

## **B. SERBIAN MEDIA SCENE IN MAY 2014**

### **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)**

In the period covered by this Report, the RBA Council was very active, especially during the state of emergency caused by the floods, as well as during the national mourning days declared by the Government of the Republic of Serbia on May 21-23.

1.1. The RBA Council passed a decision in May, recommending the Government to repeal the broadcasting fees for broadcasters from flooded areas, in accordance with Article 66 of the Broadcasting Law. At the same time, the RBA called RATEL and collective organizations for the protection of copyright and related rights to do the same and relieve these broadcasters from paying the fee for the broadcasting station, namely of the fees for exploiting the object of protection from the repertoire of collective organizations. This initiative is undoubtedly commendable, since the broadcasting infrastructure and offices of many broadcasters were destroyed in the floods, while the local media were very active in reporting about the situation in the flooded areas, including 24h coverage about the floods. Nonetheless, no list of such stations was made public by the time this Report was released and the criteria used for relieving them from paying taxes remain unknown. The geographic location in the flooded areas is certainly a crucial criterion, but must not be the only one. Namely, many local stations, although not directly affected by the floods, have sent their crews and reported from the field in neighboring local communities and the RBA Council should take into account that fact and provide to such broadcasters at least some relief related to the payment of the fee.

1.2. On national mourning day for the victims of the floods, in accordance with the Law on Observing National Mourning Day on the Territory of Serbia, the RBA Council informed

broadcasting stations on the ways they should operate for the duration of the mourning day. RBA's notice concerned the obligation to refrain from airing humoristic, folk and other entertainment programs, including films and series (excluding documentary ones), as well as to adjust the overall programming on these days. The notification said the RBA was authorized, under the abovementioned Law, to monitor the broadcasters during the observance of national mourning day, as well as that the Agency would not pass separate, individual decisions. Such public notification served as an excuse to cable operators to exclude almost all foreign channels from their offer during the days of mourning, whereas the decision which foreign channel was or wasn't appropriate was at the discretion of the operator. Such decision by the cable operators caused an uproar among professionals, social network users and independent institutions (the Commissioner), since it was completely unlawful and constituted (regardless of the intention) an attempt of private censorship. Soon after the temporary switch-off of foreign channels from the program of cable operators, the RBA Council reacted, issuing a press release (after an extraordinary session) saying "it had not passed any decision restricting or recommending cable operators in Serbia to exclude channels aired from abroad", as well as that it "understands and respects the decision of most cable operators, probably made under the personal sense of collective grief and not under the Law." Unfortunately, with its "diplomatic" press release, the RBA Council stopped short of condemning an act that may be qualified as unlawful denial of the right to information and yet another attack on the right to freedom of expression.

The Constitution of the Republic of Serbia guarantees freedom of opinion and expression, as well as freedom to request, receive and communicate information and idea by the means of speech, writing, pictures or in other ways. Such freedom of expression may be lawfully restricted, the Constitution says, if necessary for the purpose of protecting the rights and reputation of others, preserving the authority and impartiality of courts of law and protecting public health, morality in a democratic society and the national security of the Republic of Serbia (Article 46). The Constitution also says that there must be no censorship in the Republic of Serbia, while the competent court of law may prevent the dissemination of information and ideas by the means of public media only if such a measure is necessary in order to thwarting calls for violent subversion of the constitutional order, warmongering or inciting to violence or promoting racial, ethnic or religious hatred stirring up discrimination, hostility or violence (Article 50, paragraph 3). Under Article 2 of the Law on Public Information, public information may not be subject to censorship and "it is prohibited to directly or indirectly restrict freedom of public information, especially by abusing government or private authority, by misusing rights, influence or control over means of printing or distribution of public media or broadcasting equipment and radio frequencies, or in any way suitable to hamper the free circulation of ideas, information and opinions". Article 149 of the Criminal Code of the Republic of Serbia provides for the criminal

offense of Preventing the Printing and Dissemination of Print Items and Broadcasting, which, among other things, concerns the unauthorized hampering or obstruction of radio and television broadcasting. In addition, the Law on the Ratification of the Convention of Crossborder Television prescribes that the signatory states must ensure freedom of expression and information in accordance with Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as to guarantee freedom of reception, namely that they will not, on their respective territories, restrict the rebroadcasting of programming services that are in line with the provisions of that Convention (Article 4).

In order to lawfully restrict freedom of expression, there must be legal grounds for it. Adjusting the programming schedule to the requirements of national mourning day is provided for by the Law on the Observance of National Mourning Day on the Territory of the Republic of Serbia, Article 6, paragraph 1 of which says that “broadcasting organizations for informing the public on the territory of the Republic of Serbia shall be obligated to do the following in their programs, including programming for abroad, on national mourning day: air the decision on declaring the national mourning day and the program for marking the same, which decision is adopted by the competent authority of the Republic of Serbia or a body appointed by that authority; inform the public about remembrance events organized on national mourning day by the competent authorities of the Republic of Serbia or bodies appointed by such authorities; instead of humoristic, folk and other entertainment programs including popular and folk music, they will air music and programs more appropriate for the day of mourning; they will adjust a detailed programming schedule during the day of mourning”. Such restriction is in line with the Constitution, since it is prescribed by the Law and serves a legitimate purpose, in the concrete case to pay respects to the victims of a calamity. In addition, this case didn’t involve a total switch-off of the channels, but merely adjusting the programming schedule. Moreover, that obligation may, under the law and in the given context, apply only to television and radio broadcasters. Cable operators are electronic communication operators that constitute, in accordance with Article 4, subparagraphs 10) and 30) of the Law on Electronic Communications, persons performing or are authorized to perform the activity of electronic communications, which involves the provision of services by the means of electronic communication. The latter involves “entirely or predominantly the transfer of signal through electronic communication networks”, including “the services of distribution and broadcasting of media content, but not the services of provision of media content or exercising editorial control of media content transferred through electronic communication networks and services”. It is clear that the broadcasters have illegitimately assumed the role of editors, although their only obligation is to enable unhindered transfer of data without any influence on the content thereof. With their actions (which they justified by invoking the decision of the RBA), the cable operators have

temporarily engaged in private censorship and violated the constitutionally guaranteed right to free reception of information. Such an act also constitutes the provisions of at least two laws and one convention and there are also grounds for criminal responsibility. Unfortunately, the only authority that reacted decisively and on time was the Commissioner for Information of Public Importance and Personal Data Protection, who called the cable operators to restore the switched-off channels. The competent ministry stopped short of condemning this attempt of private censorship, while the RBA missed the opportunity, with its lukewarm press release, to send a clear message to the operators that such behavior is intolerable. There was no reaction from the public prosecutor either, in spite of his swift reactions in other cases of alleged abuse of the right to freedom of expression.

## STATE BODIES

### 2. The Parliament of the Republic of Serbia

On Thursday, May 29, the parliamentary committees for finance, budget and control of public funds expenditures, public administration and local self-government, respectively, were supposed to review, at a joint session, the Report about the Activities of the Anti-Corruption Agency in 2013. Due to a lack of quorum, namely the absence of the members of the Judiciary Committee, the Report was not discussed. At the same session and independently from the Finance Committee, the Judiciary Committee was supposed to also review the Annual Report of the Ombudsman, as well as the Report of the Commissioner for Information of Public Importance and Personal Data Protection. The independent institutions were practically ignored only a day after the Ombudsman announced that 19 people from his expert department had to be laid off, since the Parliament did not approve their further employment. Zoran Babic, the President of the Parliamentary Committee for Administration, Budget, Term of Office and Immunity related Affairs, stated that the request of the Ombudsman for the extension of the employment of his associates would be considered. Babic added, however, that he would personally initiate the adoption of a law which would align the salaries of the managers and representatives of all regulatory and independent bodies.

The threat to limit the salaries of employees in regulatory and independent bodies may definitely constitute putting pressure on their independence. A call to align the salaries of the employees in all regulatory and independent bodies shows a complete lack of understanding of the function and role of these bodies, their different ways of funding, as well as of the different responsibilities and complexity of the affairs carried out by their “managers and

representatives". It should at least be clear that a body subject to ad hoc decisions by the executive or legislative branch may not be independent and hence may not discharge its function independently. On the other hand, the strengthening of independent and regulatory institutions is a prerequisite for the further democratization of Serbia. These bodies need to have their capacities strengthened and not weakened. The particularly pertains to bodies ignored by the parliamentary committees for finances and the judiciary, respectively, the Ombudsman, the Commissioner for Information of Public Importance and the Anti-Corruption Agency.

### **3. The Ombudsman**

In March 2014, the Ombudsman presented the Annual Report for 2013, which he compiles and furnishes every year to the Parliament. The Report, to be decided upon Parliament in May, contains findings and recommendations related to the respect and observance of human rights. In his Report, the Ombudsman emphasized two phenomena: the control of the media through pressure mechanisms on one hand and the "tabloidization" of the state in the form of leakage of confidential information and the transfer of institutional processes to politically suitable tabloids on the other. Concerning the control of media, the Ombudsman said it was difficult to confirm and to prove; he stressed that claims about pressure and influence on the media coming from political and government circles of power (such as telephone calls after which TV shows are cancelled, texts withdrawn from newspapers, journalists being silenced and editorial policies and focuses being abruptly changed) are coming from journalist circles. The said phenomena lead to no less than self-censorship, which the Ombudsman claims to be ubiquitous in the Serbian media. The problem of the tabloidization of the state was recognized by the Ombudsman as a phenomenon characterized by having confidential information, such as information about current investigations, personal data, data about circumstances from personal life, which may be obtained only by systemic and deep invasion of privacy, as well as data bases kept by certain government authorities, appearing on regular basis in always the same media. At the same time, proceedings to determine the sources of such information, to which proceedings only authorized persons may resort to (with the goal of punishing persons for disclosing official secrets and other criminal offenses) haven't been initiated. Information that is being leaked is typically selective, incomplete and systemically targeted against certain persons; releasing such information violates not only the right to privacy, but also the presumption of innocence of the targeted persons, as well as their political career. In his Report, the Ombudsman itemized the specific achievements and shortcomings related to the realization of media freedoms. The achievements are modest and consist of the prepared drafts of new media laws and the formation of an independent commission for investigating cases of

murdered journalists. On the other hand, the Report stressed that deficiencies in media regulations result in an insufficient degree of transparency of ownership; it reminds that the privatization has not been completed, although it is mandatory by the Law; the existing models of privatization do not work and new ones haven't been found; no adequate model for the realization of the right to information in minority languages has been found (the Report particularly criticizes the possibility of national councils being entitled to establish media), while the bodies controlling the enforcement of the Law on Public Information are not carrying out their function fully and on time.

The phenomena emphasized by the Ombudsman are deeply concerning. The parts of the report pointing to pressure against media ought to be observed in the context of the claims contained in other sources, for example in the European Commission Progress Report for 2013. The latter also claims that threats and violence against journalists still represents a major cause of self-censorship. Furthermore, on May 27, the OSCE Representative for Media Freedoms Dunja Mijatovic expressed concerns over the censorship of internet content in Serbia and called on the authorities to cherish uncensored debate about issues of public interests. The OSCE press release was issued in relation to news about certain websites and online content being blocked for their criticism of the government, causing major upheaval in Serbia, including a sharp rebuttal by the Prime Minister Aleksandar Vucic. While such pressure is difficult to prove, as the Ombudsman claims, or does not exist, as claimed by the executive branch, it seems that fertile ground has been created for self-censorship and that the latter is on the rise, which is bad news. The second problem identified by the Ombudsman and also recognized in the EC Progress Report for 2013 comes in the form of targeted media campaigns based on anonymous sources or information that has "leaked". Such campaigns, the Report says, undermine the confidence in judicial institutions, violate personal data protection laws and breach the presumption of innocence. The other problems mentioned by the Ombudsman, such as insufficient transparency of ownership, unfinished privatization and the unsustainability of the existing privatization model, inadequate models for the realization of the right to information in minority languages, attacks against journalists, inadequate oversight of the enforcement of the Law on Public Information, are the consequence of the obsolete media regulations, mediocre capacities of the bodies that are supposed to oversee compliance and the years-long delay in implementing media reforms, all phenomena we have been pointing on multiple occasions in these reports.

#### **4. Commissioner for Free Access to Information of Public Importance and Personal Data Protection**

Notwithstanding all the positive developments in Serbia in the area of free access to information of public importance, there are still certain issues related to the exercise of that right. The annual report of the Commissioner for Free Access to Information of Public Importance and Personal Data Protection, detailing the implementation of the laws in his area of competence, has shown that media representatives and journalists complained in 2013 to the Commissioner more often over denied information due to, on one hand, the increased number of requests and, on the other hand, the unwillingness of the authorities to allow free access to information. The Report says public authorities typically explain their unwillingness to allow access by invoking secrecy reasons, protection of privacy, by claiming they are not subject to the relevant law or contesting the applicant's request. The Report concludes that the main obstacle for a consistent enforcement of the Law on Free Access to Information is the non-functioning of the mechanisms that are not under the control of the Commissioner, but that of the executive branch, but particularly due to the fact that, in spite of clearly defined obligations, the Government has failed to secure the enforcement of the Commissioner's decisions. Furthermore, the Ministry of Justice and State Administration has failed (for the third year in a row) to prosecute a single among numerous perpetrators of violations of the relevant legislation. The Commissioner claims that all these facts combined are tantamount to an open call to breach the Law and a practice that must be promptly reversed.

Access to information of public importance has proven to be the key instrument for the development of investigative journalism, bearing in mind the traditional "isolationism" of the authorities, i.e. their unwillingness to proactively and even without request make available information of public interest. Article 51 of the Constitution of the Republic of Serbia says that everybody shall be entitled to receive timely information about matters of public interest, which means that the media are obligated to provide timely and complete information to the citizens. If such information is denied to them, the media are unable to fulfill their constitutional obligation. Therefore, the degree of the realization of the right to free access to information of public importance is indicative for the development of media freedoms in general.

## 5. Prosecutor's Office for High-Tech Crime

Apart from causing invaluable loss of life and material damage, the floods that hit Serbia last May also brought serious problems related to freedom of expression online. Many websites, typically those that were critical of the government's reaction in an emergency, were continuously targeted by hackers (such as the Teleprompter internet portal, the Druga strana blog and later the website of Pescanik). Furthermore, the blog of Vreme's journalist Dragan Todorovic was withdrawn from the Blic website; the blog contained a text by Novica Milic, a professor of the Media and Communications Faculty of the Singidunum University in Belgrade, itself including a fictitious resignation of the Prime Minister Aleksandar Vucic. The above incidents have understandably been interpreted as systemic pressure against critical media. Meanwhile, it seems that the Prosecutor's Office for High-Tech Crime failed to react adequately to the hacking attacks on websites. It reacted only after the attacks on the website of Pescanik, which happened after they released, on June 1<sup>st</sup>, a text by Ugljesa Grusic, a Senior Lecturer from the Nottingham University, Branislav Radeljic, Associate Professor of the University of East London and Slobodan Tomic, a Doctoral Student of the London School of Economics and Political Sciences, accusing the Minister of Interior Nebojsa Stefanovic of plagiarizing his PhD dissertation. This case will be elaborated on in the next report. While the above mentioned hacking attacks didn't attract the attention of the High-Tech Crime Prosecutor, the latter did react to comments posted on social networks about the number of casualties in the floods. Several people were indicted of the criminal offense of attempting to cause panic and unrest. The investigative judge ordered three people to be placed in custody for 30 days, but these solutions were appealed against and ultimately repealed. In each of these cases, at issue were the comments posted either on social networks or under specific news segments online, which comments claimed official information about the number of dead to be false and that the actual numbers were much higher.

The hacking attacks on websites are nothing new in Serbia. Pescanik's website filed back in January 2009 the first criminal charges in relation to a so-called Denial of Service (DOS) attack. The latter involves a coordinated attempt by an individual or group to overload the resources of a server, so that ordinary users may not reach it. Unfortunately, although the case of Pescanik from January 2009 wasn't the only DOS attack against media websites, hitherto investigations weren't successful and nobody was indicted. Meanwhile, charges for the criminal offense of causing panic and unrest are something new. The Criminal Code defines it as causing panic or seriously undermining the public order or obstructing the enforcement of the decisions passed by state authorities or organizations discharging public authority, by communicating or

spreading false news or claims. A qualified form of that criminal offense exists where the false news or claims are communicated or disseminated through public media or by similar means or at a public gathering. The basic form of that felony is subject to between three months and three years in prison and a fine, while the qualified form is punishable by between six months and five years in jail. It will be interesting to see how the Prosecutor will substantiate the existence of premeditation, namely the awareness of the defendants that what they have communicated and disseminated was a lie. Furthermore, taking into account the emergency situation caused by the unprecedented floods, as well as the fact that, notwithstanding the frequency of such information communicated by state bodies, there were no cases of significant undermining of public order or a threat of it, or obstructing the enforcement of the decisions passed by state authorities or organizations discharging public authority, it is pertinent to ask where are the limits of panic if it has existed or could have happened, caused by the flood as the objectively existing calamity, as well as what effect could individual comments on social networks or media websites in general have generated on the objectively existing situation. On the negative side, in all three above described cases the defendants were to be placed in custody. The fact that the decisions on custody were repealed upon appeal is good news, but the question remains as to what extent the fact custody was ordered by the Prosecutor had caused self-censorship, stifling public debate about even objectively unquestionable information, leading to the absence of criticism.