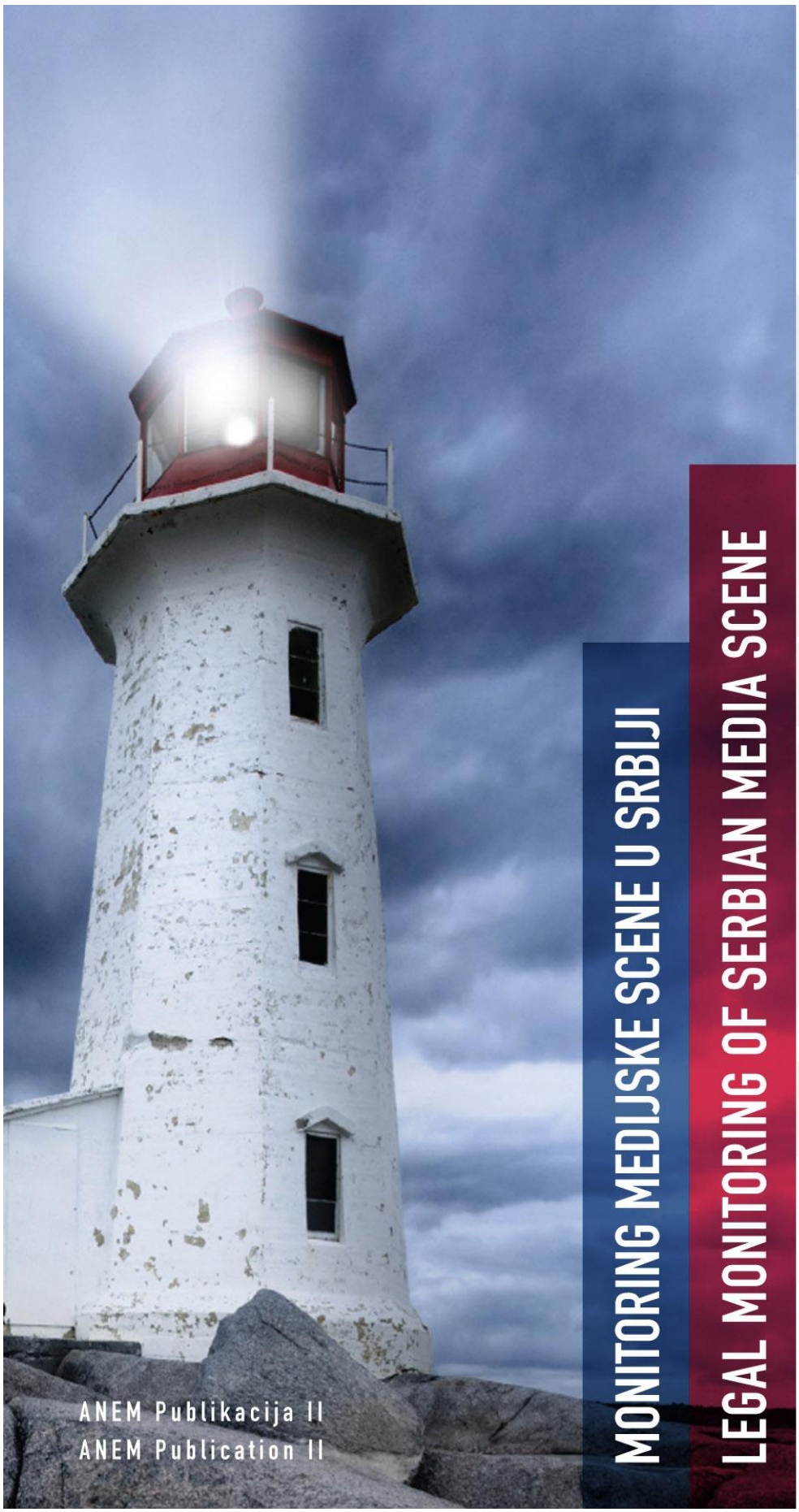

MONITORING MEDIJSKE SCENE U SRBIJI

LEGAL MONITORING OF SERBIAN MEDIA SCENE

ANEM Publikacija II
ANEM Publication II

ANEM

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UVOD

Pravni monitoring medijske scene u Srbiji traje već šest meseci. Sprovodi ga stručni tim advokatske kancelarije „Živković&Samardžić“, u saradnji sa ANEMom. Poseban način promocije rezultata monitoringa predstavljaju izdanja specijalizovane Publikacije u elektronskoj i štampanoj formi, koja kroz stručne autorske tekstove bliže objašnjavaju pojedina važna medijska pitanja u prethodnom tromesečju. I pravni monitoring i izdanja ove Publikacije, omogućili su svojom podrškom USAID i IREX Srbija.

Ovaj broj Publikacije predstavlja nadogradnju rezultata sprovedenog pravnog monitoringa u periodu avgust – oktobar 2009.

Nalazi pravnog monitoringa medijske scene u Srbiji, za navedeni period, pokazuju sledeće:
U posmatranom periodu nije bilo nikakvog napretka u medijskom sektoru. Ekonomsko propadanje medija je nastavljeno. Nije učinjeno ništa da se medijima olakša položaj, a Vlada pokazuje nedovoljnu zainteresovanost za sprovođenje sopstvenih mera i za pružanje pomoći i podrške medijima. Umesto toga, loše promene regulatornog okvira, protiv volje samih medija, su nastavljene, a zbog načina na koji su učinjene i mogućih posledica, značajno doprinose otežavanju situacije u kojoj se mediji nalaze. Najavljena izrada Medijske Strategije, koja je trebalo da doprinese definisanju ciljeva i prioriteta kojima se teži, kao i principa i vrednosti koji će se štititi, nije odmakla dalje od najave. Stoga se i u odnosu na njenu izradu može osnovano sumnjati u iskrenost namera vlasti da se medijska scena sistemski reformiše na način koji će omogućiti i razvoj medijskog sektora i dalju demokratizaciju društva. Kriza u odnosima medija i vlasti i nepoverenje koje je vlast izazvala nedovoljnom brigom i razumevanjem za medije, mogu značajno usporiti razvoj ovog sektora i dovesti u pitanje dostignuti nivo sloboda i demokratskih standarda. Zato je nephodno da sam medijski sektor jasno definiše svoje zahteve i ponudi rešenja za sva važna medijska pitanja, za šta je potrebno da prevaziđu parcijalne interese i da svoju energiju usmere ka postizanju ciljeva koji su im ili bi im morali biti zajednički. Tako ujedinjeni povećavaju šanse za uspeh, kako je to dosadašnja praksa i pokazala.

Monitoring ostvarivanja slobode izražavanja i slobode medija pokazuje da su i u posmatranom periodu bili prisutni različiti vidovi ugrožavanja ovih sloboda. Porast nasilja u društvu kome su sve češće izloženi i mediji, čak i oni kojima informativni program nije dominantan, ozbiljno dovodi u pitanje dalji istraživački rad i kritički odnos novinara prema štetnim pojavama u društvu. Dodatnu otežavajuću okolnost predstavlja i ekonomsko siromašenje medija, jer su tako oslabljeni mediji lakše podložni pritiscima. Ipak, najznačajniji faktor koji preti da ugrozi ono što je do sada postignuto u oblasti ovih sloboda, jeste autocenzura medija, kao posledica nedavnih izmena Zakona o javnom informisanju.

Regulatorni okvir za rad medija značajno je izmenjen u ovom kratkom periodu. Pored štetnih izmena Zakona o javnom informisanju od 31.08.09., još dva zakona su uticala na drugačije uslove za rad medija. Zakon o nacionalnim savetima nacionalnih manjina je produbio problem medijske privatizacije svojim normama koje su u koliziji sa medijskim zakonima, a izmene Krivičnog zakonika dvostruko su zašle u medijski sektor. S jedne strane, njegovim izmenama je i zanimanjima od značaja za javno informisanje priznat status poslova od javnog značaja, te se posledično pruža i jača krivičnopravna zaštita, što je dobro. S druge strane, Zakon sada na drugačiji, i po novinare potencijalno opasniji način, reguliše pre svega izveštavanje o sudskim

procesima. Na dnevnom redu tekuće druge sednice drugog redovnog zasedanja Parlamenta u 2009. godini su Zakon o autorskom i srodnim pravima, Zakon o izmenama i dopunama Zakona o slobodnom pristupu informacijama od javnog značaja i Zakon o tajnosti podataka. Iako nisu striktno medijski i ovi zakoni će nakon usvajanja izmeniti regulatorni okvir za medije, jer nekim svojim delovima zadiru u medijsku oblast. U zavisnosti od njihovog konačnog usvojenog teksta, zavisiće i da li će te promene biti pozitivne ili negativne po medijski sektor. U ovom periodu su prvi put primenjene sporne izmene Zakona o radiodifuzuji iz maja 2009. Skupštinski Odbor za kulturu i informisanje je za člana Saveta RRA iz nevladinog sektora, samostalno izabrao dva kandidata od kandidovanih šest, predloživši Skupštini one koji ne uživaju podršku većih i značajnijih nevladinih organizacija. To isto može da se dogodi i medijima u nekom narednom periodu.

Nadležni organi ni u ovom periodu nisu doprineli poboljšanju položaja medija. I pored nekog smanjenja, i dalje nerealne i visoke naknade RRA, i nesmanjene tarife kolektivnih organizacija za zaštitu autorskog i srodnih prava značajno opterećuju emitere. Vladine interventne mere za pomoć medijima ni četiri meseca nakon donošenja uglavnom nisu sprovedene, jer se Vlada nije potrudila da to obezbedi. Vlast, s jedne strane, deklarativno podržava medije, a druge strane, prema medijskom sektoru pokazuje isti odnos kao prema bilo kojoj drugoj profitabilnoj industriji koju treba oporezovati i napuniti budžet, čime pokazuje nerazumevanje za funkciju medija u demokratskom društvu. Jaz koji se stvara između vlasti i medija nedavno je produbljen činjenicom da nijedan od dva kandidata sa liste koju su predložila medijska i novinarska udruženja nije dobio dovoljnu većinu za izbor u Savet RRA, što svedoči o razmeri nepoverenja vlasti u medijski sektor i o nespremnosti da se volja medijskih udruženja poštuje. Strategija razvoja medijskog sektora takođe predstavlja još uvek samo deklarativnu volju vlasti. Dalji rad na strategiji će pokazati koliko je otezanje sa njenom izradom svesna politika vlasti da sebi obezbedi veći uticaj na medije, a koliko proizvod nedovoljne kompetentnosti vlasti da definiše medijsku politiku. Regulatorna tela ni u ovom periodu nisu pokazala da imaju jasnu viziju o razvoju medijskog sektora, niti su uspela da stvore uslove za normalno funkcionisanje medijskog tržišta. Nesposobnost da se izbore sa problemom radiodifuzne piraterije istovremeno je praćena preduzimanjem mera prema legalnim emiterima, od kojih se traži ispunjavanje nerealno zahtevnih obaveza, što ozbiljno urušava medije, ionako oslabljene posledicama finansijske krize. Kvalitetni programi i sadržaji se i dalje ne vrednuju dovoljno, a Javni servis uživa povlašćen položaj, iako je očigledno da ne vrši svoju ulogu proizvodnje i emitovanja programa od opšteg interesa, već se utrkuje sa komercijalnim medijima.

U oblasti **digitalizacije i privatizacije**, vlast je nastavila da šalje protivrečne poruke medijskom sektoru. Tako, i dalje nije jasno kakvi su planovi države u odnosu na privatizaciju javnih medija. Najavljena aukcija 12 javnih medija za 11.12.09. nije rezultat sistemskih odluka. I dalje postojeća kolizija propisa ostavlja mogućnost da jedan broj medija ostane neprivatizovan, što onemogućava normalan rad medijskog tržišta, ali i samostalnost i nezavisnost tih medija. Takođe, i dalje nije jasno da li će se predstojeća digitalizacija radiodifuzije sprovoditi na način na koji to Vladina Strategija propisuje, ili na način na koji je u praksi sprovodi RTS, kršeći propise i usvojene tehničke standarde.

Navedeni rezultati i nalazi pravnog monitoringa za tromesečje avgust-oktobar 2009, osnova su za izbor tema ovog drugog broja specijalizovane Publikacije ANEMa. Stoga sadržaj ove Publikacije čine autorski tekstovi na sledeće teme: prvi tekst, advokata Slobodana Kremenjaka, se odnosi na **izmene Zakona o javnom informisanju**, ali s akcentom na ključne probleme i rizike u izveštavanju; u drugom tekstu, advokata Nebojše Samardžića, u fokusu je **privatizacija medija** i njen značaj za nezavisnost rada medija; **medijska strategija za digitalno doba**, tema je trećeg

teksta, autorke Prof dr Snježane Milivojević, koja otvara brojna pitanja, ali i nudi odgovore na mnoga od njih; u tekstu (**Pravo na) Informacije u službi slobode medija,** autorka Mr Nevena Ružić se bavi važnošću slobodnog pristupa informacijama od javnog značaja, kao i pitanja tajnosti podataka, za rad i slobodu medija. Specijalan dodatak čine **izvodi iz Sudske prakse Evropskog suda za ljudska prava** - sažet prikaz dve presude koje se odnose na primenu člana 10 Evropske Konvencije za zaštitu ljudskih prava i osnovnih sloboda.

ANEM nastoji da i ovim izdanjem Publikacije doprinese razvoju medijskog sektora i nastavku neophodnih reformi u ovoj oblasti.

Izmene i dopune Zakona o javnom informisanju
- ključni problemi i rizici u izveštavanju -

Slobodan Kremenjak, advokat[1]

Izmene i dopune Zakona o javnom informisanju okupirale su pažnju javnosti čitavog leta. Iako žestoko kritikovan, Zakon je usvojen 31. avgusta 2009. godine, istog dana objavljen je u "Službenom glasniku Republike Srbije" br. 71/2009, te 8. septembra i stupio na pravnu snagu. Zaštitnik građana Saša Janković krajem septembra podneo je Ustavnom sudu predlog za ocenu ustavnosti Zakona. Ustavni sud je, 8. oktobra, odlučio da sporni zakon dostavi Skupštini na mišljenje, kako bi se u postupku čula i druga strana – ona koja je Zakon i donela.

U očekivanju konačne odluke Ustavnog suda o ustavnosti Izmena i dopuna Zakona o javnom informisanju,

ukazaćemo još jednom, sada sa malo veće distance, na neke od ključnih nedostataka ovog akta:

Prvo, Zakon o izmenama i dopunama Zakona o javnom informisanju predviđa da javno glasilo može osnovati samo domaće pravno lice, nesaglasna je sa odredbom člana 50. stava 1. Ustava Republike Srbije. U skladu sa citiranom odredbom Ustava, svako je slobodan da bez odobrenja, na način predviđen zakonom, osniva novine i druga sredstva javnog obaveštavanja, a što bi opet, nesumnjivo, moralo da obuhvati makar svako fizičko lice.

Drugo, Zakon o izmenama i dopunama Zakona o javnom informisanju predviđa da osnivač javnog glasila ne može preneti, niti na drugi način raspolagati pravom na javno glasilo ili pravom na izdavanje javnog glasila, i da je ugovor ili drugi pravni posao koji za predmet ima prenos, odnosno drugo raspolaganje pravom na javno glasilo ili pravom na izdavanje javnog glasila ništav. Ovakva odredba Zakona o izmenama i dopunama Zakona o javnom informisanju, u suprotnosti je sa zajemčenim pravom na mirno uživanje imovinskih prava stečenih na osnovu zakona (Član 58. stav 1. Ustava i član 1. stav 1. Prvog protokola uz Evropsku konvenciju za zaštitu ljudskih prava i osnovnih sloboda), sa ustavnim jemstvom slobode preduzetništva (Član 83. stav 1. Ustava), te zaštitom prava stečenih ulaganjem kapitala na osnovu zakona, za koja Ustav garantuje da zakonom ne mogu biti umanjena (Član 84. stav 3. Ustava).

Treće, Zakon o izmenama i dopunama Zakona o javnom informisanju propisuje zabranu izdavanja javnog glasila koje nije upisano u registar javnih glasila i propisuje novčanu kaznu za privredni prestup izdavanja javnog glasila koje nije upisano u Registar javnih glasila. Ovakva odredba nesaglasna je odredbi već citiranog člana 50. stava 1. Ustava, koji podrazumeva pravo svakoga da javno glasilo izdaje slobodno od bilo kakve prethodne radnje vlasti, kao što je i registracija. Sloboda da se govorom, pisanjem, slikom ili na drugi način šire obaveštenja i ideje slobodno od mešanja javne vlasti, zajemčena je i odredbama člana 46. Ustava, člana 10. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda i člana 19. Međunarodnog pakta o građanskim i političkim pravima. Takođe, član 20. stav 2. Ustava ne dopušta da se smanji dostignuti nivo ljudskih prava. Odredbe člana 14a stava 5, i člana 92a stava 1. Zakona o javnom informisanju (član 2. i član 4. Zakona o izmenama i dopunama Zakona o javnom informisanju)

[1] Advokatska kancelarija "Živković&Samardžić"

krše tu ustavnu zabranu, jer je pre ove dopune Zakona o javnom informisanju zajemčeno pravo da se izdaje javno glasilo bilo priznato bez uslova prethodnog upisa u Registar javnih glasila.

Četvrto, Zakon o izmenama i dopunama Zakona o javnom informisanju propisuje određene privredne prestupe, te određuje nove iznose prekršajnih kazni. Zakonom o privednim prestupima određeno je da je privredni prestup društveno štetna povreda propisa o privrednom ili finansijskom poslovanju, koja je prouzrokovala ili je mogla prouzrokovati teže posledice. Osnovano se postavlja pitanje da li povreda propisa druge prirode, koji nisu ni propisi o privrednom ni o finansijskom poslovanju, odnosno konkretno povreda propisa o javnom informisanju i slobodi izražavanja, uopšte može biti proglašena privrednim prestupom. Takođe Zakon o izmenama i dopunama Zakona o javnom informisanju svojim odredbama o privrednim prestupima, prekoračio je najviše dopuštene mere novčanih kazni za privredne prestupe, odnosno, u određenim slučajevima, odredio ih u srazmeri sa prihodom osnivača, koju mogućnost Zakon o privrednim prestupima uopšte ne predviđa.

No, kakvo god naše mišljenje o Zakonu o izmenama i dopunama Zakona o javnom informisanju bilo, on je, za sada, na snazi i za očekivati je da će, dok je na snazi, biti i primenjivan.

Šta je u tom smislu ono najvažnije na šta novinari i urednici moraju da obrate pažnju u svom svakodnevnom izveštavanju?

Prvo, propisane su daleko *strože sankcije za povredu presumpcije nevinosti i ugrožavanje prava maloletnika*. Zakonom o javnom informisanju i ranije je bilo propisano da se u javnom glasilu niko ne sme označiti učiniocem kakvog kažnjivog dela, odnosno oglasiti krivim ili odgovornim pre pravnosnažne odluke suda ili drugog nadležnog organa. Razlika postoji i utoliko što povreda presumpcije nevinosti, osim što može predstavljati osnov za pokretanje parničnog postupka za naknadu štete, sada predstavlja i osnov za pokretanje postupka za privredni prestup (umesto kao do sada prekršaj). Slično je i sa ugrožavanjem prava maloletnika, koje se takođe sada sankcioniše kao privredni prestup, a ne više kao prekršaj.

Dva od razloga iz kojih naši mediji često krše presumpciju nevinosti, relativno lako se mogu otkloniti. Urednici i novinari, često, a potpuno bez osnova, veruju da postoji razlika između situacija kada iznose svoje informacije i stavove, u odnosu na situacije kada prenose informacije i stavove koje iznosi neko treći, kada, drugim rečima, citiraju. Imali smo priliku da se uvek iznova srećemo sa nevericom novinara kada im citiramo zakonsku definiciju klevete ("Ko za drugog iznosi ili pronosi štogod neistinito što može škoditi njegovoj časti ili ugledu" – pri čemu se pojam pronošenja upravo odnosi na citate izjava trećih lica), ili gore citiranog člana 37 Zakona o javnom informisanju koji štiti presumpciju nevinosti ("U javnom glasilu niko se ne sme označiti učiniocem kakvog kažnjivog dela, odnosno oglasiti krivim ili odgovornim pre pravnosnažne odluke suda ili drugog nadležnog organa" – dakle, ne sme se "označiti", bez obzira da li se to "označavanje" čini izjavom samog novinara ili citatom izjave trećeg lica). Urednici i novinari, takođe često, a opet krajnje nekritički, prenose i saopštenja državnih organa, posebno policije, na način na koji se neko protiv koga je policija tek podnela krivičnu prijavu označava kao izvršilac krivičnog dela. Zakonom o javnom informisanju, verno prenošenje neistinite ili nepotpune informacije iz dokumenta nadležnog državnog organa (u našem slučaju saopštenja policije) predviđeno je izričito kao osnov isključenja odgovornosti, ali samo za naknadu štete, a ne i za prekršaj, odnosno sada privredni prestup. Ovo svakako ne znači da nadležni sudovi u postupcima za privredni prestup takvu okolnost ne bi uzimali, ili ne bi trebalo da uzmu u obzir kada odlučuju, već da prosto dodatna mera opreza pri prenošenju osetljivih informacija nikada nije na odmet.

Što se prava maloletnika tiče, zakon propisuje da se mora posebno voditi računa da sadržaj javnog glasila i način distribucije ne naškode moralnom, intelektualnom, emotivnom ili socijalnom razvoju maloletnika, odnosno da se sadržaj koji razvoj maloletnika može ugroziti, unapred jasno i vidno označi kao takav i distribuira na način za koji je najmanje verovatno da će maloletniku biti dostupan. Takođe, maloletnik se ne sme učiniti prepoznatljivim u informaciji koja je podesna da povredi njegovo pravo ili interes. Propusti u ovoj oblasti najčešće se prave objavljivanjem sadržaja, neprimerenih maloletnicima, na naslovnim stranama novina ili u neprimerenim terminima na elektronskim medijima, odnosno objavljivanjem podataka na osnovu kojih se maloletnik, bilo kao žrtva ili kao počinilac kakvog kažnjivog dela, može identifikovati.

Drugo, Zakonom o izmenama i dopunama Zakona o javnom informisanju predviđene su i *strože prekršajne sankcije* za jedan broj prekršaja koji su i ranije bili predviđeni. Konkretno, radi se o obavezi objavljivanja impresuma, obavezi imenovanja odgovornog urednika, obavezi čuvanja zapisa (primeraka izdatih štampanih glasila, odnosno snimaka kompletnog emitovanog programa), obavezi stavljanja zapisa javnog glasila na uvid u skladu sa Zakonom (sudu, policiji, ali i svakom trećem licu koje ima pravni interes, ako u pisanoj formi zatraži i predujmi stvarne troškove). Strože prekršajne sankcije predviđene su i za neobjavljivanje, odnosno nepropisno objavljivanje odgovora, ispravke, naknadne informaciju o ishodu krivičnog postupka, odnosno presude. Navedeni prekršaji, sami po sebi, nisu sporni. Sporne su visine zaprećenih prekršajnih kazni. U svakom slučaju, uz povećanu pažnju, dodatne obuke novinara i urednika i češće kosultacije sa pravnim savetnicima, rizici odgovornosti po navedenim prekršajnim odredbama, u velikom broju slučajeva mogu biti izbegnuti.

U fokusu: Privatizacija medija u Srbiji

Nebojša Samardžić, advokat[1]

Uvod

Beskrajno odlaganje procesa privatizacije javnih medija u Srbiji podsetilo nas je na jedan događaj iz marta 2004. godine. Naime, tadašnja Vlada Republike Srbije čiji je premijer bio Vojislav Koštunica, primenivši Zakon o javnim preduzećima i obavljanju delatnosti od opšteg interesa, imenovala je Aleksandra Tijanića za generalnog direktora RTS-a. Ovakvu odluku Vlada Vojislava Koštunice donela je pozivajući se na član 14. Zakona o javnim preduzećima i obavljanju delatnosti od opšteg interesa, u skladu sa kojim direktora javnog preduzeća imenuje i razrešava osnivač. Odluka Vlade bila je u direktnoj suprotnosti sa izričitom odredbom člana 89. Zakona o radiodifuziji, u skladu sa kojom je u nadležnosti Upravnog odbora da generalnog direktora imenuje dvotrećinskom većinom ukupnog broja svojih članova, a po sprovedenom javnom konkursu. Odluka Vlade izazvala je ostavku gotovo čitavog Upravnog odbora RTS-a, proteste medijskih i novinarskih udruženja, stručne javnosti i tada opozicionih političkih partija.

Danas se postavlja pitanje da li je deo onih koji su 2004. godine protestovali, problem video u principijelnoj neprihvatljivosti neposrednog imenovanja čelnih ljudi javnog medija od strane izvršne vlasti, ili se radilo samo o ličnim nesimpatijama spram Aleksandra Tijanića. Ovakvo pitanje postavljamo iz razloga što se četiri i po godine nakon žestoko kritikovanog imenovanja Aleksandra Tijanića za generalnog direktora RTS-a po odredbama Zakona o javnim preduzećima i obavljanju delatnosti od opšteg interesa, rukovodeći ljudi čitavog niza medija u javnom vlasništvu i dalje imenuju neposredno od strane izvršne vlasti po istom tom zakonu, a da protesta koji bi dolazili iz udruženja i stručne javnosti, gotovo da i nema. Koji je razlog što preko postupaka koje smo svojevremeno smatrali neprimerenim tekovinama demokratskog sveta, danas ćutke prelazimo?

Izgovori za odlaganje privatizacije medija

Da podsetimo, jedna od ključnih intencija Zakona o radiodifuziji, koji je stupio na snagu u julu 2002. godine, bila je izmeštanje nadležnosti za imenovanje direktora i urednika javnih medija sa izvršnih vlasti. Pri tome, Zakon je predvideo dvojak pristup koji je, sa jedne strane, predviđao transformaciju Radio televizije Srbije i Radio televizije Vojvodine u republički i pokrajinski javni servis, a sa druge, obaveznu i oročenu privatizaciju preostalih regionalnih i lokalnih javnih medija.

Zakonom je osnovano nezavisno regulatorno telo za oblast radiodifuzije – Republička radiodifuzna agencija. Predviđen je složen mehanizam izbora članova Agencije, kako bi se omogućilo da u kandidovanju članova učestvuje širok spektar zainteresovanih subjekata, uključujući i one iz civilnog sektora. Agenciji je stavljeno u nadležnost, između ostalog, i da imenuje i da razrešava članove Upravnog odbora republičkog i pokrajinskog javnog servisa. Tako izabranim Upravnim odborima, koji imaju po 9 članova, stavljeno je u nadležnost da imenuju i razrešavaju generalne direktore republičkog i pokrajinskog javnog servisa, kao i direktore radija i televizije, glavne i odgovorne urednike programa, uvek dvotrećinskom većinom od ukupnog broja članova Upravnog odbora i uvek nakon sprovedenog javnog konkursa.

[1] Advokatska kancelarija „Živković&Samardžić“, Beograd

U odnosu na regionalne i lokalne javne medije, Zakon je predvideo obaveznu i oročenu privatizaciju. Bilo je predviđeno, naime, da se regionalni i lokalni javni elektronski mediji privatizuju u roku od četiri godine od dana stupanja Zakona na snagu, odnosno do jula 2006. godine. Naknadno, 2005. godine, ovaj rok je produžen do 31. decembra 2007. godine. Samo nekoliko dana pre isteka roka, 27. decembra 2007. godine, Vlada Republike Srbije, na inicijativu Ministarstva za državnu upravu i lokalnu samoupravu i Izvršnog veća Autonomne pokrajine Vojvodine, donela je zaključak 05 broj 023-8988/2007, kojim je prihvaćena Informacija o potrebi prekida postupka privatizacije elektronskih medija koji emituju programe na jeziku nacionalnih manjina, i to za ukupno 8 medija. U cilju realizacije ovog Zaključka, Agencija za privatizaciju zadužena je da u skladu sa članom 25a Zakona o privatizaciji donese rešenje o prekidu postupka privatizacije radio i/ili televizijskih stanica lokalnih i regionalnih zajednica koje emituju program na jeziku nacionalnih manjina. Dva dana kasnije, Narodna skupština Republike Srbije usvojila je Zakon o lokalnoj samoupravi i Zakon o glavnom gradu kojima je opštinama dato u nadležnost da osnivaju televizijske i radio stanice, a Beogradu da osniva televizijske i radio stanice, novine i druga sredstva javnog obaveštavanja. Poslednjeg dana avgusta 2009. godine, usvojen je i Zakon o nacionalnim savetima nacionalnih manjina. Ovim Zakonom su Republika, autonomna pokrajina ili jedinica lokalne samouprave ovlašćeni da svoja osnivačka prava na javnim medijima koji vrše informisanje u celini ili delimično na jezicima manjina, prenesu na nacionalne savete na čijem jeziku konkretni medij vrši informisanje. Na ovaj način, stvara se još jedan model za izbegavanje obavezne privatizacije.

Situacija danas

Nakon pauze od gotovo dve godine, Agencija za privatizaciju objavila je 22. oktobra javni poziv za učešće na javnim aukcijama za 12 medijskih kuća. Činjenica da je, međutim, u prethodnom periodu kreiran pravni osnov da pojedini mediji privatizaciju izbegnu, nameće brojna pitanja. Jedno je kako, u svetlu budžetskog finasiranja preostalih javnih medija, obezbediti ravnopravne uslove poslovanja komercijalnim medijima. Ono što je, međutim, sa aspekta slobode izražavanja i medijskih sloboda najznačajnije, i što nas vraća na početak naše priče, jeste kako izmestiti nadležnosti za imenovanje direktora i urednika lokalnih javnih medija sa lokalnih izvršnih vlasti. Intencija autora Zakona o radiodifuziji da se ovaj problem do prestojeće privatizacije jednostavno ignoriše, pokazala se kao pogrešna. Vlast je pronašla način da privatizaciju beskonačno odlaže, prvo neusvajanjem ili neblagovremenim usvajanjem neophodnih pravilnika kojima se privatizacija bliže uređuje. Nakon toga, produženjem rokova predviđenih u zakonu i navodnom brigom za očuvanje dostignutog nivoa manjinskih prava za informisanje na manjinskim jezicima, sve polazeći od neprihvatljive premise da informisanje na manjinskim jezicima mogu obezbediti samo mediji u državnoj svojini. Na kraju, usvojeni su novi zakoni kojima se obavezna i oročena privatizacija u dobroj meri obesmišljava.

Više od 7 godina nakon usvajanja Zakona o radiodifuziji, u Srbiji postoji oko 50 lokalnih i regionalnih elektronskih medija koji su u državnoj svojini i koji se finansiraju pretežno iz javnih izvora. Njihove upravljačke strukture i danas neposredno imenuju lokalne vlasti po Zakonu o javnim preduzećima i obavljanju delatnosti od opšteg interesa. Njihova uređivačka politika i danas je pod neposredim uticajem lokalnih moćnika, a urednici i novinari nemaju sistemske mehanizme zaštite od takvog uticaja, odnosno ostavljeni su da se protiv njih bore sami. Nastavak privatizacije jeste imperativ i dobro je što je Agencija za privatizaciju, posle duge pauze, zakazala jedan broj novih aukcija. S druge strane, negativna iskustva sa opstrukcijom privatizacije, a posebno

izmenjeni pravni okvir koji omogućava da deo javnih medija ostane neprivatizovan, nameću i nove imperative. Jedan od takvih novih imperativa je iznalaženje načina da se kreiraju mehanizmi koji bi garantovali nezavisnu poziciju redakcija preostalih lokalnih javnih medija u odnosu na lokalne izvršne vlasti.

Medijska strategija za digitalno doba

Prof dr Snježana Milivojević[1]

Za protekle četiri godine usvojena su dva strateška dokumenta koja se u nazad mogu čitati kao mapa ovdašnje medijske tranzicije na početku 21.veka. U velikoj meri oni markiraju i ulazak u sasvim novo medijsko okruženje najavljeno digitalnom revolucijom.

Prvi od njih, Strategiju razvoja radiodifuzije do 2013. godine, usvojila je Republička radiodifuzna agencija krajem 2005. godine. Posle serije skandala oko formiranja, nelegalnih izbora i višegodišnje blokade, RRA je ovim dokumentom iznela svoje viđenje medijskog razvoja u narednih osam godina. Međutim, u tekstu koji izgleda kao osrednji seminarski rad, nema nikakve razvojne vizije, jer se on u stvari bavi 'zatečenim stanjem'. Umesto razvojnih izazova, navode se tranziciona 'opšta mesta', kao što su privatizacija, raspodela frekvencija ili transformacija RTS i naširoko prepričava tri godine ranije usvojeni zakon. Glavni posao koji je RRA tada dobila i koji još radi je podela dozvola za analogno emitovanje. Kada sve žalbe i sudski sporovi budu okončani, on će biti uspešno završen otprilike u vreme početka digitalizacije, dakle, kada će konačno podeljene dozvole izgubiti smisao. Iako je bilo očigledno da će do 2013. godine TV pejzaž Evrope biti radikalno dugačiji, tehnološke promene se potpuno ignorišu, a digitalna televizija se pominje samo kao oblast na koju se strategija ne odnosi. Tako se i dogodilo da Strategija, umesto pogleda u budućnost, bude tehnološki pregažena davno pre isteka roka za koji je doneta.

Drugi strateški dokument donela je Vlada Republike Srbije u leto 2009. godine, a odnosi se na prelazak sa analognog na digitalno emitovanje. Iako se u celini bavi radio i televizijskim emitovanjem, tekst je pripremljen u Ministarstvu za telekomunikacije, a Ministarstvo kulture i RRA, koji su nadležni za vodjenje medijske politike, u njemu samo statiraju. Nijedna od dve institucije u predviđenom Akcionom planu nema nikakvih zaduženja, kao da ih se čitav posao uopšte ne tiče. Iako se u tekstu pominju posebne obaveze javnog servisa u procesu digitalizacije, za RTS su predviđeni samo promotivni zadaci, kao da je javni servis propagandna državna agencija. Iz teksta se jasno vidi da se 'digitalni prelazak' planira zato što je to međunarodna obaveza i da se ovde za njega uopšte nije pripremalo. Čak su i datum prelaska, 4. april 2012. godine, nametnule okolnosti. Dva glavna razloga za ovaj izbor su termini za početak digitalnog emitovanja u susednim zemljama, koji će preplaviti analogni signal domaćih televizija ukoliko se i ovde ne uradi isto, i činjenica da će prenosi sa Olimpijskih igara biti digitalni i da se domaćoj publici ne može uskratiti ovaj događaj. Nasuprot nejasnom i dugoročnom pogledu RRA, ovde se uglavnom samo vide najneophodniji poslovi koje se moraju uraditi u ovom kratkom periodu do proleća 2012. godine.

Ono što je u ovom četvorogodišnjem putovanju unazad najvidljivije je upadljivi i nagli transfer radio i televizijske oblasti u telekomunikacioni sektor. U uporednoj perspektivi to i nije potpuno neobično, jer su kritički istraživači medija u Centralnoj i Istočnoj Evropi već upozoravali na 'tihi rat između radiodifuznih i telekomunikacionih regulatora'. Jasno je da su telekomunikacioni regulatori moćniji, sektor kojim se bave je komercijalno uspešniji, a njihovi zaposleni su većinom tehnološki obrazovaniji. Uz to, u telekomunikacijama se odluke uglavnom donose daleko od očiju javnosti i ne izazivaju sporove koji se oko medija uvek vode. Oni i medijsku problematiku veoma

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uspešno prevode u dva 'neutralna' i 'bezbedna' jezika - tehnološki i komercijalni - koji ne izazivaju oprez tipičan za svaku intervenciju vlasti u medijsku oblast. Kako su telekomunikacije brže rastući sektor i investiciono atraktivnije tržište, ovaj postupak polako, i bez ikakve javne kontrole, pretvara radio i televiziju u udaljenu i nevažnu provinciju telekomunikacija. Zbog toga većina pitanja o kojima je potrebna politička odluka (ne u ideološkom nego u smislu javne politike), u Strategiji digitalizacije u stvari nisu ni otvorena. Na primer, ne zna se kako će država pomoći građanima u nabavci digitalnih prijemnika (procenjeni troškovi od 15 do 40 miliona Eur), već se navode tri scenarija kako je to moguće uraditi, kao da je reč o akademskoj raspravi, a ne o usvojenoj 'strategiji'. Piše da će biti sproveden onaj scenario 'koji bude u skladu sa ekonomskim mogućnostima u vreme prelaska'. Ili, kako će se deliti digitalna dividenda i šta će biti istinska korist građanima od tako oslobođenog spektra? U tekstu se, preuzimajući doslovno evropske stavove o tome, jasno navodi da spektar kao javno dobro pripada građanima. Kako će oni, za sada veoma neobavešteni, učestvovati u raspravi i da li će nje uopšte biti? U okviru podele poslova, raspodela digitalne dividende navedena je u tabeli 'tehničkih pitanja', a o njoj će se odlučivati 'zaključkom Vlade'. Digitalna dividenda je jedna od ključnih dobiti digitalizacije. Kada će i kako razgovor o njoj doći na dnevni red, ako je dve godine pre prelaska i sam koncept potpuna nepoznanica čak i najupućenijoj medijskoj javnosti?

Isti utisak ostavljaju i dva zakona koja su ove godine skoro istovremeno pripremljena, ali koji se veoma razlikuju. Izmene Zakona o javnom informisanju koje su krajem leta, po hitnom postupku, usvojene na predlog Ministarstva kulture, pokazale su koliko se u Vladi, ali i u Parlamentu i javnoj vlasti u širem smislu, malo zna o medijima. Još važnije, potvrdile su da su represija i kontrola i glavni instrumenti i glavni ciljevi politike, pa je Zakon zaglibljen na istorijskoj stranputici na kojoj su glavna medijska pitanja 'ko ih poseduje i ko ih kontroliše'. Njegova posledica biće upravo ono što nestručne vlasti uvek najbolje rade - povlače se i tvrdo kontrolišu medije koje mogu, dok nemoćno prate medijsku migraciju publike, sadržaja i novca u medije nad kojima nemaju nikakav uticaj.

Naprotiv, Zakon o elektronskim komunikacijama, koji je nedavno krenuo u javnu raspravu, bavi se upravo tim novim pitanjima. Kada bude stupio na snagu, zameniće sadašnji Zakon o telekomunikacijama, a pisan je sa namerom da se u njega ugradi EU regulativni okvir iz 2002. godine. To znači da jedan deo domaće regulative (telekomunikacije) unosi standarde koji će uticati na odluke u drugima (medij/radiodifuzija) bez prethodne zajedničke vizije. To obično kasnije otežava primenu i dovodi do paralize koja se ovde zove 'zakoni su dobri, ali se ne primenjuju'.

Jedinstvo regulative, one koja se odnosi na medijske proizvode i sadržaj i one koja se odnosi na tehniku, spektar i mreže, mora da odlikuje sve normativne tekstove. U ovom slučaju, već je utvrđen datum prelaska na digitalno emitovanje, a da se nikada nije ni poveo razgovor o značaju te promene i da se u medijima ne zna ništa o važnosti digitalizacije. Šta je tu strategija ako se iz nje ne vidi ništa o posledicama ili dobitima tog procesa? Kako to ovde niko ne zna koliki će biti taj 'oslobođeni deo spektra', niti kako se priprema njegova raspodela, a to znaju u Velikoj Britaniji koja će, kako se s ponosom navodi, preći na digitalno emitovanje u isto vreme kada i Srbija? Na portalu informacionog društva EU navodi se da će četiri petine spektra korišćenog za analogno emitovanje biti oslobođeno za nove usluge i objašnjavaju detalji sadašnjih predloga za upravljanje i raspodelu spektra. Evropska komisija je proračunala da će potencijalna ekonomska dobit, samo od harmonizacije raspodele dividende među zemljama članicama, biti izmedju 20 i 50 milijardi evra. Šta se ovde zna, i da li nešto već može da se planira, ili će Vlada svojim zaključkom, bez pripreme i u poslednji čas, donositi odluke mimo ikakve javne kontrole?

Nije ovde reč o podeli ili sukobu nadležnosti između dva Ministarstva, regulatora ili oblasti, već o novim medijima i njihovoj važnosti za razvoj demokratije u informacionom društvu. Kako će oni izgledati, zavisiće od niza odluka koje su istovremeno i tehničke i tržišne i sadržinske i u kojima mediji već sada moraju da učestvuju. Zbog toga je izuzetno važno gde će se odluke donositi, kako će se kreirati politika u oblasti, koja vrsta regulatora će se baviti audiovizuelnim uslugama i kakvu će ulogu u tome imati javnost. Takve odluke ne mogu se ni odložiti, ni sakriti tihom aneksijom radiodifuzije u telekomunikacionu oblast, što je u stvari učinjeno.

Pogled u budućnost

Zašto je ovakav pogled u nazad sada uopšte važan? Pre svega zato što otkriva nekoliko velikih nedoumica koje bi bilo dobro otkloniti uoči pisanja strategije medijskog razvoja kako bi se izbegao njen mogući 'loši start'. Ovoga puta pomenuću samo jednu o kojoj se govori (ko će raditi strategiju i sa kakvim ambicijama) i jednu o kojoj se ne govori (zašto je strategija uopšte potrebna i šta bi trebalo da sadrži).

Prvo pitanje koje se za sada najglasnije čuje u, istina tek započetim razgovorima, je ko će pisati medijsku strategiju. Ministarstvo kulture je obećalo ovaj dokument, zatečeno negativnom rekacijom na Zakon o informisanju i sa nadom da će tako amortizovati bar deo javnog nezadovoljstva. Ponudilo je da ga pripremi posebna 'radna grupa' u koju su pozvani mnogi zainteresovani. Neki su to dočekali kao dobar izgovor da sakriju svoj pristanak na loš Zakon, a mnogi i kao iznenadnu priliku da se pitaju i odlučuju o stvarima o kojima baš i ne znaju mnogo. To se jasno vidi iz dosadašnje debate. Ministarstvu je u ovom poslu zaista neophodna pomoć. Ono se svojom upadljivom samoizolacijom i nebrigom pokazalo uglavnom nestručnim za pitanja medijske budućnosti. Svi koji o medijskom razvoju razmišljaju iz različitih uglova mogli bi mnogo da doprinesu da se medijske promene napokon shvate kao razvojna šansa, a ne kao tehnološki bauk. Ali, sastavljanje radne grupe se izgleda ne razume kao prilika da se okupi zaista dobar tim, nego kao neka raspodela privilegija i mogućeg uticaja.

Dok se licitira članovima i utrkuju organizacije koje 'žele da budu predstavljene', nekako se ne vidi koliko je u njima stvarno onih koji bi mogli da sastave ovakav tekst. Ukoliko se odluči da radna grupa priprema dokument kojim se trasira budući medijski razvoj bar za nekoliko narednih godina, to će verovatno značiti manje članova, a više posla. Ukoliko, pak, radna grupa bude prilika da 'imamo svog čoveka tamo gde se odlučuje', biće velika gužva, ali i veliki izgledi da se strategija saplete. *U prvom slučaju* će se definisati izazovi pred kojima su mediji (tehnološki, tržišni, regulativni i sadržinski) i kako će se za njih pripremati. To bi zahtevalo radnu grupu čiji članovi imaju različite specijalizacije, ali podjednake kompetencije za medijska pitanja. *U drugom slučaju*, strategija će biti proizvod demokratskog dogovora različitih aktera o tome šta je moguće uraditi u medijima u narednih par godina. U lošijoj varijanti drugog slučaja, strategija će biti još jedan spisak 'medijskih problema', ponavljanje ciljeva sa početka tranzicije i nada da će se iz nekog istorijskog tajnog džepa izvući još desetak godina za zaostajanje.

Za sada je neizvesno koja će koncepcija prevladati, ali je veoma indikativno sa koliko entuzijazma ide proces samokandidovanja za jedan ovako težak posao. Za pisanje strategije za prelazak na digitalno emitovanje nije bilo ni izbliza toliko interesovanja, ne sećam se čak da se javno znalo za njeno pripremanje. Zašto su tehnološke teme privukle tako malo pažnje, i kad su to tehnička rešenja postala 'neutralna'? U EU se, naprotiv, upravljanje spektrom otvorilo kao jedno od

osnovnih političkih pitanja, neki čak tvrde da će ono imati ključnu ulogu u medijskom razvoju. Ono se provlači kroz mnoge debate koje se uveliko vode - hoće li se ubuduće medijska politika voditi na 'tržišno zasnovanoj regulativi', šta znači 'neutralnost platformi' za buduće proizvođače sadržaja, šta će biti sa tradicionalnim medijima kad se 'linearni' i 'sadržaji -na- zahtev' izjednače, hoće li sadašnje televizije preživeti mrvljenje publike koja će birati između ogromne ponude, smanjujući interes oglašivača za nekada masovne medije?

Složenost ovih pitanja delom objašnjava zašto se tehnički i sadržinski problemi razdvajaju i zašto se ljudi iz medija smatraju uglavnom nadležnim za ovo drugo. Iluziju da će to moći da rade nezavisno od tehničkih rešenja, razvejaće im najjednostavnija šema o digitalnoj radiodifuziji u kojoj se vidi lanac veoma različitih učesnika u odnosu na dosadašnje, a koja će tako izgledati već od 2012. godine. Oni koji će pisati strategiju, pisaće je za takve 'medije'. Veoma je pogrešno misliti da će za taj tekst biti dovoljno prepisati stare ciljeve i da je ono što su bile teme pre 20 ili 10 godina ostalo isto. Zbog toga što se mediji menjaju ubrzano i globalno, ovo je prilika da se svi - mediji, publika, regulatori - upoznaju sa dubinom promena i sa njima nose istovremeno kada i čitava Evropa. Ako Ministarstvo telekomunikacija garantuje da je to tehnički izvodljivo, Ministarstvo kulture bi moralo da traži strategiju u kojoj će se videti da li je to i sadržinski izvodljivo.

Prvo pitanje koje se za sada najređe čuje je zašto je strategija uopšte potrebna i šta bi ona trebalo da sadrži?

Oslanjajući se na ranija iskustva, izgleda da se i u ovom slučaju jasno razlikuju dva odgovora. *Po jednom*, strategija bi trebalo da ima vrlo pragmatičan cilj i da bude spisak poslova ili lista zakona koje bi trebalo doneti da bi se 'uredila' medijska oblast. Ovako minimalistički tekst ne bi doneo mnogo koristi. Ovde je već bilo vlada koje su tvrdile da su medijski zakoni doneti i da je oblast dobro regulisana, ali se, eto, zakoni 'ne primenjuju'. Čak i da je to tačno, i da su doneti zakoni pomogli sređivanju nasleđenog haosa iz 90-tih, oni više ne mogu biti regulativni okvir u kome će mediji raditi u narednoj deceniji. Strategija koju je RRA usvojio 2005. godine za to je najbolji dokaz. Uostalom, baš se u mnogo razvijenijim društvima stalno menjaju i dopunjavaju regulativni instrumenti: na primer, Evropski okvir za elektronske komunikacije usvojen 2002.godine, već dve poslednje godine je u procesu izmena i očekuje se usvajanje novog do 2010.godine. Evropska direktiva o televiziji bez granica doneta je 1989. godine kao odgovor na veliki izazov satelitske televizije, a 20 godina kasnije menja se Evropskom Direktivom o audiovizuelnim medijskim uslugama koja odgovara na potrebu jedinstvenog regulisanja linearnog i ne-linearnog medijskog sadržaja.

Prema drugom odgovoru, strategija bi trebalo da bude mnogo ambiciozniji dokument, pošto se usvaja u trenutku revolucionarnih medijskih promena. Ako smo već savremenici nastajanja jedne nove medijske ekologije, ona bi mogla da bude vodič kroz zamršeni i teško predvidivi svet promena koje nije lako razumeti. Za početak bi trebalo da pokaže upravo da nije moguće doneti jedan 'paket' zakona koji će 'srediti' medijsku oblast. Dobra vest je da takav paket ne postoji i da mediji zahtevaju stalnu regulativnu i političku (policy) aktivnost vlasti. Osim toga, konvergencija medija i usluga ubrzano briše granice između medijskih i nemedijskih zakona i svakoga dana otvara nove dileme koje je teško i predvideti, kao što su: kako se piraterija video i muzičkih sadržaja razlikuje od plagiranja knjiga, da li je u redu da Google dobija novac od reklama na stranicama gde objavljuje izbor vesti, dok istovremeno mediji koji prave te vesti ostaju bez prihoda, zašto države brane tvitovanje izbornih rezultata pre objavljivanja zvaničnih, kako se odnositi prema sve većem, otvorenom i ne-tržišnom sektoru informacija, kulture i znanja koji raste u informacionom društvu, i mnoge, mnoge druge.

Zbog toga, pisanje medijske strategije ovoga puta ne može biti 'business as usual', već zahteva dalekovidost kojom će se postaviti osnove medijske politike za bar tri do pet godina. Informaciono društvo odavno više nije akademski koncept. Mediji više ne liče na one institucije koje su proizvodile sadržaje za masovnu publiku: korisnici sami sve više traže sadržaje koje žele (koje povlače iz medija tzv. 'pull' media) i sve manje primaju one koje mediji šalju svima (guraju kroz svoje kanale tzv. 'push' media). Uz medije i nove platforme pojavljuju se novi uređaji koji frapantnom brzinom osvajaju tržište. Samo u prvoj godini kada se pojavio, iPod je prodat u 32 miliona komada, po jedan svake sekunde, i ostvario promet od tri biliona dolara, pri čemu je samo tržište privezaka i slične opreme za njega iznosilo milijardu dolara. Prema procenama iz EU okvira za informaciono društvo i medije (**„i2010"**), više od polovine svih novih radnih mesta u EU od 2000. do 2010. biće povezano sa informaciono-komunikacionim tehnologijama. U informacionom društvu građani su preplavljeni informacijama - nedavno je procenjeno da saobraćaj samo na registrovanim web stranicama iznosi 40 milijardi strana i da ispod njih ima još 450 do 550 milona 'dubokih', nevidljivih strana raznih podataka. To nepojmljivo obilje govori o još jednom razlogu zbog koga je potrebno da strategija ovoga puta bude jedan drugačiji dokument. Medijska politika se do sada uvek bazirala na 'principu oskudnosti'. Mediji su od nastanka osvajali slobodu boreći se protiv restriktivnih mera vlasti koje su arbitrirale i delile uvek nedovoljne resurse (frekvencije, roto-papir, distributivne mreže). Mediji sada pomažu nastanak sveta u kome je glavni problem obilje i u kome tri tradicionalna cilja medijske politike kada je reč o sadržaju, a to su kvalitet, pluralizam i standardi, dobijaju novi smisao.

Dakle, pravi razlog za donošenje strategije je informaciono društvo koje je došlo do granica Srbije, ne samo zato što će ga doneti digitalni signali, već i zato što su mnogi građani Srbije toliko medijski pismeni da zahtevaju da žive u njemu. Strategija bi zato trebalo da olakša društveni odgovor na nekad teško pomirljive suprotnosti u informacionom društvu među kojima su:

- ogromne mogućnosti koje donosi digitalna revolucija sa nejednakim mogućnostima za korišćenje novih tehnologija koje prete otvaranjem novog 'digitalnog jaza',
- sloboda izražavanja sa zaštitom ljudskog dostojanstva koja poštuje iste standarde u on-line i off-line svetu,
- podsticanje kreativnosti i inovativnosti u medijskoj industriji, koje zahteva 'laki regulativni dodir', sa potrebom da se medijski razvoj usmerava, a ne samo prati,
- očuvanje etosa javne službe u informacionom obilju i multikanalnom okruženju
- kako raspodeliti digitalnu dobit tako da donosi najveću konkurentnost i ekonomsku dobrobit, ali nije plen samo najmoćnijih korporacija.

Kako će se na ovakva pitanja odgovarati u raznim zemljama, zavisiće upravo od toga kako se u njima definišu ciljevi i strategija razvoja. Vivijan Reding, komesarka za medije i informaciono društvo EU, nedavno je predlagala da se u Evropskoj uniji formira jedno jedinstveno regulatorno telo, konvergirani regulator, koji bi mogao da sagleda sve potrebe za promenama, formuliše politike koje podstiču konkurenciju, ne sputavaju inovacije, ali brine o vrednostima i kvalitetu sadržaja u komunikaciji. Ona je radikalizovala pitanje koje je u nekim zemljama Evrope već dovelo do formiranja jednog zajedničkog regulatora za oblasti telekomunikacija, radija, televizije i bežičnog spektra. U njima se smatra da jedinstveni regulator može bolje da se snađe u svim oblastima medijskih promena koje je teško pratiti i koje se gube na relaciji telekomunikacije - radiodifuzija, elektronske mreže - medijski sadržaj. Da li je konvergencija regulatora ispravan odgovor na medijsku konvergenciju i šta bi bile njene prednosti ili nedostaci u maloj i relativno tehnološli slabo razvijenoj zemlji? I to pitanje je u podtekstu javno nepostavljenog pitanja zašto je strategija uopšte potrebna i na šta bi sve ona trebalo da se odnosi.

U stvari, najjednostavniji zajednički odgovor na sve njih je da je pisanje strategije prilika za početak razgovora o medijima u digitalnoj eri. I pogled u budućnost čiji ishod nije unapred poznat.

(Pravo na) Informacije u službi slobode medija

Mr Nevena Ružić[1]

O slobodi informacija

Sloboda izražavanja, pa samim tim sloboda medija, podrazumeva slobodu informacija. Teško je zamisliti izražavanje nekog mišljenja, a posebno ako se ono odnosi na širenje ideja ili kritiku nečeg postojećeg, ako su informacije na kojima se to mišljenje zasniva nedostupne. Ukoliko mediji imaju moć i ulogu da informišu javnost, da ukazuju na promene u društvu, pozitivne ili negativne, onda je informacija neophodna za njihov rad.

Ukoliko bi se ocenjivalo stanje slobode medija u jednoj zemlji, onda bi takođe trebalo da se uzme u obzir pitanje slobode informacija. Međutim, definisati šta zapravo predstavlja „sloboda informacija" nije uvek jednostavno, jer je sam pojam informacije veoma širok. Teškoću predstavlja i činjenica da se sloboda informacija često definiše kao sloboda informisanja, terminom koji je u tesnoj vezi sa osnovnom ulogom medija da informiše javnost. Ako bi se sloboda informacija posmatrala u najužem smislu, onda bi se ona odnosila na pravo na slobodan pristup informacijama.

Kada se novembra 2004. godine donosio Zakon o slobodnom pristupu informacijama od javnog značaja, činjenica da se zakon odnosio na informacije, a možda i nedostatak volje nekih drugih subjekata, bila je dovoljna da se Ministarstvo kulture, kao ministarstvo odgovorno i za medije, prepozna kao nadležno. Na pitanje, da li je zakon koji se odnosi na pravo na pristup informacijama medijski ili ne-medijski zakon, ne može da se da izričit odgovor. Slobodan pristup informacijama je osnovno pravo svih, pa samim tim i medija. Činjenica da je trenutno u skupštinskoj proceduri Predlog zakona kojim se, između ostalog, prenosi nadležnost za sprovođenje Zakona o slobodnom pristupu informacijama sa Ministarstva kulture na Ministarstvo za državnu upravu i lokalnu samoupravu, ne umanjuje značaj koji ovo pravo ima za medije. Dodatno, sam Zakon sadrži odredbe koje se posebno odnose na medije i novinare.

Pored Zakona o slobodnom pristupu informacijama, ovo pravo je garantovano i Ustavom kao jedno od osnovnih ljudskih prava. Neuobičajena odredba srpskog Ustava definiše pravo na pristup informacijama kao jedan od elemenata prava na obaveštenost (član 51). Drugi element ovog „prava" je zapravo obaveza medija da poštuju pravo na obaveštenost građana, tačnije obaveza da istinito, potpuno i blagovremeno obaveštavaju o pitanjima od javnog značaja. Stoga, ukoliko mediji, pored sloboda, imaju dužnosti prema građanima, a naročito ukoliko su predviđene Ustavnim normama, onda je neophodno obezbediti pristup informacijama. U protivnom, posao medija je, ako ne nemoguć, onda svakako otežan.

Obaveza države da informiše

Polazeći od idealne situacije, potpuna primena Zakona o slobodnom pristupu informacijama zapravo znači da mediji, odnosno novinari, ne moraju biti ni svesni njegovog postojanja. Odnosno, barem ne svih odredbi Zakona. Ovo stoga što pravo na pristup ima dva aspekta. Prvi, koji se

[1] Šef Kabineta Poverenika za informacije od javnog značaja i zaštitu podataka od ličnosti

odnosi na činjenicu da svako ima pravo da zahteva pristup informacijama koje su u posedu organa javnih vlasti. Dakle, država ima obavezu da pruži informaciju onda kada neko podnese zahtev. U tom pogledu radi se o pasivnoj obavezi države. Drugi aspekt je možda i značajniji, jer obavezuje organe javnih vlasti da sami, bez obzira na postojanje zahteva, učine dostupnim informacije koje su od značaja za javnost. Ovaj drugi aspekt podrazumeva aktivnu ulogu države.

Proaktivna uloga države u ostvarivanju prava na slobodan pristup informacijama ne samo da obavezuje državne organe da informišu građane i na taj način ih uključuje u proces donošenja odluka, već istovremeno pojednostavljuje postupak ostvarivanja prava i svakako smanjuje troškove odgovaranja na pojedinačne zahteve. Princip participativne demokratije, javnosti u radu, i racionalizacija organizacije posla, neki su od osnovnih principa dobrog upravljanja.

Proaktivno objavljivanje informacija je, prema Zakonu o slobodnom pristupu informacijama, obaveza svih državnih organa kojima Zakon nalaže da objave „informator o radu". Reč je o dokumentu koji sadrži informacije različitog karaktera koje se tiču ovlašćenja, unutrašnje organizacije organa, spiska najčešće traženih informacija ili što detaljnijeg spiska trošenja budžetskih sredstava. Informator se objavljuje u elektronskoj formi kako bi se olakšalo pretraživanje, kopiranje ili preuzimanje informacija koje sadrži. Ukoliko se obaveza proaktivnog pružanja informacija ispunjava u punom smislu, onda novinar ne mora da traži informacije o visini plate ministra ili direktora agencija. Takođe, novinar ne mora da traži informaciju o ugovoru o, na primer, koncesiji za izgradnju auto-puta. Te informacije bi trebalo da su dostupne na sajtu organa. Na osnovu već dostupnih informacija, novinari, kao uostalom i svi građani, mogu da upoređuju informacije različitih organa i donose zaključak o (ne)racionalnoj potrošnji novca poreskih obveznika. Ili, mogu da ih porede sa sličnim informacijama organa u drugim zemljama. U tom slučaju, podnošenje zahteva odnosilo bi se na neke specifične informacije.

Međutim, idealna situacija je nešto što je još uvek daleko od realne. Veliki broj državnih organa nema informatore. Prema izveštaju Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti o sprovođenju Zakona o slobodnom pristupu informacijama za 2008. godinu, informator nisu izradili: jedno ministarstvo, više od dve trećine od ukupnog broja opština (100) i gotovo polovina ukupnog broja organa za prekršaje, kao i mnogi drugi organi. Čak i ukoliko postoji, informator često nije potpun, niti redovno ažuriran.

Praksa je još uvek da se pristup informacijama ostvari tek kada se formalno podnese zahtev. Državni organ je dužan da omogući uvid u informaciju ili dostavi kopiju informacije u uobičajenom roku od 15 dana od dana podnošenja zahteva. U pogledu troškova izrade kopije dokumenata koji sadrže tražene informacije, mediji i novinari su oslobođeni obaveze plaćanja troškova. Na taj način Zakon posebno tretira medije, uzimajući u obzir neophodnost informacija za obavljanje njihovog posla. Istovremeno, svaka diskriminacija medija je zabranjena. Organ ne sme favorizovati jedan medij i uskratiti informaciju drugom, a mediji imaju pravo na naknadu štete ukoliko je državni organ stavio drugi medij u bolji položaj.

Zakon predviđa prekršajnu odgovornost, kako u slučajevima neopravdanog uskraćivanja informacija i neobjavljivanja informatora o radu, tako i u slučajevima diskriminacije medija. Kazne za prekršaje su u rasponu od 5.000 do 50.000 dinara. Međutim, mali, gotovo zanemarljiv broj prekršajnih postupaka dovoljno ukazuje na problem sprovođenja Zakona, pa samim tim i poštovanja prava na pristup informacijama. Ovo bi možda moglo da se objasni nedostatkom kapaciteta Ministarstva kulture za nadzor nad sprovođenjem Zakona. Međutim, objasniti ne znači

i opravdati. Imajući u vidu pomenuti Predlog o izmenama i dopunama Zakona[2], kojim se predviđa prenos ove nadležnosti na Ministarstvo za državnu upravu i lokalnu samoupravu, mogao bi se očekivati neki napredak. Ali, ovaj Predlog odlaže stupanje na snagu upravo ovih odredbi o nadzoru, šest meseci nakon objavljivanja tog Zakona, uz obrazloženje za potrebno obezbeđivanje kadrovskih i materijalnih uslova za preuzimanje poslova nadzora.

Dodatno, poseban problem predstavljaju oni slučajevi kada i pored rešenja Poverenika da se pruži informacija pristup nije omogućen. Mehanizam da Vlada Republike Srbije izvršava rešenja Poverenika pokazao se kao neadekvatan.

Odsustvo efikasnih mehanizama nadzora u pogledu odgovornosti funcionera i drugih odgovornih lica u državnim organima, kao i izvršenja odluka Poverenika, svakako negativno utiču na ostvarivanje prava na slobodan pristup informacijama. Kako je to navedeno u pomenutom izveštaju Poverenika, time se stiče utisak „da Vlada (ali i Ministarstvo), makar i nesvesno, podržava i ohrabruje državne organe u kršenju ovog, Ustavom i Zakonom zagarantovanog, prava."[3]

Tajnost u službi ograničenja slobode informacija

Slobodan pristup informacijama svakako ne znači da su sve informacije koje poseduje neki organ javne vlasti dostupne javnosti. Kao što je to slučaj sa slobodom medija i izražavanja, i sloboda informacija podleže nekim ograničenjima. Stoga, svako definisanje prava na slobodan pristup informacijama mora uzeti u obzir i slučajeve ograničenja tog prava. Međutim, ograničenja su dopuštena samo ukoliko imaju za cilj zaštitu nekih drugih interesa, bilo javnih ili privatnih, koji su u datom momentu značajniji od prava na pristup informacijama. To je ujedno i ustavnopravna obaveza koja se odnosi na sva zajemčena ljudska prava. Sâm Zakon taksativno navodi slučajeve mogućeg ograničenja prava.

Jedno od značajnih ograničenja prava je tajnost podataka. Ovo ne iz razloga da je tajnost podataka važnija od, na primer, prava na privatnost, već prevashodno što je ova materija još uvek neuređena u pravnom sistemu Srbije. Prema Zakonu o slobodnom pristupu informacijama, ograničenje je moguće ukoliko se zahtev odnosi na "informaciju ili dokument za koji je propisima, ili službenim aktom zasnovanim na zakonu, određeno da se čuva kao državna, službena, poslovna ili druga tajna, odnosno koji je dostupan samo određenom krugu lica, a zbog čijeg bi odavanja mogle nastupiti teške pravne ili druge posledice po interese zaštićene zakonom koji pretežu nad interesom za pristup informaciji." (čl. 9. st. 1. t. 5) Tako, neophodno je da se ispune dva uslova. Prvi je formalni, odnosno postojanje odluka na osnovu kojih se određena informacija proglašava kao poverljiva. I drugi, važniji, materijalni uslov – čuvanjem informacije zapravo se štiti važan interes, jer njenim otkrivanjem prouzrokuju se određene posledice. Ispunjenost formalnog uslova nije dovoljna da se ograniči pristup. Tako, svaki pojedinačni slučaj zahteva da se odmere i uporede značaj slobode informacija, odnosno prava na pristup informacijama sa jedne strane, i značaj interesa koji se štiti odlukom o poverljivosti sa druge. Istovremeno, oznaka poverljivosti nije

[2] Predlog Zakona o izmenama i dopunama Zakona o slobodnom pristupu informacijama od javnog značaja je na dnevnom redu druge sednice Drugog redovnog zasedanja Narodne skupštine Republike Srbije u 2009. godini, koja je otpočela 26.10.09.

[3] Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti, "Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja za 2008.godinu", str. 18.

neograničena u trajanju. Okolnosti se menjaju, pa samim tim i potreba za čuvanjem podataka od očiju javnosti.

Trenutni pravni okvir, tačnije nedostatak odgovarajućeg zakona kojim se uređuje pitanje tajnosti podataka, uzrok je nepostojanja jasnog određenja šta, zapravo, predstavlja poverljivi podatak, čiju sadržinu javnost ne treba da zna. Ukoliko se tome doda uobičajena praksa da se oznaka poverljivosti stavlja i na dokumenta koja se čak dostavljaju redovnom poštom, s pravom se može postaviti pitanje arbitrarnosti klasifikovanja podataka. Kada je Vlada, jula 2009. godine, usvojila Predlog zakona o tajnosti podataka[4], osnovna kritika odnosila se upravo na činjenicu da se time suštinski ne doprinosi rešenju problema. Veliki je broj, kako načelnih, tako i pojedinačnih, zamerki izrečenih od strane stručne javnosti, nezavisnih tela, pa i stručnjaka Saveta Evrope. Imajući u vidu izraženu spremnost Ministarstva pravde da uskladi postojeći Predlog sa sugestijama i primedbama, trebalo bi ipak sačekati konačan tekst predloga za neke dalje komentare.

Međutim, pravna sigurnost u pogledu poverljivosti informacija, odnosno u pogledu objavljivanja tih informacija, veoma je značajna za slobodu medija. Ako se uzme u obzir da se za objavljivanje poverljivih podataka može izreći kazna i do 10 godina zatvora, teško da se može zahtevati od novinara da objave neki dokument, pa makar on ukazivao na nezakonite radnje. Ukoliko bi postojao jasan zakonski okvir, onda ne bi mogla da se dogodi situacija u kojoj jedan medij uloži vreme i napore da dobije određeni dokument, koji se krije pod velom tajnosti, a da onda, kada nakon dugotrajnog procesa, najzad dobije mogućnost uvida u dokument, isti bude objavljen u nekom drugom mediju. Dokument ne sme istovremeno da bude poverljiv za jedan medij i potpuno dostupan za drugi. U takvoj situaciji ili bi odgovorao onaj koji je nezakonito sprečavao pristup dokumentu ili onaj koji je dokument na nezakoniti način dostavio drugom mediju. U potonjem slučaju, novinar koji je prvobitno tražio dokument bi imao pravo na naknadu štete.

Dokle god se jasno ne uredi postupak utvrđivanja tajnosti određenih podataka, ne može se govoriti o poštovanju prava na pristup informacijama u punom obimu, a samim tim ni o punom poštovanju slodode izražavanja i medija.

Zaključak

Svako neopravdano uskraćivanje informacija ne predstavlja samo kršenje prava na pristup informacijama, već prava na slobodu izražavanja, odnosno slobodu medija. Ukoliko se medijima Ustavom određuje ne samo pravo, već i dužnost da informiše javnost, onda država ima obavezu da obezbedi pravni i društveni okvir koji omogućava medijima da ispune svoju dužnost.

Postojanje pozitivne obaveze države u pogledu obezbeđivanja svih preduslova za ostvarivanja slobode izražavanja i medija, potvrđeno je bogatom praksom Evropskog suda za ljudska prava koja je ove, 2009. godine, dopunjena dvema važnim presudama. U aprilu, Sud je prvi put ustanovio kršenje prava na pristup informacijama u okviru člana 10 o slobodi izražavanja. U slučaju Mađarske unije za građanske slobode protiv Mađarske,[5] Sud je posebno istakao da vlasti ne mogu imati monopol nad informacijama od javnog značaja, jer se time ograničava pravo medija. U maju, Sud je ponovo jednoglasno potvrdio obavezu poštovanja odluka nadležnih organa

[4] Predlog Zakona o tajnosti podataka je na dnevnom redu druge sednice Drugog redovnog zasedanja Narodne skupštine Republike Srbije u 2009. godini, koja je otpočela 26.10.09.

[5] Mađarska unija za građanske slobode protiv Mađarske *(predstavka br. 37374/05)* od 14. aprila 2009.

u pogledu ostvarivanja prava na slobodan pristup informacijama.[6] Time je Sud uspostavio standard da nedopušteno ograničavanje i ovog prava može biti sankcionisano naknadom štete.

Ukoliko Srbija ne uspostavi adekvatan normativni okvir i mehanizam ostvarivanja prava na pristup informacijama, sa pravom se može očekivati veliki broj zahteva u Strazburu. Svako odgovorno društvo ne bi trebalo da dopusti da se zbog neprihvatljivih propusta državnih organa troši novac građana.

[6] Slučaj Kenedi protiv Mađarske (predstavka br. 31475/05), Presuda od 26. maja 2009.

EVROPSKI SUD ZA LJUDSKA PRAVA, SUDSKA PRAKSA[1]

I SUDSKA PRAKSA BR. 118, APRIL 2009. (strane 15-16)

Član 10 Evropske Konvencije za zaštitu ljudskih prava i osnovnih sloboda

Tarasag A Szabadsagjogokert (Mađarska Unija za građanske slobode) protiv Mađarske (br.37374/05)
Presuda, 14.04.2009.

SLOBODA SAOPŠTAVANJA INFORMACIJA

NVOu uskraćen pristup informacijama o tekućem postupku pred Ustavnim sudom: Povreda

Činjenični osnov: U martu 2004. godine član Parlamenta i druga fizička lica podnela su zahtev da se ispituje ustavnost izmena Krivičnog zakona, u vezi sa krivičnim delima koja su povezana sa drogom. Nekoliko meseci kasnije, podnosilac predstavke, nevladina organizacija za zaštitu ljudskih prava koja je aktivna na polju politike borbe protiv droga, zahtevala je pristup zahtevu. Bez prethodne konsultacije člana Parlamenta, Ustavni sud je odbio zahtev podnosioca predstavke, dajući objašnjenje da se zahtev na uvid može dobiti samo po prethodno dobijenoj saglasnosti njegovog podnosioca. Nakon ovoga, podnosilac predstavke je tužbom pred regionalnim sudom tražio izdavanje naloga Ustavnom sudu da omogući pristup predmetu, u skladu sa Zakonom o podacima iz 1992. godine. U odluci koju je u postupku po žalbi potvrdio drugostepeni sud, regionalni sudovi su odbili zahtev podnosioca predstavke smatrajući podatke "ličnim" kojima se ne može pristupiti bez prethodnog odobrenja podnosioca zahteva za ispitivanje ustavnosti. Zaštita takvih podataka se, po mišljenju suda, ne može zaobići usled postojanja drugih, legitimnih interesa, uključujući i pravo na slobodan pristup informacijama. U međuvremenu Ustavni sud je u svojoj odluci odlučio o ustavnosti i objavio u svojoj odluci i skraćeni sadržaj zahteva za ispitivanje ustavnosti.
Pravo: U vezi sa slobodom štampe, Sud je dosledno nalazio da javnost ima pravo da dobije informacije od opšteg interesa. S obzirom na aktivnosti podnosioca predstavke koje podrazumevaju i postupke za zaštitu ljudskih prava, između ostalog i u oblasti zaštite slobode informisanja, Sud podnosioca karakteriše kao društvenog čuvara *(watchdog)*, čije aktivnosti po Konvenciji uživaju zaštitu sličnu onoj koja se obezbeđuje štampi. Sud je dalje našao da sumarni zahtev za ispitivanje ustavnosti, posebno kada ga podnese poslanik u Parlamentu, nesumnjivo predstavlja stvar od javnog interesa. Kreirajući administrativne prepreke i uskraćujući pristup sadržaju takvog zahteva za ispitivanje ustavnosti podnosiocu predstavke, koji se bavio legitimnim prikupljanjem informacija o stvari od javnog značaja, vlasti su ometale pripremne faze tog procesa. Štaviše, *monopol* Ustavnog suda na informacijama u ovakvim slučajevima predstavljao je vrstu cenzure. U suštini, Sud je ponovio stav da pravo na slobodu primanja informacija predviđeno članom 10, zabranjuje Vladama da ograničavaju primanje informacija koje su treća lica nameravala ili mogla nameravati da šire. Međutim, slučaj podnosioca predstavke tiče se pre vršenja njegove funkcije društvenog čuvara *(watchdog)*, nego uskraćivanja opšteg prava na pristup zvaničnim dokumentima. Informacija koju je tražio podnosilac predstavke bila je spremna i dostupna i nije zahtevala prikupljanje bilo kakvih podataka od strane Vlade. U takvim uslovima, Države imaju

[1] Izvod iz zvaničnih dokumenata Evropskog suda za ljudska prava, dostupnih na web sajtu Suda; prevod uradila advokatska kancelarija "Živković&Samardžić", Beograd

obavezu da ne ometaju protok informacija traženih od podnosioca predstavke. Osim toga, nikakvo upućivanje na privatni život konkretnog člana Parlamenta nije se moglo pronaći u njegovom zahtevu za ispitivanje ustavnosti. Bilo bi pogubno za slobodu izražavanja u sferi politike ako bi javne ličnosti mogle da cenzurišu štampu i javnu debatu pozivajući se na svoja lična prava. Na posletku, Sud je stao na stanovište da prepreke postavljene da bi se ometalo dobijanje informacija od javnog interesa mogu obeshrabriti one koji rade u medijima ili srodnim oblastima u vršenju svoje vitalne funkcije "čuvara javnosti" ("*public watchdog*") i tako uticati na njihovu mogućnost da obezbede tačne i pouzdane informacije.

Zaključak: Povreda (jednoglasno)
Član 41- Utvrđivanje povrede predstavlja dovoljnu i pravičnu naknadu štete.

II SUDSKA PRAKSA, BR. 119, MAJ 2009. (strana 18)

Član 10 Evropske Konvencije za zaštitu ljudskih prava i osnovnih sloboda

KENEDI protiv MAĐARSKE (Br. 31475/05)
Presuda 26.05.2009.

SLOBODA IZRAŽAVANJA
Uporni pokušaji vlasti da izbegnu postupanje u skladu sa sudskom odlukom, kojom im je naloženo da omoguće neograničen pristup dokumentima bivše državne Službe bezbednosti: povreda

Činjenični osnov: Podnosilac predstavke je istoričar koji je zatražio od Ministarstva unutrašnjih poslova pristup određenim dokumentima, u nameri da objavi studiju o radu Mađarske Službe bezbednosti iz šezdesetih godina prošlog veka. Nakon što je njegov zahtev bio odbijen uz obrazloženje da su predmetni dokumenti klasifikovani kao Državna tajna, podnosilac je pribavio odluku regionalnog suda kojom mu se omogućava neograničen pristup, nakon što je uspešno dokazao da su mu dokumenti neophodni za istorijsko istraživanje na kome je radio. Nakon neuspešne žalbe Vrhovnom sudu, ministarstvo je ponudilo pristup, pod uslovom da podnosilac potpiše dokument o čuvanju poverljivosti. Podnosilac je to odbio i pokrenuo postupak izvršenja u oktobru 2000. godine. Međutim, posle ponovljenih zahteva i žalbi Ministarstva po različitim osnovima, podnosilac predstavke ni nakon osam i po godina nije dobio neograničen pristup odnosnim dokumentima.
Pravno stanovište: U podnosiočevoj predstavci navodi se da njegova nemogućnost da objavi objektivnu studiju o funkcionisanju državne Službe bezbednosti usled opstrukcije Ministarstva nije bila ispitana u smislu člana 10. Podnosilac je pribavio odluku regionalnog suda kojom mu se omogućava pristup dokumentima, te iako se vodio spor oko obima prava pristupa, nacionalni sudovi su u više navrata odlučivali u korist podnosioca u izvršnim postupcima i novčano kažnjavali Ministarstvo. Pri takvim okolnostima, uporno odbijanje vlasti da se povinuje odlukama u izvršnom postupku, koje je dovelo i do nalaženja suda da je povređeno i pravo na suđenje u razumnom roku u smislu člana 6. stav 1. Konvencije, bilo je u suprotnosti i sa nacionalnim pravom i praktično arbitrarno. Takva zloupotreba ovlašćenja od strane vlasti, ne može biti kvalifikovana kao "propisana zakonom".

Zaključak: Povreda (jednoglasno)
Član 41 - 6.000 EUR na ime naknade nematerijalne štete.

INTRODUCTION

The legal monitoring of the Serbian media scene lasts for the past six months. It is conducted by the expert team of Law Office "Zivkovic&Samardzic" in coordination with ANEM. Creation and issuing of the Publication is the special activity aimed at promotion of monitoring results in a new way: through further expert elaboration of some important media issues in the previous quarterly period. The monitoring and the editions of Publication are made possible by USAID and IREX.

This issue of Publication is an addition and upgrade of the legal monitoring conducted from August to October 2009.

The findings of the legal monitoring in the period observed showed the following:
There was no progress whatsoever in the media sector. The economic decline of the broadcasters is continuing. Nothing has been done to facilitate the media situation and the Government is showing a lack of interest for implementing its own measures and assisting the media. Instead of that, bad changes to the regulatory framework, against the will of the media, are still being forced upon them. The situation of the media is made even more difficult due to the manner in which these changes have been introduced as well as their potential consequences. The announced drafting of the Media Strategy, which should contribute to defining the aspired goals and priorities, as well as the principles and values to be protected, remains merely an announcement. Therefore one may reasonably doubt the sincerity of the Government's intentions to reform the media scene so as to enable its development and further democratization of society. The crisis in the relations between the media and the authorities and the mistrust that the latter have caused with their lack of care and understanding for the media may significantly slow down the development of the sector, and call into question the achieved level of freedom and democratic standards. For that reason the media sector should clearly define its requests and offer solutions to all significant media issues. In order to attain that, it is necessary to overcome partial interests and direct the energy toward accomplishing goals that are or should be the mutual ones. As experience has shown in the past, unified in such a way, they stand a better chance for success.

The monitoring of the exercise of the freedom of expression and freedom of media showed that, in the observed period, these freedoms were threatened in different ways. The increase of violence in society, to which the media had been more frequently exposed, including those not primarily news-oriented, is seriously threatening further investigative work and a critical attitude of journalists towards negative phenomena in society. An additional aggravating circumstance is the economic decline of the media, which makes them more vulnerable to pressure. However, the most significant factor threatening to compromise what has been achieved so far in relation to these freedoms is self-censorship, as a consequence of the recent amendments to the Law on Public Information.

The regulatory framework for the media functioning has recently been substantially altered. Besides the harmful amendments to the Law on Public Information from August 31, 2009, two other laws have also affected the conditions for the work of media. The Law on National Councils of National Minorities has deepened the problem of media privatization with its provisions in collision with media laws, while the amendments to the Criminal Code have had a double effect on the media sector. On one hand, its amendments and provisions have recognized the status of "professions of importance for public information" as "professions of importance for the public",

which are accordingly protected by a stricter penal policy, which is good. On the other hand, the Law on Amendments to the Criminal Code introduces new criminal offenses, namely regulates differently the reporting on current legal proceedings so as to make it potentially more risky for journalists. The Law on Copyright and Related Rights, the Law on Amendments to the Law on Free Access to Information of Public Importance and the Law on Classified Data are included in the agenda of the second sitting of the Serbian Parliament's second regular session in 2009. Although these laws are not strictly media laws, they will alter the regulatory framework for media, after they are adopted. Namely, these laws partially go deep into the field of media and negatively affect it. Depending on their finally adopted text, these changes will be positive or negative for the media sector. The controversial amendments to the Broadcasting Law, passed in May 2009, have for the first time been applied in this period. The Parliamentary Culture and Information Committee has independently elected two out of the proposed six candidates from the NGO sector for membership in the RBA Council, proposing to Parliament those candidates that do not enjoy the support of larger and more prominent NGOs. This could be also happened to the media in the following period.

In the observed period, **the competent authorities** have again failed to contribute to improvement of the media situation. In spite of the some fee reduction, existing unrealistic RBA fees and extremely high tariffs of collective organizations for the protection of copyright and related rights are a significant burden for broadcasters. Urgent Government measures to assist the media in crisis are yet to be implemented four months after they were passed because of a lack of initiative by the Government. The latter has, on one hand, in words supported the media; on the other hand, considered the media sector as any other profitable industry that should be taxed in order to fill up the budget, which shows its lack of understanding the role of media in a democratic society. The gap between the Government and the media has recently been deepened with the fact that none of the two candidates from the list proposed by the media and journalists' associations has won a necessary majority to be appointed to the Council. It demonstrates the extent of the Government's distrust towards the media sector and media and journalists' associations, as well as its unwillingness to respect the will of these associations. The Media Sector Development Strategy also remains mere lip service by the Government, for the time being. Further activities on the Strategy will show the extent to which the foot-dragging on its drafting has been a deliberate policy of the authorities in order to secure greater influence on the media, or a consequence of the Government's lack of competence for defining media policy. Regulatory bodies have again failed to show that they have a clear vision of the development of the media sector, or to create the conditions for the normal functioning of the media market. Their inability to address the problem of broadcasting piracy has been accompanied with the introduction of measures against lawful broadcasters, which are required to fulfill unrealistic obligations, dealing yet another blow to the media already hit by the financial crisis. Quality programs and content remain unappreciated and the Public Service enjoys a privileged position, in spite of the fact that PBS doesn't fulfill its duty of producing and airing program of general interest, but merely competes with commercial media.

In the area of **digitalization and privatization,** the Government has continued to send contradictory messages to the media sector. For instance, it remains unclear what is the Government's plan regarding the privatization of public media outlets. The auction of 12 publicly owned media, which was announced for December 11, 2009, was not a result of systemic decisions. The persisting collision of regulations leaves the possibility for a certain number of media to remain not yet privatized, which would obstruct the normal operation of the media market and the autonomy and independence of these media. Furthermore, it is still not clear whether the

coming digitalization of broadcasting will be implemented as specified by Government's Strategy, or as PBS is doing it in practice, breaching regulations and adopted technical standards.

The above results and findings of the legal monitoring for the quarter August to October 2009 were crucial for the selection of themes for this second edition of ANEM's specialized Publication. Therefore it consists of authors' texts on the following topics: the first text by Lawyer Slobodan Kremenjak concerns the **amendments to the Law on Public Information**, with an emphasis of key problems and risks in reporting; the second text, by Lawyer Nebojsa Samardzic, focuses on the **privatization of media** and its importance for the media independence; **Media Strategy for a Digital Era** is the theme of the third text by PhD Snjezana Milivojevic, raising many questions and offering answers on this topic; in the text **(The Right to) Information in the Service of Freedom of Media**, the author Nevena Ruzic addresses the importance of free access to information of public importance, as well as the question of classified data for the work of the media and their freedom. Special appendixes are the excerpts from the **European Court of Human Rights case law**, containing a summary of two verdicts concerning the application of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This issue of Publication, as well as the previous once, represents ANEM contribution to the development of the media sector and continuation of the necessary reforms in this area.

Amendments to the Public Information Law
- key problems and risks in reporting -

Slobodan Kremenjak, lawyer[1]

Amendments to the Public Information Law attracted a lot of public attention during the summer. Although it was heavily criticized, the Law was adopted on August 31, 2009 and published on the same day in the "Official Gazette of the Republic of Serbia" No. 71/2009. It came into force on September 8, 2009. At the end of the same month, the Ombudsman, Sasa Jankovic, filed a request for appraisal of constitutionality of the Law with the Constitutional Court. On October 8, the Constitutional Court decided to forward the disputed Law to the National Parliament to be reviewed, with the aim to hear the opinion of the other side, i.e. the side that passed the Law.

While the Constitutional Court's final decision on constitutionality of the Law Amending the Public Information Law is still being expected,

we will point out – now from a slightly larger distance – some of the key flaws in this law:

First, the Law Amending the Public Information Law stipulates that a public media outlet can be established only by a domestic legal person, which is contrary to the article 50, paragraph 1 of the Constitution. This constitutional provision specifies that everyone is free to establish newspapers and other means of public informing without any approvals and in accordance with the law. This undoubtedly includes at least all physical persons.

Second, the Law Amending the Public Information Law specifies that the founder of a public media outlet is not allowed to transfer or in any other way to dispose of the right to a public media outlet or the right to publish such a media outlet; it also specifies that any contract or any other legal arrangement transferring the right to the public media outlet or the right to publish it shall be considered void. This provision of the Law Amending the Public Information Law violates the guaranteed right of peaceful enjoyment of his possessions acquired in accordance with the law (article 58, paragraph 1 of the Constitution, and the article 1, paragraph 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms); the constitutional guarantee of freedom of entrepreneurship (article 83, paragraph 1 of the Constitution); and the rights acquired by lawful investment of capital. The Constitution guarantees that these rights cannot be diminished by any law (article 84, paragraph 3 of the Constitution).

Third, the Law Amending the Public Information Law forbids operation of public media outlets which are not registered with a media register and specifies a fine for the commercial offence of operating an unregistered public media outlet. This provision violates the aforementioned article 50, paragraph 1 of the Constitution, which stipulates that everyone has the right to publish a public media outlet freely and independently from any previous act of the government, like for example registration. The freedom to receive and impart information and ideas – using speech, writing, pictures or any other means – without interference by public authority is also guaranteed by the provisions of the Article 46 of the Constitution, article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the article 19 of the International Pact on Civil and Political Rights. Also, the article 20, paragraph 2 of the Constitution forbids any

[1] Legal office "Zivkovic & Samardzic", Belgrade

diminishing of the achieved level of human rights. Provisions of the article 14a, paragraph 5 and the article 92a, paragraph 1 of the Public Information Law (articles 2 and 4 of the Law Amending the Public Information Law) violate this constitutional ban, because prior to these amendments to the Public Information Law, the right to publish a public media outlet had been guaranteed without any preconditions related to registration with the Register of Public Media Outlets.

Fourth, the Law Amending the Public Information Law defines certain commercial offences, as well as new amounts for fines. The Law on Commercial Offences defines commercial offences as socially harmful violations of regulations on commercial or financial operation which have caused or could have caused serious consequences. It is reasonable to ask how a violation of non-commercial and non-financial regulations – specifically, the violation of regulations related to public information and freedom of expression – can be considered to be a commercial offence. At the same time, the Law Amending the Public Information Law has exceeded the highest allowed limits of fines for commercial offences. It has also defined the fines as a percentage of founder's revenue in certain cases, but this option is not envisioned by the Law on Commercial Offences.

Still, whatever opinion we may have about the Law Amending the Public Information Law, it is now in force and we should expect that it will be implemented.

In this sense, what are the most important things to be considered by journalists and editors in their everyday reporting?

First, *sanctions for violation of the presumption of innocence and rights of minors are now much harsher.* The Public Information Law had previously stipulated that in public media outlets no one must be reported to be a perpetrator of a punishable offence, or described as a guilty or responsible party, before an effective decision by a court or other body. There is another difference – violation of the presumption of innocence, apart from being a basis for a damages claim, now allows initiation of commercial offence proceedings (previously defined only as a misdemeanor). Situation is similar if rights of minors are violated, which is now a commercial offence (previously misdemeanor).

There are two reasons why our media outlets often violate the presumption of innocence that can easily be rectified. Editors and journalists, often completely groundlessly, believe that there is a difference between situations when they convey their own information and opinions, and the situations when they cite someone else's information and opinions. Most of the journalists have been surprised when we explained them the legal definition of libel ("making or conveying untrue information that can damage a person's honor or reputation" – in this case, the term 'conveying' relates precisely to quoting of third persons' statements), or the previously mentioned article 37 of the Public Information Law which protects the presumption of innocence ("In a public media outlet, no one must be reported to be a perpetrator of a punishable offence, or described as a guilty or responsible party, before an effective decision by a court or other authorities" – therefore, no one must be "reported" as such, regardless of whether that "reporting" is performed by a journalist's own statement or by quoting a third person's statement). At the same time, editors and journalists often and without reservation report statements and announcements made by authorities, especially the police, in a way that suggests that a person who was charged with a criminal offence is actually the perpetrator of that offence. The Public Information Law stipulates that verbatim reporting of incorrect or untrue information from a document made by relevant official bodies (in our case, police announcements) is grounds for dismissal of legal responsibility, but only with relation to possible damages, not when it comes to responsibility for the misdemeanor (now classified as a commercial offence). Of course, this does not mean that in such proceedings courts

would not (or should not) take into account these circumstances; it just means that additional precaution while reporting sensitive information is a good idea.

Regarding the rights of minors, the law stipulates that the content of public media outlets and the manner of their distribution must not harm moral, intellectual, emotional or social development of minors, and that the content which may harm the development of minors must be clearly and visibly marked as such and be distributed in a way that is least likely to make it available to them. Also, minors must not be made recognizable in information which may harm their rights or interests. Violations in this area are most often made when content inappropriate for minors is printed at the front page of a newspaper or aired in certain time slots by broadcasters, or when publishing information that allows a minor to be identified as a victim or a perpetrator of a criminal offence.

Second, the Law Amending the Public Information Law stipulates *harsher penalties* for certain offences that had already existed and been defined. Specifically, they are related to the obligation to publish imprint and to identify the editor-in-chief, the obligation to preserve the information (copies of published issues and recordings of the entire aired program), the obligation to make published issues and recordings available in accordance with the Law (to courts, the police, as well as any third person that has a legal interest, if requested from such third person in a written form and if expenses are paid in advance). Harsher penalties are also stipulated with regard to failure to publish or improper publishing of responses, corrections, and subsequent information on the outcome of criminal proceedings and their verdicts. The offences themselves are not controversial. What is debatable is the severity of the prescribed penalties. In any case, with increased attentiveness, additional training of journalists and editors, and more frequent consultation with lawyers, the risk of being punished for these offences can be averted in many cases.

In focus: Media privatization in Serbia

Nebojsa Samardzic, lawyer[1]

Introduction

The endless postponing of the process of privatization of public media outlets in Serbia reminded us of an event from March 2004. The then Government of the Republic of Serbia, whose prime minister was Vojislav Kostunica, implementing the Law on Public Enterprises and Engagement in a Business of General Concern, appointed Aleksandar Tijanic to the position of general manager of the RTS. The Government of Vojislav Kostunica adopted this decision under the article 14 of the Law on Public Enterprises and Engagement in a Business of General Concern, in accordance to which the general manager of a public company is appointed and released from duty by its founder. The Government's decision was in direct violation of the explicit provision in the article 89 of the Broadcasting Law, in accordance to which the Managing Board is authorized to appoint the general manager with a two-thirds majority of the total number of its members and after a public contest. The Government's decision caused the resignation of almost the complete Managing Board of the RTS, as well as protests of media and journalistic associations, experts and the then opposition political parties.

Today, we are left wondering whether some of those who protested in 2004 did it because of their principled opinion that it was unacceptable for the top management of a public media outlet to be directly appointed by the executive branch of government, or whether it was the result of personal animosity towards Aleksandar Tijanic. We ask this question because four and a half years after the harshly criticized appointment of Aleksandar Tijanic to the position of the general manager of the RTS in accordance with the Law on Public Enterprises and Engagement in a Business of General Concern, the management of numerous publicly-owned media outlets is still being appointed directly by the executive government under the same Law, while protests from associations and experts have been almost completely absent. Why are we now silently ignoring the actions that we have previously considered contrary to contemporary democratic achievements?

Excuses for postponement of media privatization

One of the key intentions of the Broadcasting Law that went into force in July 2002 was to transfer the authority to appoint directors and editors of public media outlets from the executive branch of government to other entities. At the same time, the Law stipulated a dual approach which, on the one side, envisioned a transformation of the Radio Television of Serbia and Radio Television of Vojvodina into a republic and provincial public service broadcaster, and on the other side, a mandatory privatization of remaining regional and local public media outlets in accordance with a fixed schedule.

In accordance with the Law, an independent regulatory body for the area of broadcasting was established – the Republic Broadcasting Agency. A complex mechanism for election of members of the Agency was put into place in order to allow a wide range of interested participants to take part in nomination of members, including those from the civil sector. Among its other roles, the Agency was authorized to appoint and release from duty the members of the Managing Board of republic

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and provincial public service broadcasters. The Managing Boards appointed in this way, with 9 members each, were authorized to appoint and release from duty the general managers of the republic and provincial public service broadcasters, as well as the directors of radio and television and editors-in-chief of the program, always with a two-thirds majority of the total number of members of the Managing Board and after a public contest.

With regard to regional and local public media outlets, the Law specified a mandatory privatization with a fixed schedule. It was stipulated that regional and local public media broadcasters should be privatized not later than four years after the Law's entry into force, i.e. before July 2006. Later, in 2005, this deadline was extended to December 31, 2007. Only several days before the expiry of the deadline, the Government of the Republic of Serbia, at the initiative of the Ministry of Public Administration and Local Self-Government and the Executive Council of the Autonomous Province of Vojvodina, adopted the Conclusion 05 No. 023-8988/2007 accepting the information about the necessity to abort the procedure of privatization of broadcasters airing programs in languages of national minorities, for 8 media outlets in total. For the purpose of implementation of this Conclusion, the Privatization Agency was directed – in accordance with the article 25a of the Privatization Law – to adopt a decision on abortion of privatization of radio and/or television stations of local and regional communities broadcasting programs in languages of national minorities. Two days later, the National Parliament of the Republic of Serbia passed the Law on Local Self-Government and the Law on Capital City which authorized municipalities to establish television and radio stations, and at the same time authorized the city of Belgrade to establish television and radio stations, newspapers and other means of public informing. The Law on National Councils of National Minorities was passed on the last day of August 2009. In accordance with this Law, the Republic, the autonomous provinces and units of local self-government – as founders of public companies and institutions in the area of public information which fully or partially inform the public in a language of a national minority – are authorized to transfer the founding rights to a national council of the national minority in whose language the media outlet in question fully or partially operates. In this way, another model was created that allows the mandatory privatization to be evaded.

The current situation

After a pause of almost two years, the Privatization Agency has announced on October 22 a public invitation for participation in public auctions for 12 media outlets. However, the fact that in the previous period a legal basis was created that allowed certain media outlets to avoid privatization opens many questions. One of them is how to achieve equal and fair conditions for operation of commercial media outlets, considering the budget financing of the remaining media outlets. However, the most important point from the aspect of freedom of expression and media freedom, which brings us to the beginning of our discussion, is the following question – how to take away the authority to appoint directors and editors of local public media outlets from the executive local self-government. The author of the Broadcasting Law intended to simply ignore this problem until the upcoming privatization, which has been proven to be a bad approach. The government has found a way to endlessly postpone the privatization, first by failing to adopt or delaying the adoption of necessary detailed rules for privatization, and later by extension of deadlines specified by the law as well as the supposed desire to preserve the achieved level of minorities' rights to be informed in their own language, while at the same time adopting an unacceptable assumption that only state-owned media outlets are capable of providing information in minority languages. In the

end, new laws were adopted which are counter-productive with regard to the mandatory and time-limited privatization.

More than seven years after the adoption of the Broadcasting Law, there are around 50 state-owned local and regional broadcasters in Serbia, which are financed mostly from public sources. Even today, their management structures are being appointed directly by local governments in accordance with the Law on Public Enterprises and Engagement in a Business of General Concern. Their editorial policy is under the influence of local power-brokers, while editors and journalists have no system-wide mechanisms for protection from such influence, i.e. they are left alone in the struggle against it. It is highly necessary to continue the privatization, and it is good news that the Privatization Agency has announced a certain number of new auctions. On the other side, negative experiences with the obstruction of privatization, and especially the changed legal framework which allows some public media outlets to avoid privatization, require new steps. One of such new steps is the creation of mechanisms which would guarantee an independent position of the remaining local public media outlets with regard to the executive local self-government.

Media strategy for a digital era

PhD Snjezana Milivojevic[1]

Two strategic documents, adopted over the period of four years, when read retrospectively, map the Serbian media transition at the beginning of the 21st century. They also largely indicate an expected entry into a completely new media environment at the outset of the digital revolution.

The first document, the Broadcasting Development Strategy by 2013, was adopted by the Republic Broadcasting Agency (RBA) at the end of 2005. After a series of scandals related to its establishment, unlawful nominations and years-long blockade, the RBA presented the strategy as vision of media development over the next eight years. However, this text feels rather as an average student essay, since it actually deals with the current 'situation in the field' and exhibits no developmental vision at all. Instead of future development-related challenges, it lists 'areas', the usual 'trouble spots' of media transition, such as privatization, allocation of frequencies or the transformation of RTS, and extensively rewrites the law adopted three years ago. The main task entrusted to the RBA at the time, which it has been performing ever since, was allocation of licenses for analog broadcasting. Once all appeal procedures and judicial proceedings are completed, the allocation will be successfully accomplished just in time for the beginning of digitalization process, i.e. by the time analog licenses will have become meaningless. Although it was clear that the TV setting in Europe will have been dramatically different by the year 2013, technological changes have been completely ignored. Digital television is mentioned only as an area not covered by the Strategy. Therefore, rather than offering an insight into the future, the Strategy has become technologically obsolete long before the end of its validity period.

The second strategic document was adopted by the Government of the Republic of Serbia in summer 2009 and it deals with the digital switchover. Although it directly relates to broadcasting, the paper was prepared by the Ministry of Telecommunications, while the Ministry of Culture and the RBA, which have competences in the area of media policy, hardly had any role in it. Neither of the two institutions has any obligations within the envisaged Action Plan, as if they were complete outsiders to the whole process. Although the document mentions special duties of the public service broadcaster in the process of digitization, RTS is expected to perform promotional duties only, as if the public service broadcaster were a state-owned propaganda agency. From the text of the document it is clear that 'digital transition' is an internationally-mandated obligation and that no preparations were carried out for the process. Even the switch-over date, April 4, 2012, was imposed by circumstances. It was set having in mind the timeline for digital switchover in neighboring countries, which would interfere with the analog signal of domestic TV stations, and the fact that the Olympic Games broadcasts will be digital and therefore accessible to domestic audience only in this format. In contrast to the vague and long-term approach of the RBA, this document is mostly a precise 'to do' list for the short time left before the spring of 2012.
What is most visible in this regression is the conspicuous and sudden transfer of the radio and television broadcasting into to the sector of telecommunications. Comparatively speaking, this is not so unusual, since the critical media researchers in Central and Eastern Europe have already described 'turf wars between broadcasting and telecommunications regulatory authorities'. Telecommunications regulators are clearly more powerful, their sector is more successful in

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commercial terms, while their employees are more technologically advanced. Beside this, decisions in the area of telecommunications are often made behind closed doors and do not cause public disputes as media do. They easily translate media issues into two 'neutral' and 'safe' languages – technological and commercial – which do not cause general concern that is typical of every government intervention in the media sphere. Since the area of telecommunications grows faster and attracts more investment, this step turns broadcasting into a remote and non-important province of telecommunications, slowly and without any public insight. Therefore, most of the issues that require political decision (not in the ideological but in the public policy sense) have not been even tackled by the Strategy. For example, it has not been explained how the state will help citizens acquire digital receivers (estimated costs for set-top boxes range from 15 to 40 million Euros); three possible scenarios are listed, as if it is an academic debate, not an adopted 'strategy'. The document states that 'the scenario to be implemented will be selected in accordance with financial capabilities at the time of the switchover'. Or, how the digital dividend will be shared and how citizens will benefit from the liberalized part of the spectrum. The document quotes European position and clearly states that the spectrum is a public resource that belongs to citizens. How will these citizens – who are totally uninformed at the moment – participate in the discussion and will there be a discussion at all? Within the Action plan, allocation of the digital dividend was placed in the table with 'technical issues' that will be regulated by a 'government decision'. Digital dividend is one of the key benefits of digitalization. When and how is it going to be discussed if only two years before the switchover its very concept is completely unknown even to the best-informed media professionals?

This same impression follows from two laws that were recently almost simultaneously, although they significantly differ from each other. The Law on Public Information was amended after an emergency procedure last summer, upon proposal of the Ministry of Culture. It demonstrated profound misunderstanding of media on part of the Government, the Parliament and public authorities by large. More importantly, the Law has confirmed that repression and control are both main instruments and goals of media policy, so that the Law was left stuck in a historical blind alley, where media mainly discuss 'who owns them and who controls them'. It will mainly result in a typical response of incompetent authorities – retreat and tight control over the media outlets which can be controlled, at the same time powerlessly watching migration of audience, content and money towards the media over which the government has no influence.

On the other side, the Law on Electronic Communications, which has been recently released for public debate, deals precisely with these new areas. When it comes into force, it will replace the current Law on Telecommunications. It has been prepared with an intention to include the EU regulatory framework on electronic communications. This means that a part of domestic legal regulations (in telecommunications) is introducing standards which will affect decisions in other segments (the media/broadcasting) without a prior integral vision. This kind of approach usually hinders implementation and leads to paralysis which is often described by a phrase: 'the laws are good but are not being enforced'.

All normative documents – the ones related to media products and content and the ones related to technology, spectrum and networks - must reflect unity of regulation. In this case, the switchover date has been set prior to any discussion on the significance of digitalization and without any knowledge in the media community about the process. What is it that makes any document a 'strategy' if it does not describe consequences or benefits of a process? How is it possible that no one knows anything about the digital dividend and its allocation, this being, for example, well-known in Great Britain, which will, as is proudly emphasized here, switch off roughly at the same

time as Serbia? The web portal of the EU information society states that four fifths of the spectrum used for analog broadcasting will be freed for new services and explains details of current proposals concerning management and allocation of the spectrum. The European Commission has estimated that the potential economic benefit arising from the harmonization of digital dividend between the member states only will amount to 20-50 billion Euros. But what is known here and is it possible to make any plans? Or, will everything be left to the last minute Government's decision, without proper preparation any public control?

This is not simply an issue of division or conflict of jurisdiction between two Ministries, regulators or areas. We are talking about the new media and their importance for democracy in the information society. Their role depends on numerous decisions which at the same time include technology, market and content-related issues, and the media must participate in these decisions from the very start. Therefore it is of crucial importance to consider where the decisions will be made, how the policy will be created, what kind of regulator will deal with audiovisual services and what role the public will play. Such decisions cannot be delayed nor hidden by a tacit incorporation of broadcasting into telecommunications, which is underway.

Insight into the future

Why is this retrospective view important now? Mostly because it reveals several significant dilemmas which should be clarified before the preparation of a media development strategy in order to avoid its possible 'bad start'. Let us discuss two of them – the one that is often mentioned (who will prepare the strategy and with what ambitions?) and the one that is ignored (why is the strategy needed and what should it contain?).

The first and **most** frequently **asked** question in the recently initiated debate, is - who will compose the media strategy? Surprised by the negative reaction to the Law on Information, he Ministry of Culture promised this document hoping to alleviate at least a part of public discontent. The Ministry also offered to establish a special 'working group' to compose it, inviting numerous stakeholders to participate. Some welcomed it as an opportunity to conceal their previous approval of the bad Law, while others saw it as an opportunity to have a say something that they did not fully understand. This is all clear from the debate so far. The Ministry undoubtedly needs help in this matter. With its striking self-isolation and indifference, the Ministry mainly appeared to be incompetent for issues in the area of future of media. Of course, questioning media development from various angles is essential to finally accept media changes as an opportunity, not just as a technological scare. But, it seems that the establishment of the 'working group' is not so much perceived as a chance to put together a good team as an opportunity for privileges and influence.

While possible members are being discussed and various organizations are competing for a seat in the 'working group', nobody asks who can really prepare such a document. If it is decided that a group should address issues that would guide media development for at least the next few years, this would probably mean more work and fewer members. However, if the group is seen as an opportunity to 'have our man among decision-makers', it will be very crowded, but the product is not very likely to be a success. *In the first case*, there will be at least a definition of technological, economic, content and regulatory challenges facing the media, and proposal on how to meet them. Such a group should bring together members with different profiles but equal competence in various media fields. *In the second case*, the strategy will be a result of a democratic agreement

among media stakeholders and will reflect what is possible to achieve. In the worst variant of the second case, the strategy will be just another list of 'media problems', a repetition of goals set at the beginning of transition, with a futile hope that the society will miraculously make up the missing time.

At the moment, it is uncertain which conception will prevail. But, the amount of enthusiasm in the process of self-nomination for such hard work is quite indicative. There was nowhere near as much interest in the digital switchover strategy, and I don't even recall any public knowledge about its preparation. Why do technological changes attract less attention, and since when are the technical solutions 'neutral'? In the EU, on the contrary, spectrum management has become one of the crucial political issues, with some claiming that it will play a key role in media development. It is behind many issues that are already vividly debated such as: Will the future media policy rely on 'market-based regulation'? What does 'platform neutrality' mean to content producers? What will happen to the traditional media when the 'linear content' and 'content-on-demand' become equally regulated? Will television stations of today survive crumbling of audience faced with an enormous choice accompanied with lowering of advertisers' interest in the once-mass media?

Complexity of these questions partially explains why technical issues are being separated from content issues and why media people deem themselves mostly competent for the latter. Their illusion that the two sets of issues can be dealt separately will be easily dispelled by a simplest scheme of digital broadcasting, which shows a range participants very different from the present ones, which will become reality as soon as in 2012. The strategy is to be written for such 'media'. It is wrong to think that it will be possible to recycle old objectives in order to prepare a new strategy, and that 10- or 20-year old issues have remained current. Media are changing increasingly and globally and this is an opportunity for everyone – media, audience and the regulators – to gain an insight into the depth of changes and to tackle them at the same time as the rest of Europe. If the Ministry of Telecommunications guarantees that something is technologically feasible, the Ministry of Culture should also look for a strategy which would prove that it is feasible with regard to content.

The first of the questions that are currently ignored, on the other hand, is weather the strategy is needed at all and what should it contain?
Relying on previous experiences, it seems that in this case we can clearly discern two answers. *The first* one sees the strategy as a very pragmatic document. Its goal should be to enlist immediate tasks or laws to be adopted in order to achieve a 'regulated' media sphere. Such a minimalistic document would not be of much use. We have already had governments who claimed that 'all media laws have been adopted' and that the area was well-regulated, but that laws 'were not properly enforced'. Even if this is true, and even if the adopted laws did contribute to solving the chaos inherited from the '90s, they cannot continue to be a regulatory framework for the media in the next decade. The RBA strategy from 2005 serves as the best proof for this. And in any case, it is the most developed societies that keep changing and amending their regulatory instruments: for example, the European Framework for Electronic Communications adopted in 2002 has been under review for the past two years and a new one is expected by 2010. The EU Television without Frontiers Directive was a 1989 response to the huge challenge posed by satellite TV, while 20 years later it was superseded by the Audiovisual Media Services Directive which was an answer to the need for equal regulation of linear and non-linear media services.

According to the second answer, the strategy should be a much more ambitious document since it would be adopted in a moment of revolutionary media changes. If we are witnessing completely

new media ecology, the strategy should serve as a guide through a complex and unpredictable world of changes that are not easy to understand. In fact, it should demonstrate exactly why it is not possible to pass 'a set of laws' and 'regulate the media sphere '. The good news is that such a set of laws does not exist, and that the media require permanent regulatory and policy activity of the government. Aside from this, convergence of media, platforms and services is increasingly blurring the boundaries between media laws and non-media laws, and creating new dilemmas which are hard to predict, for example: How is the piracy of video and music content different from book plagiarism? Is it acceptable that Google receive money from advertisements on its web pages with compiled news, while the media which created the news have no income? Should governments ban tweeting electoral results before the announcement of the official results? How should we relate to the increasing, open and non-market sector of information, culture and knowledge that is growing in the information society? And there are many other similar questions.

Therefore, the strategy this time is not 'business as usual' and requires far-sightedness that would inform the media policy for at least 3-5 years. Information society has ceased to be just an academic concept long ago. Today's media do not resemble the institutions that used to produce content for the mass audience any more: users increasingly seek the content they want ('pull' media) and less often receive content sent by the media to all users ('push' media). Apart from the media and new platforms, new devices emerge with breathtaking speed – only in its first year the iPod was sold in 32 million pieces – one per second – creating a market of 3 billion dollars. The market for iPod accessories alone amounted to a billion dollars. According to estimates from the EU Media and Information Society Framework (**"i2010"** [2]) more than half of all new jobs in the EU between 2000 and 2010 will be related to information and communication technologies. In the information society, citizens are flooded with information – it has recently been counted that the traffic on registered web pages amounts to 40 billion pages, with another 450-550 million of 'deep', invisible pages with various information. This incredible wealth of information calls attention to another reason why a different kind of strategy is needed today – until now, media policy has always been based on the 'principle of scarcity'. Since their inception, media have always achieved their freedom by fighting the restrictive measures of governments, who were the arbiter and allocator of scarce resources (frequencies, printing paper, distribution networks). Media now contribute to the creation of a world in which the main problem is abundance and in which traditional goals of the media policy regarding the content – quality, pluralism and standards – are acquiring new meanings.

Therefore, the main reason why the strategy should be adopted is the fact that the information society has reached the borders of Serbia, not only because it will be brought by digital signals, but also because many citizens of Serbia are sufficiently media literate to demand to live in such a society. For this reason, the strategy needs to offer a social answer for occasionally conflicting goals in an information society, such as:

- Practically endless opportunities brought about by digital revolution with unequal possibilities for access to digital technology, threatening possible internal 'digital divide';
- Freedom of expression and protection of human dignity which has the same standards in both on-line and off-line worlds;
- Stimulation of creativity and innovation of the media industry, which requires a 'light' regulatory 'touch-up', with the need to direct and guide media development rather than just follow it;

[2] **"i2010"** is the EU policy framework for the information society and media.

- Preservation of the public service ethos in a plentitude of news and multi- channel environment;
- Distribution of the digital dividend in the way which promotes competition and brings economic growth but is not only beneficial for the most powerful corporations.

The response of each country to these profound changes will depend on their own definition of goals and strategies of development. Viviane Reding, the EU Commissioner for Media and Information Society, has recently proposed that the EU should form an integrated regulatory authority – a converged regulator – in the sector. It would be able to identify all the necessary changes and formulate policies to stimulate competition without stifling innovation, at the same time safeguarding values and quality of communication content. She has radicalized the issue that has already, in certain European countries, led to establishment of a single regulator in the areas of telecommunications, radio, television and wireless spectrum. These countries believe that such a regulator is more likely to perceive the scope of changes which are hard to follow and which are often blurred between telecommunications and broadcasting; between electronic networks and media content. Is convergence of regulators the best answer to media convergence and what are its pros and cons in a small and relatively technologically undeveloped country? That issue is also hiding behind the unasked question why do we need the strategy and what should it be about.

The simplest answer to all of them is that the strategy is just an opening of a debate about the media in a digital era. And a look into the future the outcome of which may not be known in advance.

(Right to) Information in service of freedom of media

Nevena Ruzic, LLM[1]

On Freedom of Information

The freedom of expression, including media freedom, presupposes the freedom of information. It is difficult to imagine expression of opinions, especially if they are related to the circulation of ideas or criticism of the existing phenomena, if the information these opinions are based on is not available. If the media have the power and the role to inform the public, to examine changes in the society – positive or negative – then they need information in order to be able to work.

When considering the media freedoms in a country, it is also necessary to take into account the issue of the freedom of information. However, it is not always simple to define what "freedom of information" actually is, since the term 'information' has a very wide meaning. There are also difficulties related to the fact that the freedom of information is often defined as the freedom of informing, a term that is closely related to the primary role of the media to inform the public. If we analyze the freedom of information in the narrowest sense, it would relate to the right to free access to information.

During the adoption of the law on Free Access to Information of Public Importance, in November, 2004, the Ministry of Culture, the ministry responsible for the media, declared itself to be the relevant ministry for this law. Perhaps it became the relevant ministry by default, because no other ministry was willing to take on this portfolio.

It is not possible to give an unambiguous answer to the question – is the law that regulates the right to access information a media law or a non-media law? Free access to information is a fundamental right of all people, including the media themselves. A draft law that is currently in parliamentary procedure transfers the authority to enforce the Law on Free Access to Information from the Ministry of Culture to the Ministry of Public Administration and Local Self-Government, but this fact does not diminish the importance of this law for the media. Additionally, the Law itself contains provisions that are explicitly related to the media and journalists.

Aside from the Law on Free Access to Information, this right is guaranteed by the Constitution as one of the fundamental human rights. An unusual provision in the Serbian Constitution defines the right to access to information as one of the elements of the right to be informed (Article 51). Another element of this 'right' is in fact the obligation of the media to respect the citizens' right to be informed, i.e. obligation to accurately, fully and timely inform them on the issues of public importance. Therefore, if the media, apart from freedoms, have obligations toward citizens, and especially if they are stipulated by the Constitutional provisions, it is necessary to secure free access to information. Otherwise, the media's job will be made difficult or downright impossible.

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State's duty to inform

Beginning with an ideal situation, a full implementation of the Law on Free Access to Information in fact means that the media, i.e. the journalists, do not even have to be aware of its existence, at least not of the existence of all its provisions. This is because the right to access has two aspects. The first is related to the fact that everyone has the right to demand access to information held by the public authorities. This means that the state is obliged to deliver the information on request, and this is a passive obligation of the state. The second aspect is perhaps even more important, because it obliges the public authorities to make available the information of public importance regardless of demand. This aspect requires the state to play an active role.

The proactive role of the state in fulfillment of the right to free access to information not only obliges state authorities to inform the citizens, and therefore include them in the process of decision-making, but at the same time simplifies the process of exercising this right and certainly reduces the expenses of replying to individual requests. The principles of participatory democracy, transparency in work, and efficacy of work organization are some of the basic principles of good governance.

In accordance with the Law on Free Access to Information, proactive publication is an obligation of all state authorities that are required by the Law to publish an "Information Booklet" on their work. The information booklet is a document that contains various information describing the legal authority and internal organization of the official body, as well as a list of frequently asked questions or a detailed list of expenditure of budget funds. The booklet is published in an electronic form so as to make searching, copying and downloading of information contained in it easier. If the obligation of proactive offering of information is completely fulfilled, journalists do not have to request information about the salary of a minister or an institution's director. Also, for example, journalists do not have to request information about a contract on the highway construction concession. This information should be available at the relevant institution's web site. Using information that has been made available, journalists, as well as all citizens, can compare information published by various institutions and make conclusions about the (in) efficient use of taxpayers' funds. Or, they can compare this information with similar information from other countries. In this case, requests would be submitted with regard to some specific information.

However, this ideal situation is far from the current state of affairs. Numerous state institutions do not have information booklets. According to the report about the implementation of the Law on Free Access to Information for 2008 authored by the Commissioner for Information of Public Importance and Personal Data Protection, the information booklet has not been prepared and published by: one ministry, more than two thirds of the total number of municipalities (100) and almost a half of the minor offences organs, as well as some other state bodies. Even if it exists, the booklet is often incomplete and outdated.

It is common practice that access to information is fulfilled only after a formal request. State institutions are obliged to allow access to the information or deliver a copy of it not later than 15 days after the submission of the request. The media and journalists are not required to pay the expenses of copying the document that contains the requested information. In this way, the Law gives special treatment to the media, taking into account the fact that information is necessary for their work. At the same time, any kind of discrimination of the media is forbidden. State institutions must not give preferential treatment to any media outlet or deny information to other

outlets, while the media are entitled to damages if a state institution gives preference to other media outlets.

The Law stipulates misdemeanor sentences in cases of unjustified denial of information or failure to publish information booklets, as well as in the cases of discrimination against media outlets. Penalties for these misdemeanors range from 5.000 to 50.000 dinars. However, a small and almost negligible number of court proceedings indicates that there are problems in implementation of the Law, and therefore in the exercise of the right to access to information. Perhaps this could be explained by the lack of capacity of the Ministry of Culture to monitor the implementation of the Law. However, this explanation is not a justification. Having in mind the aforementioned draft law on amendments to the Law[2], which envisions the transfer of this authority to the Ministry of Public Administration and Local Self-Government, some progress could be expected in this area. But this draft postpones the entry into force of precisely these provisions on monitoring, for six months after the publication of the Law, with an explanation that it is necessary to provide personnel and material conditions for the monitoring duties.

Additionally, another problem relates to the cases when access to information has not been allowed despite the decisions of the Commissioner. The mechanism that the Government of the Republic of Serbia should enforce compliance with the Commissioner's decisions has proven inadequate.

The lack of efficient mechanisms to monitor the accountability of officials and other responsible persons in state institutions, as well as to monitor the implementation of the decisions of the Commissioner, negatively affects the exercise of the right to free access to information. The aforementioned report by the Commissioner states that this "leaves the impression that "the Government (as well as the Ministry), perhaps inadvertently, supports and encourages the state institutions to violate this right, which is guaranteed by the Constitution and the Law."[3]

Secrecy aimed at limiting the freedom of information

Free access to information certainly does not mean that all the information held by a state institution is available to the public. As is the case with the freedom of the media, the freedom of information is subject to certain limitations as well. Therefore, every definition of the right to free access to information must take into account the instances of limitation of this right. However, limitations are allowed only if they are aimed at protecting other interests, public or private, which are at the given moment more important than the right to free access to information. At the same time, this is a legal and constitutional obligation that pertains to all guaranteed human rights. The Law itself explicitly lists the cases of possible limitations to this right.

One of the important limitations to this right is the confidentiality of information. This is not because the confidentiality of data is more important than, for example, the right to privacy, but mostly because this area is still unregulated in Serbian legal system. In accordance with the Law on

[2] Draft on amendments to Law on Free access to information of public importance is included in the agenda of the second sitting of the Serbian Parliament's Second regular session in 2009, commenced on October 26, 2009

[3] Commissioner for information of public importance and protection of private data, "Report on Implementation of the Law on Free Access to Information of Public Importance for 2008", page 18

Free Access to Information, limitation is possible if the request is related to an "information or a document which is legally of officially mandated to be kept as a state, official, commercial or other secret, or which is available only to a limited number of persons, and whose public availability may lead to serious legal or other consequences harming the legally protected interests which have greater significance than the access to information" (Article 9, paragraph 1, point 5). Therefore, it is necessary to fulfill two conditions. The first one is formal, i.e. the existence of a decision on the basis of which a certain piece of information is designated as confidential. The second and more important condition is the substantive condition – protection of the information in fact protects an important interest, since its publication would lead to certain consequences. The existence of the formal condition is not sufficient to limit the access. Therefore, each individual case requires balancing and comparison of the importance of the freedom of information and the right to access to information, on one side, and the importance of the interests protected by the decision on confidentiality, on the other side. At the same time, the designation of confidentiality is not unlimited in its duration. Circumstances change, as well as the need to keep information from the public eye.

The current legal framework, i.e. the lack of an appropriate law that would regulate the issue of confidentiality of information, is the main reason for the lack of a clear definition of what exactly is confidential information that should not be available to the public. In addition, having in mind that it is a common practice to place confidentiality labels even on documents sent by regular mail, the question the arbitrariness of classifying data is reasonably posed. In July 2009, when the Government adopted the Draft Law on Classified Data[4], the main criticism was related precisely to the fact that it does not contribute to solving the problem. Numerous general and specific objections have been made by the experts, independent bodies, as well as the experts of the Council of Europe. Since the Ministry of Justice has announced it's readiness to harmonize the existing draft with the objections and proposals, further comments should be done once the final Draft is prepared.

However, the rule of law with regard to confidentiality of information and the publication of such information are of great importance for the freedom of media. Taking into account that publication of confidential information could be punished by up to 10 years of imprisonment, it would be difficult to expect that journalists would publish a document, even if it exposes illegal acts. If there was a clear framework, then it would not be possible to have a situation where a media outlet invests a lot of time and energy to acquire a confidential document, but after completing a time-consuming procedure and finally gaining access to it, sees it published in another media. A document must not be confidential for one media outlet and completely available to another at the same time. In such situation, the person who has illegally prevented access to the document, or the person who has illegally delivered the document to the other media outlet, would be liable. In the latter case, the journalist who has originally required the document would be entitled to damages.
As long as the procedure to establish the confidentiality of certain information is not clearly regulated, there can be no full exercise of the right to free access to information and thus no full respect for the freedom of expression and freedom of the media.

[4] Draft Law on Classified Data is included in the agenda of the second sitting of the Serbian Parliament 's Second regular session in 2009, commenced on October 26, 2009

The Conclusion

Each unjustified denial of information violates not only the right to access to information, but the right to freedom of expression as well, including the freedom of media. If the Constitution specifies that the media have not only a right, but an obligation to inform the public, then the state has an obligation to provide a legal and social framework which allows the media to fulfill their duty.

The existence of positive obligation of the state regarding the provision of all preconditions for exercise of the freedom of expression and the freedom of media has been confirmed in extensive practice of the European Court of Human Rights, which has included two important decisions in 2009. In April, the Court has, for the first time, established a violation of the right to access to information under the Article 10 pertaining to the freedom of expression. In the case of the Hungarian Civil Liberties Union vs. Hungary,[5] the Court has explicitly stated that state authorities cannot have a monopoly over the information of public importance because that would limit the right of the media. In May, the Court has again unanimously confirmed the obligation to comply with the decisions of relevant authorities regarding the right to free access of information.[6] In this way, the Court has established the standard that unlawful limitation of this right can be punished by awarding damages.

If Serbia does not establish an adequate regulatory framework and mechanism for exercise of the right to free access to information, it will be reasonable to expect a large number of claims in Strasbourg. No responsible society should allow the citizens' money to be wasted because of unacceptable omissions of state bodies.

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5 Hungarian Civil Liberties Union vs. Hungary *(claim No. 37374/05)* dated April 14, 2009.

6 Kennedy vs. Hungary *(claim No. 31475/05)*, verdict passed on May 26, 2009.

I European Court of Human Rights, "Information Note on the Court's case-law", No. 118; April 2009[1]

Article 10 of* Convention *for the* Protection *of Human Rights and Fundamental Freedoms

FREEDOM TO IMPART INFORMATION

NGO denied access to information on a pending constitutional case: violation.

TÁRSASÁG A SZABADSÁGJOGOKÉRT - Hungary (N° 37374/05); pages 15-16
Judgment 14.4.2009 [Section II]

***Facts*:** In March 2004 a Member of Parliament and other individuals lodged a complaint for review of the constitutionality of amendments to the Criminal Code concerning drug-related offences. Several months later the applicant, a human-rights non-governmental organisation active in the field of drug policy, requested access to the pending complaint. Without consulting the MP, the Constitutional Court refused the applicant's request explaining that complaints before it could be made available to outsiders only with the approval of the complainant. Subsequently, the applicant brought an action in the regional court for an order requiring the Constitutional Court to give it access to the file, in accordance with the relevant provisions of the Data Act 1992. In a decision that was upheld by the court of appeal, the regional courts dismissed the applicant's action after finding that the requested data was "personal" and could therefore not be accessed without the complainant's approval. The protection of such data could not, in the courts' view, be overridden by other lawful interests, including the accessibility of public information. Meanwhile, the Constitutional Court decided the constitutionality question and published a summary of the complaint in its decision.

***Law*:** In relation to freedom of the press, the Court had consistently held that the public had the right to receive information of general interest. Given the nature of the applicant's activities involving human-rights litigation, *inter alia*, in the field of protection of freedom of information, the Court characterised the applicant as a social "watchdog", whose activities warranted similar Convention protection to that afforded to the press. The Court further observed that an application for abstract review of constitutionality, particularly when made by a Member of Parliament, undoubtedly constituted a matter of public interest. In creating an administrative obstacle and refusing to grant access to the content of such application to the applicant, which was involved in the legitimate gathering of information on matters of public importance, the authorities had interfered in the preparatory stage of that process. Moreover, the Constitutional Court's monopoly of information in such cases amounted to a form of censorship. As to the merits, the Court reiterated that the right to freedom to receive information under Article 10 in the first place prohibited Governments from restricting the receipt of information that others wished or might be willing to impart. However, the applicant's case primarily concerned the exercise of the functions of a social watchdog rather than a denial of a general right of access to official documents. The information sought by the applicant was ready and available and did not require any collection of any data by the Government. In such circumstances, the States had an obligation not to impede the flow of information sought by the applicant. Further, no reference to the private life of the MP in question could be discerned in his complaint. It would be fatal for freedom of expression in the sphere of politics if public figures were able to censor the press and public debate in the name of their personality rights. Finally, the Court considered that obstacles designed to hinder access to

information of public interest might discourage those working in the media or related fields from performing their vital role of "public watchdog" and thus affect their ability to provide accurate and reliable information.

Conclusion: violation (unanimously).
Article 41 – Finding of a violation constituted sufficient just satisfaction for any damage.

II European Court of Human Rights, "Information Note on the Court's case-law", No. 119; May 2009

Article 10 of* Convention *for the* Protection *of Human Rights and Fundamental Freedoms

FREEDOM OF EXPRESSION

Persistent attempts by authorities to avoid compliance with court order requiring them to give unrestricted access to documents on former State Security Service: violation.

KENEDI - Hungary (N° 31475/05); page 18
Judgment 26.5.2009 [Section II]

Facts: The applicant, a historian, asked the Ministry of the Interior for access to certain documents as he wished to publish a study on the functioning of the Hungarian State Security Service in the 1960s. After his request had been refused on the grounds that the documents were classified as State secrets the applicant obtained an order from a regional court for unrestricted access after successfully arguing that it was necessary for the purposes of his ongoing historical research. Following the failure of its appeal to the Supreme Court, the Ministry offered access on condition that the applicant signed a confidentiality undertaking. The applicant refused and instituted enforcement proceedings in October 2000. However, following repeated court applications and appeals by the Ministry on various grounds, the applicant had still not been given unrestricted access to all the documents concerned some eight and a half years later.

Law: The applicant's complaint that he had been prevented from publishing an objective study on the functioning of the State Security Service by the Ministry's prevarication fell to be examined under Article 10. The applicant had obtained a court order granting him access to the documents and, although a dispute had arisen over the extent of that access, the domestic courts had repeatedly found for the applicant in the ensuing enforcement proceedings and had fined the Ministry. In these circumstances, the authorities' obstinate reluctance to comply with the execution orders, which had also led to a finding by the Court of a violation of the "reasonable-time" requirement under Article 6 § 1 of the Convention, was in defiance of domestic law and tantamount to arbitrariness. Such a misuse of the power vested in the authorities could not be characterised as a measure "prescribed by law".

Conclusion: violation (unanimously).
Article 41 – EUR 6,000 in respect of non-pecuniary damage.

[1] Excerpts from official documents of European Court for Human Rights, available on its web site