back, especially in view of the effects on the market and the violations of regulations on the control of state aid. The drafts of new media laws that are expected to be adopted regulate this practice in a completely new way. If the media reforms are not stopped, it is to be expected that the first competition to be called by the Ministry for the co-financing of media projects, will be implemented under brand new rules, which will be laid down by the new Law on Public Information and Media.