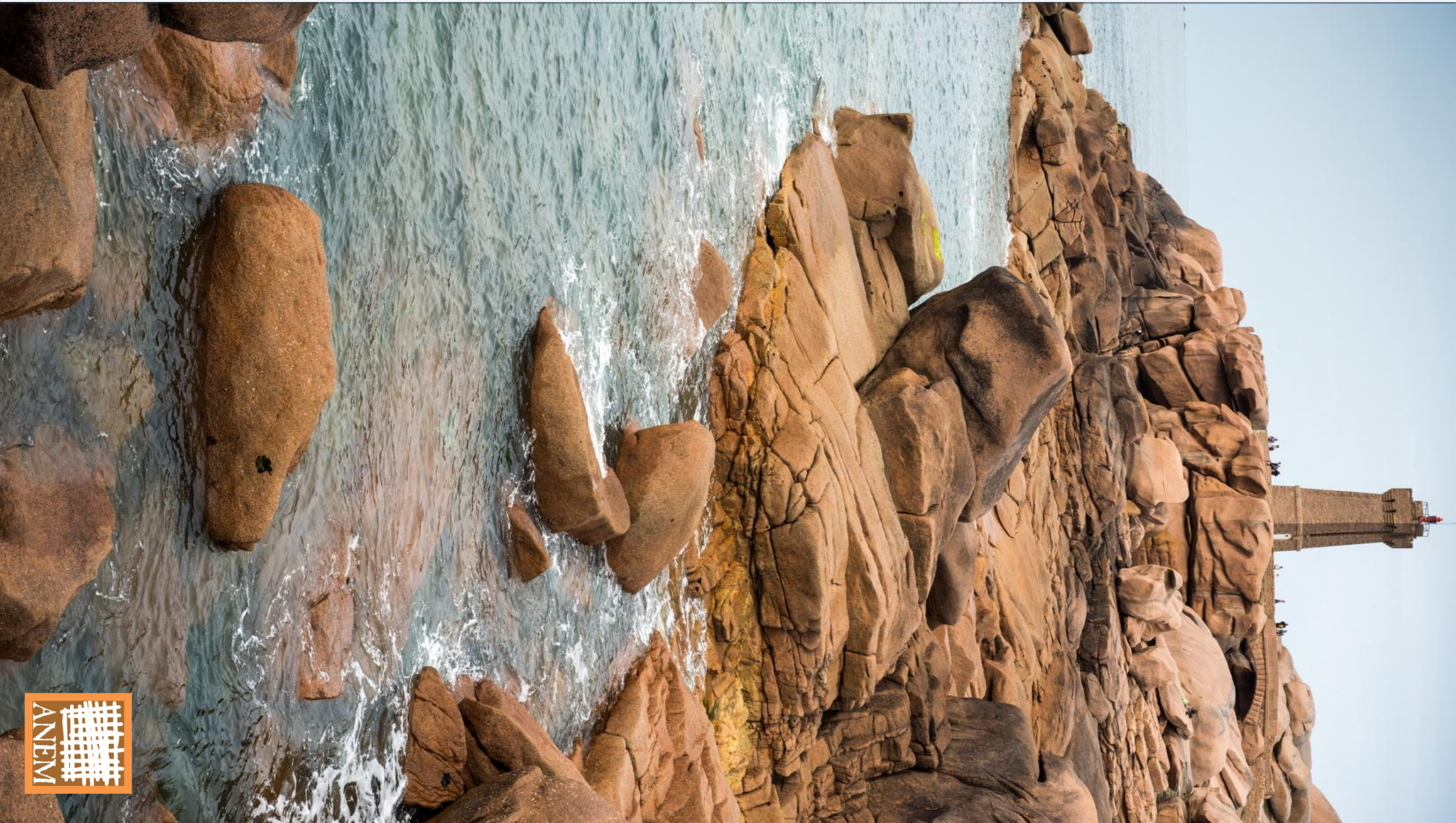
PRAVNI MONITORING MEDIJSKE SCENE U SRBIJI Publikacija X

LEGAL MONITORING OF THE SERBIAN MEDIA SCENE Publication X



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PRAVNI MONITORING MEDIJSKE SCENE U SRBIJI

UVOD

Medijsku scenu Srbije u prvih devet meseci 2014. godine, na osnovu nalaza monitoring tima ANEM-a, karakterisalo je sledeće:

Najvažniji događaj za medijski sektor u tom periodu svakako jeste usvajanje seta novih medijskih zakona – Zakona o javnom informisanju i medijima, Zakona o elektronskim medijima i Zakona o javnim medijskim servisima. Dugo očekivani zakoni, bez obzira na određene nedostatke, predstavljaju pomak napred i veliki korak u harmonizaciji sa evropskim pravnim okvirom. Njima je stvoren nov medijski regulatorni okvir koji bi, otklanjanjem uzroka najvećih problema koji već dugo opterećuju medijski sektor, trebalo da doprinese većoj zaštiti slobode informisanja, stvaranju povoljnijih uslova za rad medija i novinara i razvoju sektora. Za ostvarivanje tih suštinskih promena poseban značaj ima krovni medijski zakon – Zakon o javnom informisanju i medijima. Očekuje se da će njegova ključna rešenja, kao što su izlazak države iz vlasništva u medijima do 1. jula 2015, zabrana direktnog finansiranja medija javnim sredstvima od 1. jula 2015, uvođenje jedinstvenog sistema projektnog finansiranja medijskog sadržaja od javnog interesa (koji je prvi put definisan u oblasti javnog informisanja), kao i primena pravila o dodeli državne pomoći i zaštiti konkurencije u oblasti javnog informisanja, obezbediti uslove za stvaranje funkcionalnog medijskog tržišta sa ravnopravnim uslovima i jednakim pravilima za sve učesnike, i osigurati transparentnost finansiranja medija, a time i smanjiti mogućnost za politički i ekonomski uticaj na rad medija; unapređeni sistem registrovanja podataka o medijima treba da obezbedi transparentnost vlasništva u medijima, a propisana pravila o medijskoj koncentraciji treba da zaštite medijski pluralizam ali i da omoguće neophodnu konsolidaciju na preopterećenom medijskom tržištu. Sve to bi trebalo da doprinese i boljem ostvarivanju prava građana na informisanje. Za elektronske medije naročito je značajan Zakon o elektronskim medijima koji njihov rad reguliše u skladu sa međunarodnim dokumentima, standardima i pravilima koja važe na unutrašnjem tržištu EU u ovoj oblasti. Zakon propisuje i pravila o oglašavanju u skladu sa evropskom AVMS Direktivom, koja treba da doprinesu boljem funkcionisanju elektronskih medija. Ali, primena tih pravila u punom obimu može biti dovedena u pitanje zbog zastarelosti važećeg Zakona o oglašavanju i pravne nesigurnosti usled različitih tumačenja nadležnih organa koji zakon je jači. Ono što još može biti problem u realizaciji Zakona o elektronskim medijima jeste proširenje nadležnosti Regulatornog tela za elektronske medije (bivša RRA) uz istovremeno uvođenje novog rešenja da se na zaposlene u tom telu primenjuju propisi o državnoj upravi - to može dovesti do odliva kadrova i negativno uticati na razvoj njegovih kapaciteta i kompetencija a time i na kvalitet obavljanja novih poverenih poslova. Funkcionisanje i položaj javnih servisa uređeni su Zakonom o javnim medijskim servisima koji je u značajnoj meri harmonizovan sa evropskim standardima u primeni pravila kontrole državne pomoći na javne radiodifuzne servise, što podrazumeva njihovo odgovornije raspolaganje javnim sredstvima. Međutim, sporno u tom zakonu je to što se u mnogim rešenjima nije mnogo odmaklo od prethodnog zakona pa je transformacija RTS-a i RTV-a u istinske javne servise prilično diskutabilna, a naročito je sporno pitanje njihovog finansiranja – iako Zakon predviđa nov model finansiranja javnih servisa, iz takse, primena tog modela odložena je do početka 2016. godine a model finansiranja koji će se do tada primenjivati ne pruža dovoljno garancija za stabilno finansiranje i punu nezavisnost javnih servisa od izvršne vlasti. Ali, i pored određenih nedostataka, novi medijski zakoni su korak napred u odnosu na prethodno važeće zakone, prema oceni i monitoring tima i Evropske komisije i mnogih iz medijskog sektora. Svakako, efekat tih zakona zavisiće od toga da li će se i kako njihove odredbe primenjivati, a za njihovu realizaciju neophodno je da zakoni budu „dopunjeni" kvalitetnim podzakonskim aktima i novim Zakonom o oglašavanju, i praćeni podizanjem kapaciteta i nadležnih organa, ali i samih medija, za njihovu pravilnu implementaciju koja je podjednako važna, ako ne i važnija za reforme, uz obavezno jačanje kontrolnih mehanizama. Naravno, ključ svega je, kao i u svim ostalim oblastima, postojanje političke volje za istinske reforme u medijskom sektoru.

Regulatorni okvir za rad medija u ovom periodu unapređen je i određenim izmenama Zakona o elektronskim komunikacijama od značaja za medijski sektor – pristup zadržanim podacima je dozvoljen samo pod određenim uslovima, što je važno zbog zaštite poverljivosti novinarskih izvora; preciziran je institut obaveze prenosa (must carry) određenih TV programa. Pored toga, Savet RRA usvojio je izmene i dopune Kodeksa ponašanja emitera, i to u delu koji se odnosi na informisanje o

kriminalitetu i toku krivičnog postupka i na tretman religije i verske programe, koje su u određenoj meri pozitivne za emitere ali ne u potpunosti. U ovom periodu značajne su i dve odluke Ustavnog suda kojima su sporne odredbe Zakona o kinematografiji i Zakona o nacionalnim savetima nacionalnih manjina proglašene neustavnim te su prestale da važe, čime je njihov negativan uticaj na medijski sektor otklonjen.

Osim promena u regulatornom okviru, ostalo u medijskom sektoru bilo je po starom u ovom periodu. Nastavljena je praksa napada, pretnji i pritisaka na medije i novinare i uskraćivanja njihovih prava, kao i neadekvatnih reakcija nadležnih organa u takvim slučajevima. Sudska praksa u medijskim sporovima nije značajnije promenjena te su i dalje prisutni neujednačeni stavovi u medijskim sporovima, dugotrajni procesi, diskutabilne odluke, izostanak primene prakse Evropskog suda za ljudska prava, sem u retkim izuzecima, što doprinosi porastu osećaja nesigurnosti kod medija i novinara. Nadležni organi i organizacije nisu doprineli poboljšanju položaja medija i novinara, a izuzetak predstavljaju povoljna jedinstvena tarifa OFPS i PI za emitere, i značajni popusti i povoljnosti za emitere za plaćanje minimalne naknade SOKOJ-u (u oba slučaja - kao rezultat sporazuma između tih organizacija i ANEM-a, reprezentativnog udruženja emitera), kao i odluka Saveta RRA da emiterima sa područja ugroženih poplavama smanji naknadu (99%) u određenom periodu. Proces priprema za digitalizaciju se ubrzava, ali neka ključna pitanja za medije, direktne aktere ovog procesa, kao što su pitanje troškova i ulaganja s jedne strane, i benefita s druge strane, i dalje ostaju bez odgovora, zbog čega ne mogu da planiraju svoje poslovanje. Nova Strategija razvoja radiodifuzije, koja je veoma važna za elektronske medije i za razvoj sektora, kasni, ali se očekuje da će rad na njoj biti ubrzan nakon nedavnog usvajanja medijskih zakona. Međutim, u ovom periodu posebno je bio izražen problem ostvarivanja slobode izražavanja na Internetu, naročito uklanjanjem tekstova sa sajtova koji kritički govore o vlasti i hakerskim napadima na takve sajtove, a tokom vanredne situacije u zemlji zbog poplava čak je i pravo na iznošenje mišljenja na društvenim mrežama bilo ugroženo. To je izazvalo burne polemike, koje su vođene i na najvišem nivou između predstavnika vlasti i nekih međunarodnih organizacija, a traju i do danas, o tome da li je sloboda izražavanja ugrožena, da li su smanjene medijske slobode, ima li cenzure i autocenzure u medijima. Ono što je primetno jeste to da je sve manje kritičkih sadržaja u medijima i da mediji sve manje služe za razmenu ideja i mišljenja. Medijski sektor sam ocenjuje da su u medijima zavladale tabloidizacija i autocenzura, kao rezultat nepovoljnih uslova i okruženja za rad medija i pritiska vlasti. Stoga i jeste važan događaj za medijski sektor usvajanje novih zakona koji treba da budu osnov za dugo očekivane promene.

Polazeći od nalaza monitoring tima o tome koja su medijska pitanja bila bitna u ovom periodu, teme u ovom broju Publikacije su: novi medijski zakoni; sloboda izražavanja na Internetu; važnost pitanja finansiranja medija za građane i za medije; mediji u funkciji javnosti krivičnog postupka. Za Monitoring Publikaciju X tekstove su pisali: advokat Slobodan Kremenjak - *Novi medijski zakoni – šta se postiglo i šta nam tek predstoji*; Miloš Stojković, advokatska kancelarija „Živković&Samardžić“, Beograd - *Pravo na zaborav – šest meseci primene presude Evropskog suda pravde*; Nemanja Nenadić, programski direktor organizacije „Transparentnost Srbija”- *Finansiranje medija*; Siniša Važić, sudija Apelacionog suda u Beogradu - *Dileme u vezi sa snimanjem i emitovanjem suđenja u krivičnom postupku*. Peti tekst predstavlja sažet prikaz dve presude Evropskog suda za ljudska prava koje se odnose na primenu člana 10 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda; prva se odnosi na povredu slobode izražavanja dosuđivanjem štete zbog klevete učinjene objavljivanjem članka kojim se kritikuje odluka Ustavnog suda koja nalaže raspuštanje političke partije; druga se odnosi na povredu slobode saopštavanja i primanja informacija učinjenu nepostupanjem organa vlasti po odlukama suda kojima se od njih zahteva da novinaru učine dostupnim informacije od javnog značaja.

Beograd, septembar 2014. godine

Novi medijski zakoni – šta se postiglo i šta nam tek predstoji

Slobodan Kremenjak[1]

Srbija je početkom avgusta 2014. godine dobila svoje nove medijske zakone. Domašaj onoga što se novim zakonima postiglo možda je najlakše sagledati ako konačne zakonske tekstove uporedimo sa onim što su pre pune četiri godine, septembra 2010. godine, medijska i novinarska udruženja u Srbiji – ANEM, NUNS, UNS, NDNV i Lokal pres – jedinstveno tražila od vlade u tadašnjoj javnoj debati o Medijskoj strategiji.

Prvi zahtev odnosio se na javnost medijskog vlasništva. Udruženja su tražila da se izmenama zakonske regulative obezbedi da podaci o vlasništvu nad medijima, uključujući nazive kompanija koje učestvuju u vlasničkim strukturama, procenti njihovih udela i imena njihovih vlasnika, budu dostupni javnosti, bez obzira da li je sedište takvih kompanija u zemlji ili inostranstvu. Istovremeno, tražilo se i da se obezbedi permanentno praćenje promena vlasništva nad medijima, kako bi se izbeglo da odredbe o transparentnosti budu izigrane.

Novi Zakon o javnom informisanju i medijima predviđa uvođenje Registra medija. U ovaj registar upisivaće se podaci o pravnim i fizičkim licima koja neposredno ili posredno imaju više od 5% udela u osnivačkom kapitalu izdavača, podaci o njihovim povezanim licima i drugim izdavačima u kojima ta lica imaju više od 5% udela u kapitalu. Ovim, naravno, nije isključeno da će i dalje biti onih koji će pokušavati da prikriju vlasništvo u medijima, ali će sada upisivanjem neistinitih podataka u registracione prijave činiti krivično delo za koje je zaprećena kazna od tri meseca do pet godina zatvora.

Drugi zahtev ticao se zakonskih mehanizama koji bi sprečili stvaranje monopola na medijskom tržištu ili sprečavanja takozvanih nedozvoljenih medijskih koncentracija. Pri tome, udruženja su tražila da zakonska regulativa ne ograničava organski razvoj medijskih kompanija, a posebno da ih ne sputava u osvajanju tržišta kvalitetom. Na kraju, insistiralo se i da određivanje pragova nedozvoljene medijske koncentracije, u odnosu na radio i TV stanice, povede računa o neophodnosti da na tržištu, na kome je prethodno izdato više dozvola nego što je to ekonomski opravdano i održivo, dođe do određene konsolidacije, u meri koja će obezbediti i očuvanje tržišta i očuvanje medijskog pluralizma.

Pri svemu ovome trebalo je imati u vidu da nema jedinstvenog evropskog modela po kome bi se medijske koncentracije tretirale. Neke od evropskih zemalja na ovaj sektor primenjuju samo opšte propise o zaštiti konkurencije, druge imaju i posebna pravila za jedan ili više medijskih sektora i za pitanje unakrsnog medijskog vlasništva. U zakonima koji su upravo usvojeni, shodno onome što su medijska i novinarska udruženja tražila, Srbija se opredelila za drugi model, za poseban režim kontrole koncentracija, koji, za razliku od opšteg režima iz Zakona o zaštiti konkurencije kojim se štiti konkurencija na tržištu, štiti medijski pluralizam – štiti raznovrsnost izvora informacija i medijskih sadržaja te na taj način zapravo služi kao korektiv opštem režimu zaštite konkurencije.

Treći zahtev insistirao je na potpunom povlačenju države iz vlasništva u medijima, izuzev ustanova javnog servisa, a sve zato što je ocenjeno da je takvo povlačenje nužan ako ne i dovoljan preduslov za onemogućavanje političke kontrole medija. Dobili smo rešenje koje je od privatizacije, pored ustanova javnog servisa, izuzelo još samo medije čiji su osnivači nacionalni saveti nacionalnih manjina, kao i izdavača jednog magazina na srpskom jeziku koji se distribuira na području Kosova i Metohije. Međutim i u ta dva izuzetka predviđeni su sistemski mehanizmi koji bi trebalo da štite nezavisnost redakcija od države, odnosno nacionalnih saveta nacionalnih manjina, u vidu obaveze da najmanje dve trećine članova organa upravljanja izdavača neprivatizovanih medija čine nezavisni članovi.

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

Na kraju, udruženja su insistirala na uspostavljanju ravnopravnog tretmana svih medija na tržištu, i to tako što bi se utvrdila obaveza centralnih, pokrajinskih i lokalnih vlasti da izdvajaju određeni procenat sredstava iz budžeta za medijske projekte od javnog interesa, dostupne svim medijima pod ravnopravnim uslovima, na osnovu odluka nezavisnih komisija.

Novi Zakon o javnom informisanju i medijima upravo insistira na projektnom finansiranju medija kao prihvatljivom vidu državne pomoći medijima. Ono što su udruženja tražila a nisu dobila jeste to da obim sredstava koji će se izdvajati za medijske projekte bude opredeljen u vidu fiksno ili dovoljno precizno određenog procenta iz budžeta.

Ovako posmatrano izgleda da su medijski zakoni zapravo, uz par izuzetaka, gotovo apsolutni trijumf medijskih i novinarskih udruženja i pozitivan odgovor na sve ono što su tražila. Ali, čak i da jeste tako, ne treba zanemariti da su medijski zakoni samo deo onoga što okruženje za delovanje profesionalnih medija u jednom društvu čini manje ili više povoljnim ili nepovoljnim. Ovim, naravno, ne želimo da kažemo da dobro medijsko zakonodavstvo nije važno ili poželjno, naprotiv. Ali je sigurno da medijsko zakonodavstvo, koliko god dobro bilo, samo za sebe nije dovoljno da reši sve probleme sa kojima se mediji u društvu suočavaju.

Nesporno je da izazovi tek predstoje. Prvi bi mogao biti insistiranje na implementaciji zakona. Njihova adekvatna implementacija nezamisliva je bez jačanja kapaciteta regulatornih tela, kapaciteta sudova i drugih državnih organa koji novo medijsko zakonodavstvo treba da primene, ali i bez jačanja kapaciteta samih medija i njihovih izdavača da, radi unapređenja svog položaja, razumeju i iskoriste instrumente i sredstva koja im novi zakonodavni okvir pruža. Reč je o izuzetno ozbiljnom poslu. Pravni okvir postaje sve složeniji. Propisi o medijima nisu ostrvo, oni se oslanjaju na propise o elektronskim komunikacijama, autorskom i srodnim pravima, zaštiti konkurencije, kontroli državne pomoći i propise koji regulišu čitav niz drugih oblasti.

Upravo zato je napor koji tek predstoji, a koji treba da obezbedi zadovoljavajuću implementaciju novih medijskih propisa, i teži i po svom ishodu neizvesniji od svega što smo imali u procesu njihovog usaglašavanja, pisanja i usvajanja.

Pravo na zaborav – šest meseci primene presude Evropskog suda pravde

Miloš Stojković[1]

Evropski sud pravde je u maju 2014. godine, postupajući u slučaju Mario Kosteha Gonzales i AEPD protiv Gugl inc. i Gugl Španija *(Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González)*, ustanovio uslove pod kojima je građanima Evropske unije omogućeno da zahtevaju od Gugla uklanjanje njihovih podataka o ličnosti koji se pojavljuju u pretragama Internet pretraživača koje su zastarele i irelevantne, dajući pri tom novo tumačenje Direktive 95/46 o zaštiti podataka o ličnosti. Presuda je nesumnjivo predstavljena kao velika pobeda prava na privatnost i puno uspostavljanje tzv. *prava na zaborav (Right to be forgotten),* ali je istovremeno otvorila brojne probleme već u prvim mesecima njene implementacije.

Pravo na zaborav

Na osnovu presude, pojedinac je ovlašćen da zahteva uklanjanje svojih podataka iz Internet pretrage jer „interes zaštite ličnih podataka preteže nad ekonomskim interesom pretraživača i interesom javnosti u vezi s tim konkretnim podacima". S druge strane, to se ne odnosi na posebne slučajeve, poput uloge navedene osobe u javnom životu, gde je mešanje u njegova/njena temeljna prava opravdano jer tada javni interes preteže nad pravom na zaštitu ličnih podataka[2].

Na prvi pogled ovde se ne radi o stvari koja nije do sada bila poznata. Direktiva 95/46 je na snazi već skoro dvadeset godina, i ona upravo počiva na tome da je za svaku obradu podataka neophodan pristanak lica čiji se podaci obrađuju. To ovlašćenje podrazumeva i mogućnost povlačenja jednom date saglasnosti. Dakle, sud je samo primenio već postojeći princip na konkretni slučaj, navodeći da je Internet pretraživač rukovalac podataka koji njihovim korišćenjem vrši radnju obrade za koju je neophodan pristanak osobe na koju se ti podaci odnose.

Mario Kosteha Gonzales je građanin Španije, nepoznat široj javnosti, koji je želeo da se njegovi lični podaci uklone iz novinskog članka koji se odnosio na oglašavanje javne prodaje njegove nepokretne imovine zbog duga. Oglas je bio objavljen u novini „La Vangardija" u januaru i martu 1998. godine. U zahtevu se pozivao na irelevantnost i zastarelost ovog članka.

Osnovne posledice presude su: otvaranje mogućnosti za pojedince da uklanjaju svoje podatke iz Internet pretrage, pravo da se obrate Internet pretraživaču, i obaveza tog Internet pretraživača da postupi po tom zahtevu i podatke ukloni.

Presuda nije dala nikakve konkretne kriterijume kojima Internet pretraživač treba da se rukovodi, osim kriterijuma zastarelosti, irelevantnosti, i izuzetka koji se odnosi na poštovanje javnog interesa kada se radi o osobama iz javnog života (ali i to bez dodatnog preciziranja).

Statistika

Od maja do avgusta 2014. godine, Guglu je upućeno preko 91.000 zahteva koji su se odnosili na preko 328.000 linkova koji su sadržavali lične podatke. Oko 53% linkova za koje je zahtevano uklanjanje izbrisano je iz Gugl potrage, a oko 32% zahteva je odbijeno. Najviše zahteva je, po podacima Gugla, došlo iz Francuske (oko 17.500), Nemačke (oko 16.500) i Velike Britanije (oko 12.000).

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

[2] Videti izreku presude, koja je dostupna na: http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=HR&mode=lst&dir=&occ=first&part=1&cid=42892

Google kao nevoljni cenzor?

Piter Beron *(Peter Barron)*, direktor komunikacija Gugla u Evropi, izjavio je za BBC da presuda Evropskog suda nije nešto što su pozdravili niti nešto što su hteli, ali da je sada ona pravo u Evropi a da Gugl mora tome da se povinuje. Šef pravne službe Gugla David Dramond *(David Drummond)* ide još dalje, navodeći da je presuda suprotna Univerzalnoj deklaraciji o ljudskim pravima i da dovodi do toga da se linkovi uklanjaju „primenom subjektivnih i nejasnih kriterijuma" u oceni da li se radi o javnom interesu ili ne.

Upravo su ove izjave pokazatelj Guglovog odnosa prema novoj obavezi. Gugl je po tzv. Milenijumskom aktu *(Digital Millenium Act)* prepoznat isključivo kao posrednik *(intermediary)* u prenosu informacije a ne kao neko ko može da utiče na njen sadržaj. Ipak, presuda Suda ga je stavila u veoma nepovoljnu poziciju pošto u nekim situacijama mora da donese odluku koja (posredno) zadire u uredničku nezavisnost onlajn portala.

U gotovo pola godine primene presude Evropskog suda pravde, Gugl je imao nekoliko problematičnih odluka o uklanjanju linkova iz pretrage. Uklanjanje tih linkova bilo je toliko „sumnjivo" da su pojedini mediji objavili da Gugl taktički „generiše bes javnosti" i namerno se postavlja kao „cenzor" da bi izvršio pritisak koji bi konsekventno promenio presudu Evropskog suda pravde[3].

Neke od odluka za uklanjanje linkova daju za pravo ovakvoj konstrukciji. Pomenućemo primere uklanjanja novinskih članaka Gardijana i članaka Vikipedije. Među Gardijanovim člancima naročito su interesantni slučajevi bankara u Meril Linču *(Merrill Lynch)*, fudbalskog sudije, i slučaj kandidata za funkciju u Udruženju advokata u Velikoj Britaniji. Prvi slučaj se odnosio na Stena O Nila *(Stan O'Neal)*, bivšeg direktora Meril Linča, koji je jedan od optuženih za uzrokovanje globalne finansijske krize. Druga dva slučaja su se odnosila na moguću korupciju u sportu, odnosno na umešanost u korupcionaški skandal kandidata za visoku poziciju u strukovnom društvu advokata u Velikoj Britaniji. Wikimedia fondacija (osnivač stranice Wikipedia) početkom avgusta je objavila da je od maja veliki broj njenih stranica uklonjen iz pretraga Gugla u Evropi. Među njima se nalaze i strane koje se bave bivšim kriminalcem Gerijem Hačom *(Gerry Hutch)*, kao i strana o italijanskom gangsteru Renatu Valanzasku *(Renato Vallanzasca).*

Takođe, propust suda da utvrdi način za uklanjanje linkova doveo je do čudnih rezultata u praksi. Tako, ako se ukuca ime i prezime fudbalskog sudije koji je svirao sumnjiv penal, rezultat pretrage neće biti dostupan, ali ako se ne bi koristilo ime nego opis, poput „sudija koji nije svirao penal", link će postati dostupan. Takođe, linkovi se uklanjaju po geografskom principu, pa oni neće biti dostupni samo na lokalizovanim Gugl servisima (na primer, koji imaju ekstenzije .uk, .es, .fr), dok će biti dostupni van EU[4].

Procedura za uklanjanje linkova je opisana na stranici pretraživača Gugl. Svako lice koje želi da ukloni svoje podatke (ime i prezime) mora da popuni zahtev[5], zajedno sa podnošenjem dokumenta koji ga/je identifikuju, uz popis linkova čije se uklanjanje zahteva i opis razloga zbog kojih se to zahteva.

Kriterijumi za odlučivanje nisu navedeni, ali ih je direktor pravne službe Gugla javno objavio navodeći da Gugl pre uklanjanja linkova mora da utvrdi da li su informacije čije se uklanjanje zahteva u javnom interesu, što se postiže primenom nekoliko kriterijuma: da li se odnose na javnu ličnost, da li potiču iz renomiranih izvora, da li sadrže podatke o profesionalnom ponašanju koje je relevantno za čitaoce (potrošače), kao i da li se odnose na osudu u krivičnom postupku.

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[3] Videti: http://www.independent.co.uk/life-style/gadgets-and-tech/news/right-to-be-forgotten-google-accused-of-deliberately-misinterpreting-court-decision-to-stoke-public-anger-9582985.html

[4] Tako je dovoljno da nečije ime i prezime ukucate u pretraživaču www.google.us, pa će rezultati opet biti dostupni. Isto bi bilo i ako se ime i prezime ukucaju u www.google.rs, pošto Srbija nije članica EU.

[5] Zahtev može da podnese i advokat uz pismeno ovlašćenje ili roditelj.

Posledice

Nesumnjivo je da je presuda Evropskog suda pravde već u prvim mesecima primene pokazala brojne nedostatke koji se u ovom trenutku ne mogu jednostavno prevazići. Propustivši da definiše kriterijume i proceduru za uklanjanje linkova, presuda je dala prevelika ovlašćenja privatnom entitetu da slobodno, bez ikakve kontrole, procenjuje kada je uklanjanje opravdano. Takođe, njena „autističnost" u pogledu specifičnosti komuniciranja na Internetu je dovela do toga da se vrlo lako može zaobići korišćenjem drugačije kombinacije reči ili geografske oznake domena. Tako je ona problematična i sa aspekta legitimnosti i sa aspekta efikasnosti. Treba napomenuti i posredni efekat na samo *pravo na zaborav*, imajući u vidu da je ono već sada kompromitovano iako je legitimno. Ono nije zamišljeno da bude dodatni mehanizam za ugrožavanje slobode izražavanja, već je trebalo da bude potvrda principa zaštite podataka o ličnosti i u onlajn okruženju. Uostalom, Komesarka EU za pravdu, fundamentalna prava i državljanstvo Vivijan Reding *(Viviane Reding)* još je 2012. godine, u govoru posvećenom reformi regulatornog okvira za zaštitu podataka o ličnosti[6], istakla da postoje slučajevi kada je legitimno i legalno opravdano „zadržati podatke u bazama" (uprkos pravu na zaborav prim.aut.), a da su „arhive novina" dobar primer, kao i da je jasno da „*pravo na zaborav* ne sme da 'pretegne' nad slobodom izražavanja i slobodom medija". Zbog toga, *pravo na zaborav* ne sme da bude zanemareno, ali je neophodno pronaći adekvatan regulatorni model koji će uravnotežiti dva legitimna interesa: slobodu izražavanja i pravo na privatnost.

[6] Videti više na: http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm

Finansiranje medija

Nemanja Nenadić[1]

Zašto je finansiranje medija važno za građane?

Finansiranje medija može se posmatrati iz najmanje dva ugla, čak i kada se zanemari onaj koji same medije, njihove zaposlene i vlasnike najviše zanima – da li će moći da ostvare dobit, dobiju plate za svoj rad i koliko će im budućnost u medijskom biznisu biti izvesna.

Prvi ugao posmatranja medijskog finansiranja, od strane građana, jeste njihova želja da dobiju informacije koje su potpune, ažurne i objektivne. Da li će informacije biti zaista takve ne zavisi isključivo od stručnosti i veštine samih novinara da informacije prikupe, prerade i objave, pa čak ni od toga da li su novinari i urednici lično nepristrasni u pogledu pitanja o kojem pišu ili kakve afinitete i viđenja stvarnosti imaju. Jednak ili čak veći značaj, kako u pogledu izbora tema o kojima će mediji pisati tako i načina obrade tih tema i zaključaka do kojih će doći, mogu imati izvori finansiranja. Zbog toga je građanima, a naročito „konzumentima" medijskih usluga veoma bitno da dobiju informacije o tome iz kojih izvora se medij finansira. Ti podaci im ponekad mogu poslužiti da donesu sopstveni sud o tome da li se finansiranje medija odrazilo na neki način na medijske sadržaje. Da bi poređenja te vrste bila uspešna ponekad neće biti dovoljno čak ni da građani imaju na raspolaganju potpune podatke o izvorima finansiranja medija, već će biti potrebne i druge informacije.

Na primer, činjenica da je jedno preduzeće ili neki državni organ u značajnoj meri finansirao određeni medij neće biti dovoljna za izvođenje valjanog zaključka o tome da je ovo finansiranje uzrokovalo pristrasno izveštavanje o nekoj pojavi, ukoliko čitalac ne uporedi tekst ili prilog sa informacijama koje su o istoj stvari objavljene u drugim medijima. Isto tako, građanin neće moći da proceni uticaj finansiranja ako nema dodatne podatke, npr. da je vlasnik preduzeća X koje je finansiralo medij ujedno i vlasnik preduzeća Y o kojem je medij objavio pristrasan tekst, da su neobjektivne pohvale mera koje sprovodi neko ministarstvo posledica činjenice da unutar opštinske vlasti sredstva za medije raspoređuje funkcioner koji potiče iz iste stranke kao i ministar i slično.

Drugi ugao posmatranja finansiranja medija koji građane zanima proističe iz činjenice da se medijski sadržaji veoma često plaćaju novcem poreskih obveznika. Građanima je u interesu da to finansiranje bude transparentno, to jest da se zna koliko je novca koji medij dobio, od koga je dobio, u kom postupku, za šta, s kojom svrhom. Međutim, građanima je jednako bitno da znaju da li se sredstva koriste na najbolji mogući način – da li bi sa istim ulaganjima finansiranje medija moglo da im donese kvalitetnije medijske sadržaje ili veći broj tih sadržaja, odnosno da li bi to ulaganje za postojeći nivo kvaliteta i obima medijskih sadržaja moglo da bude manje. U tom pogledu način posmatranja medijskih rashoda od strane građana je suštinski isti kao što je kod bilo kog drugog budžetskog rashoda.

Kako finansiranje utiče na nezavisnost medija?

Nezavisnost medija je teško ostvarivi ideal. Pre nego što sagledamo koji način finansiranja omogućava ostvarivanje nezavisnosti na najbolji način, treba da vidimo koji izvori finansiranja medijima uopšte stoje na raspolaganju.

Prvi izvor finansiranja je plaćanje medijskih usluga od strane krajnjih konzumenata – npr. čitalaca novina ili pretplatnika elektronskih medija. Ovaj način finansiranja naizgled obezbeđuje najveći stepen nezavisnosti. Međutim, ni on nije bez rizika. Tako, na primer, i mediji koji u potpunosti finansijski zavise od spremnosti svoje publike da plati korišćenje medijskih sadržaja mogu na drugi način biti zavisni od spoljnih činilaca – na primer, tako što od drugih zavisi hoće li uopšte ili hoće li

[1] Programski direktor organizacije „Transparentnost Srbija"

pravovremeno dobiti pristup važnim informacijama koje će kasnije podeliti sa svojim čitaocima. Kada ti bitni podaci dolaze od organa vlasti, mediji koji vlastima nisu naklonjeni će, za razliku od „podobne“ konkurencije, ostati uskraćeni za intervju sa zvaničnicima, priliku da snime neki važan događaj, kao i za informacije „iz izvora bliskih vladi” ili „izvora bliskih istrazi”. Dakle, čak i kada čitaoci plaćaju punu cenu novina medij može biti u situaciji da cenu za dobijanje podataka od vlasti plati svojom zavisnošću.

Drugi vid finansiranja medija, koji je takođe naizgled nekontroverzan, jeste naplata medijskih usluga privredi, to jest finansiranje iz oglašavanja. Međutim, za razliku od komercijalnih ugovora koje među sobom zaključuju drugi privredni subjekti, ugovori o medijskom oglašavanju ponekad nisu samo to. Naime, normalno je očekivati da će oglašivači biti zainteresovani ne samo da njihove reklamne poruke stignu do čitalaca i gledalaca već i za to da na drugi način budu promovisani ili da makar ne budu izloženi u lošem svetlu u medijima. Ovakvi ugovori po zakonu nisu dopušteni jer se moraju odvojiti reklamni od informativnih priloga. Zakoni mogu da zabrane ali ne mogu da spreče nijednu „prirodnu pojavu”, pa ni plasiranje reklama ili omogućavanje dodatne promocije kroz navodno informativne i objektivne analize, komentare i vesti. Da li će u praksi ugovori o oglašavanju u medijima predstavljati čisto plaćanje za pruženu uslugu koje za medije ne stvara nikakvu dodatnu obavezu ili prepreku nezavisnom radu zavisi najviše od tržišta na kojem mediji rade. Na svakom tržištu, pa i ovom, ako ne postoji „ravnoteža snaga” onaj koji je jači diktira uslove. U današnjoj Srbiji stanje je takvo da ima više medija koji su zainteresovani da omoguće oglašavanje nego privrednih subjekata koji su u mogućnosti da plate za oglašavanje. Zbog toga je ravnoteža pomerena, tako da mediji moraju da čine određene ustupke oglašivačima.

Kod ovog vida finansiranja stvari se značajno komplikuju usled činjenice da se na tržištu oglasa veoma često poslovi medijskog oglašavanja ne ugovaraju direktno već preko posrednika. Samim tim, osim od zainteresovanih privrednih subjekata mediji mogu postati zavisni i od marketinških agencija kojima „na veliko” prodaju svog oglasni prostor i od interesa koje imaju vlasnici tih agencija. Posledica toga u praksi može biti to da medij ne sme svojim tekstovima „da se zameri” ne samo firmi koja se direktno oglašava u tom mediju već ni drugim klijentima iste marketinške agencije.

Treći vid finansiranja medija predstavljaju donacije, bilo one koje su u vezi sa radom medija generalno ili su u vezi sa nekim posebnim programima. Uticaj na nezavisnost medija i ovde postoji, ali su njegova snaga i posledice po rad različite od slučaja do slučaja. Na primer, ako donacija predstavlja generalnu podršku istraživačkom novinarstvu bez zalaženja u to na šta će se priča koja je plod tog istraživanja odnositi, negativnih uticaja po nezavisnost verovatno neće biti. Ukoliko je pak donacija namenjena izradi priloga i tekstova o tačno određenoj temi (za koju je donator zainteresovan), kao posledica će se javiti neravnoteža u pristupu i moguće zapostavljanje drugih, jednako značajnih tema, za koje nije bilo zainteresovanih donatora. Naravno, koliki će uticaj po nezavisnost biti dosta zavisi i od toga ko je darodavac. Sigurno je da nema iste posledice finansiranje srpskih medija npr. od strane neke australijske filantropske organizacije koja nema nikakve interese u Srbiji i od strane farmaceutske kompanije koja na našem tržištu plasira svoje proizvode.

Četvrti vid finansiranja je onaj koji dolazi od države. On ima svoje razne vidove i posledice po nezavisnost medija. Državno finansiranje može biti direktno i posredno, javno ili skriveno. Pravni modaliteti uključuju sledeće osnovne oblike:

1) Direktno finansiranje medija „u državnom vlasništvu” iz budžeta. Ovaj oblik finansiranja je nepoželjan iz mnogo razloga. Pre svega zato što stvara visok stepen zavisnosti od onih koji odlučuju o visini budžeta, a zatim i zato što građani ne vide jasno za koje svrhe se novac izdvaja niti da li se on troši na najbolji mogući način. Međutim, koliko će se u praksi odraziti na nezavisnost medija zavisi od toga koliko će se političari mešati u uređivačku politiku i na koji način je rukovodstvo budžetskog medija izabrano, kao i od ličnog integriteta urednika medija. U Srbiji je dugi niz godina ovo bio dominantan oblik finansiranja medija, sa brojnim lošim iskustvima po nezavisnost medija, ali i nekim svetlim suprotnim primerima.

2) Programsko finansiranje medija iz budžeta. Ovaj oblik finansiranja ima neke očite prednosti nad direktnim budžetskim davanjima. Prvo, to je mogućnost da i drugi mediji (a ne samo oni koje je država osnovala) konkurišu za dobijanje ovih sredstava. Druga prednost jeste to što se jasnije vidi na šta novac odlazi, što bi sledstveno trebalo da obezbedi i veću odgovornost za trošenje budžetskog novca, bolji kvalitet i/ili manje rashode. Koliko će ovi efekti biti postignuti u praksi zavisi od mnogih činilaca. Pre svega od toga da li će teme koje se finansiraju (tzv. (su)finansiranje programa od javnog interesa) biti pravilno odabrane. Ovde se može javiti isti (negativan) uticaj po objektivnost medija kao i kod donatorskog finansiranja – npr. tako što će mediji birati da izveštavaju više o temi koja se finansira iz budžeta a zapostaviti druge, jednako važne teme. Drugo važno pitanje jeste sam način dodele novca na konkursima – koliko će kriterijumi biti precizno postavljeni, da li će komisija za izbor biti stručna, koliko će članovi komisije i sami biti nezavisni od medija koji očekuju ovu pomoć i od drugih koji bi želeli da utiču na njihov rad, koliko će se političari mešati u odluku komisije i slično. U Srbiji je nedavno usvojeni Zakon o javnom informisanju i medijima doneo bitne promene na ovom polju, propisujući konkurse kao dominantan vid državne pomoći medijima. Međutim, zakonske norme nisu dovoljno precizne, a problemi se mogu očekivati kod odabira prioriteta za finansiranje, sastava konkursnih komisija, kriterijuma i krajnje odluke organa (koliko će se poštovati mišljenje komisije). Naravno, povrh svih tih problema (koji se delimično mogu ublažiti kvalitetnim podzakonskim aktom koji treba da pripremi Ministarstvo kulture i informisanja) lebdi možda i najvažniji – para u budžetima sigurno neće biti dovoljno.

3) Finansiranje medija kroz druge vidove državne pomoći. Mediji se mogu finansirati i posredno iz budžeta, kroz razne druge vidove državne pomoći kao što su poreske olakšice, popust na usluge koje pružaju javna preduzeća, ustupanje nekretnina na korišćenje, povlašćene cene repromaterijala, smanjenje carina za opremu, reprogramiranje poreskih obaveza, garancije za kredite koje uzimaju mediji i slično. Svi ovi vidovi pomoći nose sa sobom iste rizike kao i direktno finansiranje iz budžeta. Sa stanovišta nezavisnosti, ti rizici mogu biti još veći jer je zakonom nedovoljno uređena primena ovih mera, a one često, zbog niske vrednosti, nisu podvrgnute ni kontroli na osnovu Zakona o kontroli državne pomoći.

4) Plaćanje medijskih usluga. Državni organi, lokalne samouprave, javna preduzeća i druge javne institucije takođe se javljaju na tržištu kao korisnici medijskih usluga. Takvo ponašanje ponekad proističe iz obaveza državnih organa (na primer, da objave oglase o privatizaciji i javnim prodajama imovine, a nekada je takva obaveza postojala i za javne nabavke). Drugi vid usluga javlja se kada javne institucije sprovode neke kampanje u vezi sa svojim radom (npr. ekološke, zdravstvene itd) U svim takvim slučajevima javlja se pitanje kojem mediju će usluga biti plaćena i kojeg obima će ona biti. Odabir medija može imati posledice na nezavisnost medija u odnosu na organ koji takvo oglašavanje vrši iz istog razloga zbog kojeg na nezavisnost medija može uticati oglašavanje privrednih subjekata – medija ima mnogo a prilika za ovakvo oglašavanje znatno manje. Da problem bude veći, uopšte nije lako utvrditi objektivne kriterijume za izbor ponuđača na medijskom tržištu koji bi mogli da dovedu do nepristrasne javne nabavke – niti jedini kriterijum može biti najniža ponuđena cena, niti naručilac može u potpunosti da bude objektivan kada postavi neke druge parametre (npr. ciljna grupa čitalaca i gledalaca koje određeni medij pokriva).

Glavni problemi nakon izmene pravnog okvira

Nedavno usvojeni Zakon o javnom informisanju i medijima predstavlja napredak u odnosu na postojeće stanje, ali ne rešava u potpunosti problem nedovoljne javnosti podataka o finansiranju medija. Predlozi koji su imali za cilj rešavanje tih problema bili su izneti na javnoj raspravi, ali razlozi za njihovo neprihvatanje nisu objavljeni.

Odredbe ovog Zakona mogu da obezbede javnosti lakši pristup nekim informacijama koje su od značaja za sticanje utiska o uticajima na uređivačku politiku medija, a koje proizlaze iz vlasništva u medijima ili finansiranja medija od strane države. To su pre svega odredbe iz člana 39. st. 1. t. 9. i 10, koje će omogućiti jasniji uvid u podatke o tome koji obim prihoda medijske kuće ostvaruju od organa vlasti po raznim osnovama (subvencije, projektno finansiranje, oglašavanje itd.).

Zakon je doneo i promene u pogledu javnosti vlasništva jer predviđa obavezno objavljivanje podataka o „pravnim i fizičkim licima koja neposredno ili posredno imaju više od **5% osnivačkog kapitala**" u medijima.

Najveći problem koji je ostao nerešen jeste to što Zakon ne obezbeđuje javnost drugih podataka koji mogu biti značajni građanima da procene moguće vidove uticaja na uređivačku politiku, što je bilo predviđeno državnom Medijskom strategijom iz 2011. a navodi se i kao jedan od problema u Izveštaju vladinog Saveta za borbu protiv korupcije iz 2011. Naime, firma koja osniva medij može biti osnovana sa veoma skromnim početnim ulaganjem jednog fizičkog ili pravnog lica (npr. 60.000 RSD), ali na rad medija nesumnjivo mogu uticati i veliki oglašivači, sponzori i zajmodavaci. O mogućnostima uticaja na uređivačku politiku po tim osnovama, koji mogu biti daleko značajniji od samog vlasništva, ovaj zakon uopšte ne govori. Rešavanje ovog pitanja bilo je deo političkog programa vlade iz 2012, ali se od toga, uprkos stalnom pozivanju predstavnika vlasti na „izveštaj Verice Barać", očigledno odustalo.

Pogled na budućnost

Nezavisnost medija u Srbiji u budućnosti nije izvesna a vrlo je verovatno da će izazovi koji se postavljaju pred one koji žele da svoj posao rade isključivo profesionalno biti i snažniji. Nema naznaka da bi u dogledno vreme moglo da dođe do bitnog pomaka nabolje u pogledu platežne moći konzumenata medijskih sadržaja, snage privrede koja finansira medijsko oglašavanje ili mogućnosti države da obezbedi veću potporu nepristrasnom javnom informisanju. Pored toga, tradicionalni mediji se suočavaju, ne samo u Srbiji, sa drugim problemima koji negativno utiču na njihovu finansijsku situaciju (npr. Internet). Ostaje samo nada da će drugi faktori koji idu u prilog nezavisnosti biti snažniji. Tu pre svega mislim na pojačano interesovanje građana da informacije koje dobiju preko medija podvrgnu testu objektivnosti a ne da ih primaju zdravo za gotovo, kao i sve veće mogućnosti koje im stoje na raspolaganju da to i učine – samostalnim prikupljanjem i ukrštanjem podataka iz drugih izvora, pre svega zahvaljujući (još uvek uglavnom) slobodnom Internetu. Sve to će naterati i medije da budu objektivniji i profesionalniji ukoliko budu želeli da prenesu svoje poruke publici.

Dileme u vezi sa snimanjem i emitovanjem suđenja u krivičnom postupku

Siniša Važić[1]

Sud, sudski postupci, izjave ključnih učesnika važnih krivičnih postupaka oduvek su zanimali javnost i bili u fokusu njenog interesovanja. To zanimanje bilo bi veće ako bi informacija sa tih suđenja bila propraćena fotografijama ili snimcima optuženih, važnih svedoka, predstavnika tužilaštva, odbrane ili suda. Prisustvo elektronskih medija, pored pisanih koji već odavno prisustvuju sudskim postupcima, pokazuje se kao pitanje na koje, ako nije do sada, uskoro treba dati odgovor. Ovo tim pre kada se zna da za većinu naših građana televizija jeste najznačajniji izvor informacija a da je za mnoge od njih zapravo i jedini izvor informacija. Upravo zbog toga prezentacija sudskih postupaka na televiziji, odnosno u elektronskim medijima na adekvatan način važna je ne samo kao ostvarenje prava na obaveštenost, što je zapravo jedno od ustavnih prava (član 51 Ustav Republike Srbije), već i kao mogućnost da svaki građanin može da razume sudsku vlast bolje.

Argumenti za i protiv medijskog praćenja suđenja su zapravo dileme koje se otvaraju uključivanjem kamera u sudnicu i uvođenjem sudnice i suđenja u domove građana. Da li je prisustvo kamere i javno prenošenje suđenja u suštini samo „malo više javnosti" od one koja već ionako prisustvuje suđenjima? Nije li to samo zapravo uvećanje broja ljudi koji bi verovatno da su imali priliku i mogućnost došli i prisustvovali suđenju i sedeli u sudnici? Ova pitanja svakako zaslužuju odgovor.

Jasno je da je ključ problema koji se prepoznaje u pomenutim ustavnim rešenjima upravo u pronalaženju ravnoteže između obaveze države da zaštiti prava okrivljenog u sudskom postupku i obaveze države da obezbedi pravo građanima na obaveštavanje.

Javnost krivičnog postupka obezbeđuje se ne samo prisustvom stranaka-učesnika u krivičnom postupku, kao i eventualnim prisustvom tzv. stručne javnosti (kada je reč o prisustvu pojedinih službenih lica, naučnih, stručnih i javnih radnika), već i pravom građana da neposredno prisustvuju sudskim postupcima, kao i pravom da o preduzetim radnjama budu obavešteni putem sredstava javnog informisanja. Kako tehnički nije moguće obezbediti neograničeno neposredno prisustvo opšte javnosti odnosno svih građana koji bi hteli da prisustvuju nekom sudskom postupku, obaveza je države da to omogući predstavnicima sredstava javnog informisanja i na taj način posredno obezbedi prisustvo javnosti u sudskom postupku.

Jedna od Preporuka Saveta ministara Savete Evrope govori o potrebi preduzimanja neophodnih mera za implementaciju principa kao što su informisanje javnosti kroz medije, potreba izveštavanja uživo i snimanja u sudnicama, podrška medijskom izveštavanju, pri čemu se svakako mora voditi računa o zaštiti svedoka i oštećenih.

Zakonodavac, a zatim i sud, treba da pronađu „zlatnu sredinu" između, s jedne strane, nesporne i veoma važne potrebe informisanja javnosti o toku suđenja i sadržini onoga što se kao dokazi na tim suđenjima izvode i time javnost upoznaju sa događajima koji su predmet krivičnog postupka, i s druge strane, obaveze da se o interesima samog krivičnog postupka vodi računa, prevashodno imajući na umu načelo zakonitosti i efikasnosti krivičnog postupka, kao i o zaštiti lica koja se pojavljuju u postupku, i onih koji se u tim postupcima pominju; u prvom redu, to se odnosi na zaštitu svedoka, oštećenih, odnosno žrtava, i na kraju i samih optuženih.

Jedna od najvećih opasnosti koja može da ugrozi zakonitost pa i efikasnost krivičnog postupka postoji u situaciji kada nekritičko i neograničeno praćenje suđenja i prenošenje iskaza u sudnici saslušavanih

[1] Sudija Apelacionog suda u Beogradu

lica kao i izvođenje drugih dokaza kroz medije objektivno može da u određenoj meri utiče pa i ugrozi iskaze onih lica koja tek treba da budu saslušana.

Opšte mesto i generalna primedba onih koji se protive prisustvu kamera u sudnici jeste to da kamere u sudnici utiču na suštinu postupka, odnosno na sud (a zapravo sudije), stranke u postupku i svedoke.

Zagovornici takvog stava smatraju da uvođenje kamera u sudski postupak pravi od stvarnih ljudskih sudbina i pravnih problema zabavu. To za posledicu može da ima trivijalizaciju sudskog postupka i eroziju pravnog sistema. To takođe može da ima za posledicu to da ne samo advokati (bilo kao punomoćnici ili kao branioci) već i tužioci i sudije postanu medijski interesantni i izađu iz anonimnosti u kojoj su do tada živeli i radili. Postavlja se pitanje da li će to za posledicu da ima promenu ponašanja sudija i tužilaca, pa i mogućeg uticaja na njih u njihovom teškom i odgovornom poslu kojim se bave? Osim toga, neće li prikazivanje slika sudija i tužilaca kao i zaposlenih u sudu na TV ekranima za posledicu da ima i mogućnost njihovog lakšeg prepoznavanja u svakodnevnom životu i time ih učiniti „ranjivijima" i osetljivijima na moguće neprijatnosti, uključujući tu i provokacije i pretnje?

Naša zemlja, kao i zemlje u regionu, nema neko veliko iskustvo sa snimanjem i emitovanjem sudskih postupaka, pa ankete u tom smislu gotovo da i nisu moguće, a i ako bi ih i bilo, one bi se odnosile na pretpostavljene situacije a nikako ne na iskustvene podatke. Zbog toga nije nevažno upoznati se sa anketama i rezultatima tih anketa koje se odnose na snimanje i emitovanje suđenja iz Međunarodnog krivičnog tribunala za bivšu Jugoslaviju.

Ankete i analize koje su urađene u vezi sa snimanjem i emitovanjem suđenja iz MKTJ usmerene su na ocenu i procenu rada zaposlenih i s tim u vezi uticaja prisustva kamera na njihov rad i ponašanje, kao i na uticaj prisustva kamera na svedoke, sudije, branioce i okrivljene. Zaključci do kojih se dolazi na osnovu tih anketa ukazuju da velika većina tvrdi da je uticaj kamera na njihovo ponašanje u sudu minimalan. U prvom redu, to je zbog koncentrisanosti na svoj posao. Nešto manje precizni i jasni bili su u stavu po pitanju uticaja kamera na svedoke. Većina upitanih je smatrala da su samo iskazivanje svedoka i njihova sadržina takvi da čine teškim davanje ocene o mogućem uticaju na svedoke zbog prisustva kamera.

Što se tiče sudija, značajna većina smatra da sudije nisu pod uticajem kamera te da njihov profesionalizam i iskustvo u svakodnevnim televizijskim suđenjima njima omogućava da svoje obaveze obave, a da ih prisustvo kamera od toga ne može odvratiti niti im promeniti stavove i ponašanje.

U odnosu na branioce, većina smatra da branioni nisu pod uticajem kamera. Ipak bilo je onih koji su kritikovali korišćenje kamera za političke ciljeve i u korist svog klijenta. Mnogi od ispitanika nisu mogli da procene da li su branioci bili teatralni u svojim postupcima zbog prisustva kamera ili je to bio deo njihovog branilačkog arsenala.

U odnosu na okrivljene, okolnost da o suđenjima pred MKTJ oni imaju dosta pasivnu poziciju ostavila je neocenjenim mogući uticaj kamera na ponašanje okrivljenih pred njima.

Opšti zaključak koji se nameće kada se ocenjuje prisustvo kamera u sudniciama MKTJ i emitovanje snimaka sudskih procesa jeste pozitivan i podržava stav onih koji smatraju da je to bilo potrebno i da je dobro što se ta suđenja snimaju i emituju u javnosti.

Kako je već rečeno, sudski postupci su javni, što znači da im osim građana prisustvuju i novinari pisanih medija kao i novinari elektronskih medija koji svojim člancima, reportažama ili izveštavanjem neretko i ispred zgrade suda izveštavaju i obaveštavaju javnost o toku suđenja. Na taj način oni zapravo slušajući i gledajući suđenje prikupljaju informacije, selektuju ih i putem medija prenose onima koji to čitaju, slušaju ili gledaju, približavajući tok sudskog postupka onima koji nisu bili prisutni na samom suđenju.

U sudnici se nalazi onoliko građana odnosno publike, dakle javnosti, koliki je broj zainteresovanih da prisustvuju tom suđenju i zapravo jedino ograničenje takvog prisustva javnosti jeste postojeći broj mesta u sudnici koji može biti od nekoliko mesta do nekoliko stotina mesta.

To drugim rečima znači da određeni broj građana sluša, gleda, pamti i prepričava ono što su videli i čuli u sudnici za vreme suđenja. Postavlja se pitanje zašto ne dozvoliti i drugima da čuju, vide i sami zaključe i ocene šta se to dešavalo na nekom suđenju? Zašto im uskratiti pravo na takvu informaciju? Da li se javnost krivičnog postupka iscrpljuje samo u mogućnosti i prisustvu određenog, po pravilu, malog broja onih koji su uspeli da uđu u sudnicu i da li je time u potpunosti zadovoljeno načelo javnosti krivičnog postupka? Nije li uostalom i sud pa i sudski postupak koji se u sudu odvija i neka vrsta opšteg javnog dobra koje pripada svima i treba da bude dostupno svima i u ovom obliku, dakle kao informacija o sudskom postupku!

Zašto prihvatiti mogućnost da novinari i pisani mediji ili reporteri TV kuća registruju, filtriraju i daju informaciju o nekom suđenju? Naravno, pri tome se uopšte ne sumnja u njihovu objektivnost i nepristrasnost, već jednostavno reč je o tome da svaki čovek ima svoju individualnu mogućnost percepcije, pamćenja i kasnije reprodukovanja onoga što je čuo i video, uz sopstvene kriterijume o važnom i zanimljivom. Upravo te okolnosti svakom izveštavanju sa suđenja, bez obzira na uloženi napor u objektivnost i profesionalni pristup, daje pečat subjektivnog i ličnog.

Omogućavanje snimanja i emitovanja sudskih postupaka bi osim toga učinilo dostupnijim i transparentnijim i rad sudova i sudske vlasti u celini. Uostalom, sudije su izabrane na trajni mandat. Nije li snimanje i emitovanje suđenja istovremeno i mogućnost da se izvrši uvid u njihov rad, ponašanje, odnos prema poslu, prilika da se bolje shvati sudska grana vlasti uopšte? Time se i sudska vlast čini dostupnijom, jasnijom i razumljivijom običnom građaninu.

Osim toga, emitovanje tih suđenja može da ima i edukativnu komponentu. Time bi se ne samo stručna javnost već i ona laička mogla na konkretan način upoznati i videti u pravoj formi i konkretnoj sadržini kako izgleda primena zakona u praksi.

Bez sumnje, javnost može da ima određeni uticaj na sudski postupak. Intenzitet tog uticaja i moguće posledice na zakonitost i pravičnost samog postupka zavise od više činilaca. To su: prisustvo tog sudskog postupka u medijima (brojnost članaka u pisanim medijima i reportaža u elektronskim medijima), veća ili manja objektivnost u izveštavanju (objektivnost zavisi u dobroj meri i od onoga koji tu ocenu o objektivnosti daje), izjave javnih ličnosti a posebno političara i političkih stranaka (naročito onih na vlasti) u vezi sa nekim sudskim postupkom – reč je o izjavama i stavovima kada neki uticajni političar ili druga ugledna i važna javna ličnost izjavi da je neko lice bez sumnje izvršilac krivičnog dela a tek je podneta krivična prijava ili započeta istraga, da će npr. sudski postupak biti završen do određenog vremena itd, što ne samo da direktno povređuje presumpciju nevinosti okrivljenog već može da utiče i na zakonitost samog krivičnog postupka.

Utisak da javnost može da utiče na sudske postupke i njihov ishod postaje tim veći kada sudovi počnu da donose „očekujuće" odluke, odnosno kada budu izloženi „toplom zecu" opravdanih i neopravdanih kritika (koje su neretko prezentovane na neprimeren način i prostim rečnikom) u situaciji kada sud donese odluku koja se „ne sviđa" javnosti. To su najčešće odluke o npr. ukidanju pritvora koje se obavezno tumače kao da je okrivljeni oslobođen od optužbe, ili odluka o odlaganju sudskog ročišta, ili pak neprimereno komentarisanje visine izrečene kazne. Javnost prezentovana u medijima razloge za ovakve odluke suda po pravilu traži u „nezakonskim" i „nepravničkim" stavovima i zaključcima suda koji se po pravilu objašnjavaju ovim redom: korupcija, politička opredeljenost sudija, nerad i neznanje, a tek nakon toga stidljivo se dopušta mogućnost da su to možda ipak i oni razlozi koje je dao sam sud.

Posledica toga jeste da sudovi mogu da počnu da donose odluke koje bi zadovoljavale želje i stavove javnosti i to u prvom redu one opšte laičke javnosti, ne isključujući tu i „političku javnost"ako takva kategorija javnosti može da se ustanovi. Ovde u prvom redu mislim na npr. odluke suda o određivanju i produžavanju pritvora, gde se baš zbog brojnosti i „obojenosti" članaka u medijima i stavova koji se

zastupaju to tumači kao uznemirenje javnosti i time pronalazi zakonski osnov za ostajanje okrivljenog u pritvoru te opravdava postupak suda.

Naravno, ključni element u oceni da li taj uticaj uistinu postoji ili ne jeste u „stepenu otpornosti" sudova na takve pretpostavljene ili stvarne uticaje.

Očigledan je zaključak da svi pomenuti učesnici ovog bez sumnje javnog i važnog posla moraju da porade na jačanju svog profesionalnog kapaciteta i integriteta i to u prvom redu pravosuđe, a zatim i zaposleni u sredstvima javnog informisanja, a na kraju i nosioci političke vlasti.

Jedan od lekova koji bi u određenoj meri mogli da pomognu u izlečenju i da povrate makar deo poverenja u rad pravosuđa, jeste, po mom mišljenju, i uvođenje kamera u sudnice, odnosno snimanje i emitovanje određenih sudskih postupaka. Uveren sam da bi se na taj način osim rada suda i sudija, javnost mnogo bolje upoznala i sa radom javnih tužilaštava, advokature, sudskih veštaka, policije, raznih agencija i inspekcija, ukratko svih onih koji se pojavljuju u sudskim postupcima. To bi bila prilika da se daleko bolje uvidi i oceni i njihov rad i njihov doprinos u vođenju i okončanju nekog sudskog postupka.

Mislim da je važno i da bi bilo dobro i da naša zemlja učini hrabar iskorak u pravcu dozvoljavanja prisustva kamera u sudnicama. Strah od snimanja i od prisustva kamera i nenaviknutost na iste, gotovo da su u potpunosti izgubili na intenzitetu kada se shvati da smo mi danas u svakodnevnom životu izloženi oku kamera postavljenih na javnim prostorima, ulicama, trgovima i u službenim prostorijama.

Smatram da, makar u probnom periodu, snimanja suđenja ne treba da budu prenošena direktno, već sa odloženim terminom emitovanja i sa neophodnim skraćenjima koja nikako ne bi tangirala suštinu nečijeg iskaza.

Na kraju se može zaključiti sledeće: zabrana prisustva kamera u sudnicama je, uz neke minimalne metamorfoze koje je suštinski nisu uklonile, nastala u vreme kada je televizija bila u svom povoju i nije bilo nikakvog iskustva sa njom u vezi.

Sud ne treba da se bavi i brine za svoju popularnost, bilo u pozitivnom ili negativnom smislu, ali treba da se brine o tome da li javnost i građani veruju sudu. Poverenje u pravosuđe i poverenje u pravnu državu je uostalom jedan od opštedržavnih zadataka na putu za Evropsku uniju. Ništa ne gradi i ne stvara poverenje u nečiji rad kao sama javnost tog rada. Ništa ne stvara ili onemogućava javnost u radu sudova kao slobodan ili ograničen pristup i pravo građana da sami budu svedoci „istine u akciji", kako je Dizraeli nazvao pravdu. Za to nema boljeg mesta od suda i sudskog postupka.

Napomena: Ovaj tekst predstavlja prerađenu i skraćenu verziju inače većeg teksta objavljenog u Zborniku radova i predstavljenog na savetovanju Srpskog udruženja za krivičnopravnu teoriju i praksu, na Zlatiboru, u septembru 2014.

Evropski sud za ljudska prava
Informatori o praksi Suda[1]

Informator br. 174 **maj 2014. godine**

ČLAN 10

Sloboda izražavanja

Dosuđena šteta zbog klevete učinjene objavljivanjem članka kojim se kritikuje odluka Ustavnog suda kojom se nalaže raspuštanje političke partije: *povreda*

Mustafa Erdoğan i drugi protiv Turske - 346/04 i 39779/04
Presuda 27.5.2014 [Deo II]

Činjenice – Podnosioci su obavezani od strane građanskog suda da plate naknadu štete zbog klevete učinjene objavljivanjem članka napisanog od strane prvog podnosioca predstavke, profesora ustavnog prava, u kom kritikuje odluku Ustavnog suda da raspusti političku partiju i dovodi u pitanje profesionalnu kompetenciju i nepristrasnost većine sudija koji su učestvovali u postupku.

Pravo – član 10: Konačnim presudama povodom tužbi zbog klevete koje su podnela tri člana Ustavnog suda došlo je do mešanja u pravo na slobodu izražavanja podnosilaca predstavke. Predmetno mešanje u slobodu izražavanja bilo je propisano zakonom i težilo je legitimnom cilju zaštite ugleda ili prava drugih.

Predmet navedenog članka, napisanog od strane jednog naučnika, odnosi se na bitno i aktuelno pitanje u demokratskom društvu – funkcionisanje pravosudnog sistema – u vezi s kojim javnost ima legitiman interes da bude informisana. Stoga, on jeste doprineo debati od javnog interesa.

Tužioci u tri posebna postupka bili su članovi Ustavnog suda koji su glasali za raspuštanje političke partije. Iako se ne može reći da su oni sebe svesno izložili pomnom promatranju svake svoje reči i radnje od strane javnosti u istoj meri kao političari, pripadnici pravosuđa koji vrše javne funkcije mogu ipak biti predmet dozvoljene kritike u većoj meri od običnih građana. U isto vreme, međutim, Sud je u mnogim situacijama isticao posebnu ulogu pravosuđa u društvu, koje, kao garant pravde, osnovne vrednosti pravne države, mora da uživa poverenje javnosti kako bi uspešno obavljalo svoje dužnosti. Stoga, može biti neophodno zaštititi to poverenje od štetnih napada koji su suštinski neosnovani, naročito u pogledu činjenice da su sudije koje su bile kritikovane obavezane diskrecijom koja ih sprečava da odgovore.

Domaći sudovi su smatrali da su određeni izrazi korišćeni u članku predstavljali klevetanje tužilaca i da je autor prekoračio granice dozvoljene kritike. Sud je prihvatio da su jezik teksta i neki upotrebljeni izrazi bili grubi i da se mogu smatrati uvredljivim. Kao što je rečeno, to su uglavnom bili vrednosni sudovi, obojeni autorovim ličnim političkim i pravnim mišljenjima i gledištima. Oni su bili zasnovani na načinu na koji je Ustavni sud odlučivao o određenim pitanjima, a predmetne odluke, uključujući i odluku da raspusti političku partiju, već su bile predmet javne debate, kao što je podnosilac nastojao da prikaže u postupcima pred domaćim sudovima. S obzirom na to, može se smatrati da su bili dovoljno činjenično zasnovani. Domaći sudovi nisu pokušali da razgraniče činjenične izjave u spornom članku od vrednosnih sudova, i ne čini se da su ispitali da li su poštovane „dužnosti i odgovornosti" koje se odnose na podnosioce u smislu člana 10. stav 2. Konvencije, niti su procenili da li je članak

[1] Izvodi iz zvaničnih „Informatora o praksi Suda" Evropskog suda za ljudska prava, dostupnih na Internet prezentaciji Suda; prevod uradila advokatska kancelarija „Živković&Samardžić", Beograd

objavljen u dobroj veri. U konkretnom slučaju, oni su propustili da stave sporna opažanja unutar konteksta u kom su bila izneta. S tim u vezi, Sud je ponovio da stil čini deo komunikacije kao forma izražavanja i, kao takav je zaštićen zajedno sa sadržinom tog izražavanja. Kada je u obzir uzet sadržaj članka u celini, kao i kontekst, sporne primedbe ne mogu biti tumačene kao bezrazložan lični napad protiv tužilaca. Štaviše, članak je bio objavljen u kvazi-akademskom tromesečniku a ne u popularnim novinama.

U svetlu prethodno iznetog, i uprkos njihovom diskrecionom pravu, nacionalni organi nisu naveli dovoljno razloga kojim bi prikazali da je mešanje u slobodu izražavanja podnosilaca bilo neophodno u demokratskom društvu radi zaštite ugleda i prava drugih. Ovaj zaključak je učinio nepotrebnim da Sud odluči o tome da li su iznosi koji su bili određeni da ih podnosioci plate na ime naknade štete bili proporcionalni cilju kojem se težilo.

Zaključak: *povreda (jednoglasno).*

Član 41: naknada štete plaćena od strane prvog podnosioca u postupcima pred domaćim sudovima i 7.500 evra prvom podnosiocu na ime nematerijalne štete.

Informator br. 175 jun 2014. godine

ČLAN 10

Sloboda saopštavanja informacija
Sloboda primanja informacija

Nepostupanje organa vlasti po odlukama suda kojima se od njih zahteva da novinaru učine dostupnim informacije od javnog značaja: *povreda*

***Roşiianu protiv Rumunije* - 27329/06**
Presuda 24.6.2014. godine [Odeljak III]

Činjenice – U relevantnom periodu, i u prethodnih šest godina, podnosilac predstavke je vodio televizijsku emisiju koja se emitovala na lokalnom gradskom kanalu, u kojoj se raspravljalo, između ostalog, o tome na koji način su javni fondovi bili korišćeni od strane opštinske administracije. U cilju obavljanja svoje profesije, podnosilac predstavke se obratio gradonačelniku sa zahtevom da mu određene informacije od javnog značaja budu učinjene dostupnim. Podneo je tri uzastopna zahteva u vezi sa različitim temama. Gradonačelnik je odgovorio podnosiocu u tri lakonska pisma. Uzevši u obzir da ova pisma nisu sadržala adekvatne odgovore na njegove zahteve za informacije, podnosilac predstavke je pokrenuo tri zasebna postupka pred Upravnim sudom, pokušavajući da, između ostalog, izdejstvuje nalog gradonačelniku da mu učini dostupnim informacije. U tri posebne odluke, Apelacioni sud je odobrio zahtev podnosioca predstavke i naložio gradonačelniku da novinaru učini dostupnim veliki deo traženih informacija. Prema navodu podnosioca predstavke, pravosnažne presude Apelacionog suda nisu izvršene, uprkos njegovim brojnim pritužbama.

Pravo – **Član 6 stav 1 (građanski postupak) (izvršni postupak)** – **Pristup sudu:** Podnosilac predstavke je izdejstvovao tri pravosnažne sudske presude koje su nalagale gradonačelniku da mu učini dostupnim određene informacije od javnog značaja. Domaći sudovi su doneli zaključak da se pisma, u kojima je podnosilac predstavke pozvan da dođe kako bi dobio fotokopije nekoliko zasebnih dokumenata koji su sadržali informacije podložne različitim interpretacijama, nikako ne mogu smatrati odgovarajućim izvršenjem sudskih odluka. Pored toga, Sud nije mogao da utvrdi da li su dokumenta na koja su pisma upućivala zaista sadržala informacije koje je tražio podnosilac

predstavke, uzevši u obzir propust vlade da dostavi Sudu predmetnu dokumentaciju ili da je pošalje u sažetom obliku.

Sud je potvrdio da pravo na pristup sudu ne može predstavljati zahtev državi da izvrši sve presude u građanskim sporovima bez obzira na njihovu prirodu i okolnosti. Međutim, predmetni organ vlasti u ovom slučaju je bio deo opštinske administracije koja je činila sastavni deo države podložan vladavini prava, i njegovi interesi su se podudarali sa potrebom za pravilnim sprovođenjem pravde. Tamo gde su organi uprave odbili da se pridržavaju sudske odluke ili nisu uspeli u tome, ili su čak odložili takvo činjenje, garancije iz člana 6 koje je uživala parnična stranka nisu ostvarile svoju svrhu. Nadalje, bilo je neprimereno zahtevati od pojedinca koji je izdejstvovao presudu protiv države da po okončanju pravnog postupka pokrene izvršni postupak za dobijanje satisfakcije. Uprkos tome, u predmetnom slučaju, podnosilac predstavke je preduzeo više koraka kako bi izdejstvovao izvršenje sudskih odluka, zahtevajući da se gradonačelnik novčano kazni, podnoseći krivičnu prijavu i zahtevajući čak izvršenje jedne od odluka od strane sudskog izvršitelja. Osim toga, podnosilac nikada nije obavešten, putem zvanične upravne odluke, o postojanju bilo kog osnova za objektivnu nemogućnost organa vlasti da izvrše sudske odluke. Ove činjenice su bile dovoljne da se donese zaključak u konkretnom slučaju da su odbijanjem da sprovedu pravosnažne sudske odluke, koje su nalagale da se podnosiocu učine dostupnim informacije od javnog značaja, domaći organi vlasti lišili podnosioca prava na delotvoran pristup sudu.

Zaključak: *povreda (jednoglasno).*

Član 10: Došlo je do ometanja prava na slobodu izražavanja podnosioca predstavke u svojstvu novinara. Kao i u slučaju *Kenedi protiv Mađarske,* ova predstavka se odnosila na pristup podnosioca predstavke informacijama od javnog značaja neophodnim za obavljanje njegove profesije. Podnosilac predstavke je izdejstvovao tri sudske odluke koje su mu omogućavale pristup informacijama. Podnosilac predstavke je učestvovao u zakonitom prikupljanju informacija koje se odnose na pitanje od javnog značaja, tačnije na aktivnosti opštinske uprave. Pored toga, uzevši u obzir da je njegova namera bila da predmetne informacije podeli sa javnošću i time pokrene javnu debatu o dobroj javnoj upravi, pravo podnosioca predstavke da saopštava informacije je bilo narušeno. Isto tako, nije došlo do odgovarajućeg izvršenja predmetnih sudskih odluka. Opštinske vlasti takođe nikada nisu tvrdile da su tražene informacije nedostupne. Složenost traženih informacija i značajan posao za lokalnu vlast koji bi podrazumevao njihovo prikupljanje navedeni su samo da opravdaju nemogućnost brzog pružanja informacija. Imajući u vidu te okolnosti, vlada nije navela nijedan argument koji bi ukazao na to da je ometanje prava podnosioca predstavke predviđeno zakonom, ili da se njime ostvaruje jedan ili više legitimnih ciljeva. U skladu s tim, prigovori vlade su morali da budu odbačeni.

Zaključak: *povreda (jednoglasno).*

Član 41: 4,000 EUR na ime naknade nematerijalne štete

LEGAL MONITORING OF THE SERBIAN MEDIA SCENE

INTRODUCTION

On the basis of ANEM's monitoring team findings, the Serbian media scene in the first nine months of 2014 was marked by the following:

The key event for the media sector in that period was definitely the adoption of the set of new media laws – the Law on Public Information and Media, the Law on Electronic Media and the Law on Public Service Broadcasters. The long awaited laws, regardless of some flaws, are a significant move forward and a big step in harmonization with the European legal framework. They have created a new regulatory framework for the media, which will hopefully contribute (by removing the causes of the biggest problems long burdening the media sector) to greater protection of freedom of information, creating better conditions for the operation of media and journalists and for the development of the sector as a whole. Particularly important for the realization of these essential changes is the umbrella law – the Law on Public Information and Media. The key concepts contained therein, such as the withdrawal of the state from media ownership by July 1, 2015, the ban on direct media financing with public funds from July 1, 2015, the introduction of the single project-financing system of media content in public interest (which has been defined for the first time in the field of public information), as well as the application of rules on awarding state aid and protection of competition in the field of public information, are expected to provide the conditions for the creation of a functional media market and a level playing field and equal rules for all participants as well as ensure transparent financing of the media, thereby reducing the possibilities for political and economic influence on the media. The improved system of registration of data about the media is aimed at ensuring the transparency of media ownership, while the rules on media concentration ought to protect media pluralism, also enabling the necessary consolidation on the already oversaturated media market. All the above should contribute to the better realization of the citizens' right to information. Particularly important for electronic media is the Law on Electronic Media, regulating their operations in line with international documents, standards and rules in force on the internal market of the EU in this area. The Law also prescribes the rules on advertising in accordance with the European AVMS Directive, aimed at improving the functioning of electronic media. However, the full scale application of these rules might be hampered by the obsoleteness of the current Advertising Law and legal uncertainty due to different interpretation by the authorities of which Law prevails. What also might be a problem in the realization of the Law on Electronic Media is the expanded competences of the Regulatory Body for Electronic Media (the former RBA), along with the introduction of a new concept - to apply state administration regulations on the employees of that body. The latter might cause a "brain drain" and adversely affect the development of that body's capacities and competences, thereby undermining its ability to discharge its new tasks. The functioning and the position of public service broadcasters are regulated by the Law on Public Service Broadcasters, which has been significantly harmonized with the European standards in the application of state aid rules to PSBs, which involves these funds to be spent with greater responsibility. However, the concepts contained in that Law don't depart much from previous legislation, bringing in question the transformation of RTS and RTV into genuine PSB's. Especially dubious is the financing thereof; while the Law provides for a new model of financing of PSBs (from the tax), the application of that model was postponed by the start of 2016. Meanwhile, the financing model that will be applied until then fails to guarantee financing stability and full independence of PSBs from the government. In spite of the above-mentioned shortcomings, in the opinion of the monitoring team, the European Commission and many media stakeholders, the new media laws are a step forward compared to the laws previously in force. The effects of these laws will depend on their proper implementation, which requires the adoption of the quality bylaws and new Advertising Law; the capacity of the competent authorities and the media as well ought to be boosted, which is crucial for the proper implementation of the said laws, as well of the reforms. Meanwhile, the controlling mechanisms should also be strengthened. Naturally, the key for everything, just like in all other areas, is the existence of political will for genuine reforms in the media sector.

The regulatory framework for the operation of the media was also improved owing to certain amendments to the Law on Electronic Communications relevant for the media sector – access to

withheld data is allowed only under certain conditions, which is important for the protection of the confidentiality of journalists' sources; the "must carry" institute for certain programs has been provided for in detail. In addition, the RBA Council adopted the amendments to the Broadcasters Code of Conduct, in the part pertaining to reporting about crime and the course of criminal trials, as well as to the treatment of religion and religious programs, which are favourable for the broadcasters, albeit not completely. This period was also marked by two decisions of the Constitutional Court, declaring the disputable provisions of the Law on the Film Industry and the Law on National Councils of National Minorities unconstitutional and invalidating the same, thereby removing their harmful influence on the media sector.

Apart from the changes to the regulatory framework, the rest of the affairs in the media sector remained unchanged. Attacks, threats and pressure against media and journalist have continued; their rights are being denied, while the reaction of the state remains inadequate. The practice of the courts in media-related disputes hasn't significantly changed and there are still diverging views, lengthy trials and questionable decisions, while the case-law of the ECHR is seldom applied, which all contribute to the growing sense of insecurity of media and journalists. The competent authorities and agencies have failed to better the position of media and journalists, with the exception being the favourable single OFPS and PI tariff for broadcasters and significant discounts and benefits for broadcasters for the payment of SOKOJ minimum fees (both as a result of an agreement between these organizations and the ANEM, representative association of broadcasters), as well as the decision of the RBA Council to reduce the fee (by 99%) charged to broadcasters from flood affected regions. The preparations for the digital switchover are speeding up. On the other hand, some key issues for the media, as the direct actors in this process (such as the cost-effectiveness of their operations) remain unaddressed and they are unable to plan their operations. The New Broadcasting Development Strategy, which is crucial for the electronic media and the development of the sector as a whole, is delayed and the related activities are expected to accelerate after the recent adoption of the media laws. A key problem in this period has been freedom of expression on the Internet, especially by the removal of texts critical of the government and the hacking of websites conveying such texts, while during the state of emergency due to the floods, even the right to posting personal opinions on social networks was threatened. Heated debates ensued, persisting to this day, even at the highest level between the government and certain international organizations, about whether freedom of expression and media freedoms were threatened and about censorship and self-censorship in the media. However, increasingly less criticism and the exchange of ideas and opinions in the media are evident. According to the media sector itself, tabloidization and self-censorship in media prevail, as a result of an unfavourable work conditions and environment and the government pressure. Therefore, the adoption of the new media laws, which should be the cornerstone for the long-awaited changes, has been the landmark event for the media.

In accordance with the findings of the monitoring team about the key media issues in this period, the topics in this issue of the Publication are: the new media laws; freedom of expression on the Internet; the importance of media financing for the citizens and the media; and the media in the function of transparency of criminal proceedings. For the Monitoring Publication X texts were written by: Slobodan Kremenjak, Attorney at Law – *New Media Laws – Achievements and Future Challenges*; Miloš Stojković, "Živković&Samardžić" Law Office, Belgrade – *The Right to be Forgotten – Six Months of the Implementation of the ECJ Judgment;* Nemanja Nenadić, Program Director of the organization "Transparency Serbia" - *The Financing of Media*; Siniša Važić, Judge of the Appellate Court in Belgrade – *Dilemmas Related to Recording and Releasing Footage from Criminal Trials*. The fifth text is a brief summary of two judgments of the European Court of Human Rights, relating to the application of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:; the first judgment pertains to the violation of freedom of expression by awarding of damages for defamation on account of publication of article criticizing Constitutional Court decision ordering dissolution of a political party; the second judgment pertains to the violation of freedom to impart and receive information commited by failure by authorities to comply with final court orders requiring them to disclose public information to journalist.

In Belgrade, September 2014

New Media Laws – Achievements and Future Challenges

Slobodan Kremenjak[1]

Serbia got its new media laws in early August. We may be able to grasp the reach of what has been achieved with these laws by comparing the final texts thereof with the requests jointly tabled four years ago (in September 2010) by the media and journalists' associations in Serbia (ANEM, NUNS, UNS, NDNV and Local Press) to the Government in the public debate about the Media Strategy.

The first request concerned the transparency of media ownership. The associations demanded the adoption of amendments that would secure the public availability of information about the owners of media, including the names of companies owning media shares, the percentages of these shares and the names of these companies' owners, regardless if the latter are seated in Serbia or abroad. Permanent monitoring of any ownership changes was also requested in order to avoid any circumvention of the transparency provisions.

The new Law on Public Information and Media foresees the introduction of the Media Register. This Register shall contain data about legal and natural persons owning, directly or indirectly, a share greater than 5% in the founding capital of a publisher; it will also contain information about their affiliates and other publishers where these natural persons own more than 5% of the total shares. These provisions, of course, do not exclude the existence of those that will try to conceal their shares in the media. However, by filling in inaccurate data in the registry application, they will now be committing a felony subject to between three months and five years in prison.

The second request concerned legal mechanisms for preventing the creation of a monopoly on the media market and a so-called unlawful concentration of media ownership. At that, the associations had demanded the laws not to restrict the organic development of media companies, and especially "conquering" the market with quality. Finally, they insisted that, while setting the thresholds of illicit media concentration with respect to radio and TV stations, the legislators should consider the necessity to affect a certain consolidation on the market (which has seen the issuance of more licenses than economically justifiable and sustainable), to the extent that will make it possible to keep the market afloat and preserve media pluralism.

We should also bear in mind that there is no single European model under which all types of media concentrations would be regulated. Some European countries have been applying only general competition rules to this sector, while others have separate rules for one or more media sectors, as well as for the issue of cross-media ownership. In the newly-adopted laws, accordingly to what the media and journalists' associations requested, Serbia opted for the second model – a special concentration control regime – which, as opposed to the general regime from the Competition Protection Law (protecting competition on the market), protects media pluralism – the variety of information and media content, by serving as a corrective mechanism to the general competition protection system.

The third request insisted on the complete withdrawal of the state from media ownership, except for the public service broadcasters (PSBs), since such withdrawal was assessed as necessary, and possibly a sufficient condition for preventing political control of the media. We have obtained a solution that has exempted from privatization (in addition to PSBs) only the media founded by the ethnic minorities' national councils, as well as the publisher of a Serbian language magazine distributed on the territory of Kosovo and Metohija. However, the said two exceptions too involve systemic mechanisms aimed at protecting the independence of media from the state and the ethnic minorities'

[1] Attorney at Law; The „Živković&Samardžić" Law Office, Belgrade

national councils, in the form of an obligation prescribing that no less than two thirds of the members of the decision making bodies of unprivatized media publishers should be independent members.

Finally, the associations insisted on all media on the market being treated equally, by setting out the obligation of central, provincial and local authorities to earmark a certain percentage of the funds from their budgets for media projects of public interest, available to all media under equal conditions, to be awarded by independent commissions.

The new Law on Public Information and Media insists on project-based financing of the media as the acceptable model of state aid. A request by the associations that has not been granted is that the amount of the funds that will be earmarked for media projects be allocated in the form of an exact percentage or a minimum percentage of the budget.

All in all, the new media laws appear to be, with a few exceptions, an absolute victory for the media and journalists' associations and a positive response to everything they demanded. However, even if this is the case, we must not forget that these media laws are merely a part of what makes the professional media environment in a society favourable or unfavourable. This is, of course, not to say that good media legislation is not important or desirable - quite on the contrary. However, media laws *per se*, no matter how well-crafted, are not sufficient to deal with all the problems faced by the media.

The way forward is filled with challenges. The first could be related to the actual implementation of the laws, which is inconceivable without strengthening the capacity of regulatory bodies, courts and other state authorities that are supposed to apply the new media legislation. The capacity of the media must also be boosted, as well as that of the publishers, with the aim of having them understand, for the sake of improving their position, the instruments and means provided by the new legislative framework. It is a considerable task. The legal framework is getting increasingly complex. Media regulations are not an island, as they rely on regulations governing electronic communications, copyright and related rights, competition protection, state aid control and regulations governing many other areas.

That is why future efforts, aimed at securing satisfactory implementation of new media regulations, are more difficult and uncertain outcome-wise than everything that we faced in the process of the negotiation, drafting and adoption of these regulations.

The Right to be Forgotten – Six Months of the Implementation of the ECJ Judgment

Miloš Stojković[1]

In May 2014, the European Court of Justice (ECJ), ruling in the case *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, laid down the conditions under which the citizens of the European Union may require from Google to remove from search results their personal data that are outdated and irrelevant. The ECJ thus provided a new interpretation of the Data Protection Directive 95/46. While the judgment has undoubtedly been hailed as a major victory for the right to privacy and the full establishment of the so-called "right to be forgotten", it has also led to the emergence of many issues as early as in the first months of its implementation.

The right to be forgotten

Under the ECJ judgment, a person may require for his/her data to be removed from search indexes because the interest of personal data protection overrides the economic interest of the search engine and that of the general public in relation to such data. This does not, however, apply to special cases, such as a role of a person in public life, where interfering with his/her fundamental rights is justified, since the public interest in such cases overrides the right to the protection of personal data[2].

At first glance, this is not about issues that were previously unknown. Directive 95/46 has been in force for almost 20 years and it is precisely based on the required consent of a person for each processing of his/her personal data. This authority also involves the possibility to withdraw consent already given. Hence, the ECJ has merely applied the already existing principle to a concrete case, stating that the Internet search engine is a data operator, which by using this data is actually processing it, thus performing an action requiring consent of the person the data relates to.

Mario Costeja González is a Spanish citizen, unknown to the general public, who wanted his personal data to be deleted from the Google search engine, where it appeared as part of a newspaper article about the debt-recovery auction of his property. The advertisement was published in the La Vanguardia newspaper in January and March 1998. In his request González said the article to be irrelevant and obsolete.

The main consequences of the ECJ judgment are the opening of the possibility for individuals to have their data removed from Internet search indexes, the right to address a search engine operator, as well as the obligation for such operator to abide by that request and remove the data.

The judgment stopped short of providing any specific criteria the search engine operator should observe, save the one about outdatedness, irrelevance and exception which relates to respecting the public interest in relation to public persons (this also scarce in details).

Statistics

In the period May-August 2014, Google received more than 91.000 requests regarding more than 328.000 links containing personal data. About 53% of the links the removal of which was requested have been deleted from Google search, while 32% of the requests were turned down. According to

[1] „Živković&Samardžić"Law Office, Belgrade

[2] See the disposition of the judgment at http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=HR&mode=lst&dir=&occ=first&part=1&cid=42892

Google, the majority of requests came from France (about 17.500), Germany (16.500) and the UK (about 12.000).

Google as the reluctant censor?

Peter Barron, Google's Director of Communications in Europe, told the BBC that the ECJ judgment is not something his company hailed or wanted, adding, however, that it has become law in Europe and that Google must abide by it. The Head of Legal Affairs in Google David Drummond went a step further, saying the judgment to be in contradiction with the Universal Human Rights Declaration and resulting in "links being removed by applying subjective and unclear criteria" in weighing if something is in the public interest or not.

Such statements are the testament of Google's attitude towards this new obligation. Under the Digital Millennium Act, Google has been recognized as an intermediary in conveying information, unable to affect the content of information. Still, the ECJ judgment placed the Internet giant in an unfavorable position, since in certain situations it must take decisions that (indirectly) interfere with the editorial independence of websites.

In almost half a year of the implementation of the ECJ judgment, Google has made several problematic decisions on removing links from search indexes, which links were so "suspicious" that some media reported Google was deliberately stoking public anger and assuming a censoring role in order to generate pressure ultimately aimed at reversing the ECJ judgment[3].

Some of these decisions on removal seem to justify such conclusions. We will mention the examples of removal of reports by the Guardian and articles in Wikipedia. Among the former, particularly interesting are the cases of a banker at Merrill Lynch, a football referee and a candidate for the office in the UK Bar Association. The first case concerned former Merrill Lynch CEO Stan O'Neal, one of the people blamed for causing the world financial crisis. The other two cases are related to possible corruption in sports, namely the alleged involvement in corruption of a high-level contender for high office in the UK Bar Association.

The Wikimedia Foundation (founder of Wikipedia) announced in early August that many of Wikipedia's pages were removed from Google search in Europe since May. Among the removed pages were those dealing with the former criminal Gerry Hutch, as well as a page about the Italian gangster Renato Vallanzasca.

Furthermore, the ECJ's omission to prescribe how exactly the links will be removed has led to strange results in practice. Hence, if one types the name and surname of the football referee who called a probable penalty, the result of the search will be unavailable. However, if one types a description, such as "the referee that didn't call the penalty", the link will become available. Moreover, the links are deleted under a geographical principle and hence they will be unavailable only on localized google services (such as those bearing the extension .uk, .es or .fr), while they remain available outside of the EU[4].

The procedure for the removal of links is described on the Google webpage. Every person wishing to remove their data (name and surname) must fill in a request[5], along with submitting an identification document and the list of links the removal of which they are demanding and the reasons for such a request.

The criteria for making a decision on removal are not stated on the Google website. However, Google's legal affairs department has released them publicly, saying that, prior to removing the links, Google

[3] See: http://www.independent.co.uk/life-style/gadgets-and-tech/news/right-to-be-forgotten-google-accused-of-deliberately-misinterpreting-court-decision-to-stoke-public-anger-9582985.html

[4] Hence it suffices to type in somebody's name and surname in the search engine www.google.us and the results will be available. The same if you type them in www.google.rs, since Serbia is not an EU member.

[5] The request may be filed by an attorney-at-law along with a written power or a parent.

must establish if the information the removal of which is requested is in public interest. The latter is carried out by applying several criteria: does the information pertain to a public person; does it originate from a reliable source; does it contain data about professional conduct that is relevant to the readers (consumers); as well as does it pertain to a criminal conviction.

Consequences

The ECJ judgment has undoubtedly revealed many shortcomings in the first months of its application already, which are currently difficult to overcome. By failing to define the criteria and procedure for removing the links, the judgment vested excessive authority on a private entity to decide freely and without control if removal is justified or not. Furthermore, its "lack of perspective" with regard to the specificity of online communications has led to the fact that restrictions are very easily circumvented by using a different combination of words or geographic domain. Thus the judgment is also problematic from the standpoint of legitimacy and efficiency. The indirect effect on the very right to be forgotten should also be mentioned, which right, while being legitimate, has already been compromised. It has never been conceived as an additional mechanism for threatening freedom of expression; it was rather supposed to validate the principle of personal data protection in the online environment. After all, the EU High Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding stressed as early as in 2012 in a speech devoted to the reform of the regulatory framework for personal data protection[6] that there are cases where it is legitimate and legally justified to keep data in databases (despite the right to be forgotten A/N) and that newspaper archives were a good example. Reding also noted that it was clear that the right to be forgotten must not take precedence over freedom of expression and freedom of media. Therefore, the right to be forgotten must not be neglected, but an adequate regulatory model must be found to strike a balance between two legitimate interests – freedom of expression and the right to privacy.

[6] More details at: http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm

The Financing of Media

Nemanja Nenadić[1]

Why is the financing of media so important for the citizens?

The financing of media may be observed from no less than two angles, even if we disregard the most interesting aspect for the media, their employees and owners – whether they will be able to make profit, get their salaries and to what extent they will have a certain future in the media business.

The first angle from which the citizens may view media financing is their desire to get complete, updated and objective information. Whether the information will be such does not depend only on the professionalism and skills of the journalists in collecting, processing and publishing information or even on whether the journalists and editors are personally unbiased towards the issues they write about or their personal affinity and worldview. The sources of financing bear an equally important, if not greater weight on the selection of topics and how these topics are processed by the media and the conclusions that are drawn from them. Therefore, it is crucial for the citizens, and especially for the "consumers" of media services to obtain information about the sources of financing the media. This information may sometimes help them to make their own judgment about whether the financing of the respective media outlet has affected in any way the content it publishes. In order for such comparisons to be successful, it will sometimes not be enough for the citizens to have complete information about the sources of media financing. They will need to learn some more facts.

For example, the fact that a public company or a state authority has substantially funded a certain media outlet will not suffice to draw a valid conclusion about whether such funding has caused biased reporting about a certain phenomenon if the readers do not compare the text/program in question to information published about the same topic by other media. Moreover, citizens will not be able to assess the influence of funding without having other information, such as if the owner of the company X, which has financed the media outlet, is also the owner of the company Y, which has been reported on in a biased manner by the same media outlet and if the biased praise of the measures pursued by a government ministry are the result of an official allocating municipal funds to the local media being from the same political party as the minister.

The second angle for viewing media financing, which is relevant for the citizens, arises from the fact that media content is often paid by taxpayer money. It is in the interest of the citizens that financing is transparent, i.e. that they know how much money was allotted to which media, by whom, for which purpose and if the proper procedures have been complied with. However, it is equally important for the citizens to know if the funds are used in the best possible way, namely if for the same money they could have received better media content or more of it, or if such investment could have been lesser for the same content and quality? In that regard, the way in which the citizens view media expenses is essentially the same as with other budget expenditures.

How does financing affect the independence of media?

True media independence is difficult to achieve. Before we make an overview of how financing enables the best possible independence, we should look at the sources of financing that are available to the media.

The first source of financing is paying for media services by the end consumers – e.g. newspaper readers or electronic media subscribers. This way of financing seemingly ensures the highest degree of independence. However, it is not without risk. Hence, the media that is completely financially dependent on the preparedness of their audience to pay for media content may also be dependent on

[1] Program Director of the organization "Transparency Serbia"

external factors: for example, others will determine if these media will receive important information on time, which information they will later share with their readers. When this important information comes from the authorities, the media that are not "pro-government" will, as opposed to their "pro-government" competition, remain without an interview with officials, an opportunity to film an important event, as well as without information "from government sources" or "from sources close to the investigation". So, even when the readers pay the full price of newspapers, the newspaper may find itself forced to pay with its independence for information from the authorities.

The second type of media financing, which at first glance appears uncontroversial, is charging companies for media services, i.e. financing from advertising. However, as opposed to commercial contracts entered into between different companies, advertising contracts are often not just that. Namely, it is normal to expect the advertisers to be interested not only in their advertising messages reaching clients and readers, but also in being promoted in different ways, or at least being exempt from media criticism. Such contracts are not allowed by law, since advertisements must be separated from news programs. Laws may disallow, but cannot prevent the placement of ads or additional promotion through allegedly objective and informative news analysis, commentary or news. Whether advertising contracts with the media will constitute in practice sheer payment for services, while not creating any additional obligations or obstacles to media independence, primarily depends on the media market. In the absence of equilibrium of market forces, the stronger ones will impose the rules of the game. The current situation in Serbia is such that there are more media interested in supplying advertising space than economic players that can afford to pay for advertising. Therefore, the balance is shifted so that the media must make concessions to the advertisers.

With this type of financing, things are getting increasingly complicated due to the fact that on the advertising market advertising deals are often negotiated not directly, but through an intermediary. Hence, apart from being dependent on economic entities, the media may also become dependent on the marketing agencies they are "wholesaling" their advertising space to, as well as on the interests of the owners of these agencies. In practice, this may result in the media trying not to "offend" in any way in its texts not only the company that is directly advertising itself in the media in question, but also other clients of that same marketing agency.

The third type of media financing are donations, either those related to the activities of the media in general or to some special programs. Influence on media independence exists here too, but its intensity and consequences on the work of the media differ from case to case. For example, if the donation constitutes general support to investigative journalism, without interfering with the content of the story arising from such journalism, there will probably be no negative influences on independence. However, if the donation is intended for the production of programs and texts about a specific topic (of interest for the donor), the consequence will be a disequilibrium in the approach and the possible "neglect" of other, equally important topics, for which there were no interested donors. Naturally, the extent of the influence on independence significantly depends on the donor. The financial contributions to Serbian media by an Australian philanthropic organization with no interests in Serbia and those of a pharmaceutical company selling its products on the Serbian market will certainly not have the same consequences.

The fourth type of financing is that coming from the state. It has many varieties and consequences on media independence. State financing may be direct and indirect, open or concealed.

The legal modalities include the following basic forms:

Direct financing of state-owned media from the budget. This form of financing is undesirable for many reasons. First, it creates a high degree of dependence on those who decide about the budget amount, but also because the citizens cannot see clearly for which purposes the money is earmarked and if it is spent in the best possible way. However, the extent to which the independence of media will be interfered with depends on the extent of political interference with editorial policy and how the management of the media outlet (that is financed from the budget) has been appointed. The personal

integrity of the editors will also play a role. This model was prevalent in Serbia for a long time, involving many negative experiences related to independence, but with some positive examples too.

Program-based financing of the media from the budget. This form of financing has some obvious advantages over direct budget funding. First, it is the possibility for other media too (and not only those founded by the state) to compete for these funds. The second advantage is that one may see more clearly the purposes for which the money is spent, which should ensure greater accountability for the expenditures of budget funds, better quality and/or lower expenditures. The extent to which these effects will be achieved in practice is conditional on many factors, the first being if the topics that are funded (so-called financing of programs of public interest) have been properly selected. Here we may see the same harmful effects on the objectivity of the media as with donor financing. For example, the media could opt for reporting more extensively about a topic financed from the budget and neglect other, equally important topics. The second important question is the way in which the money is allotted on the competitions – the precision of the criteria set, the level of professionalism of the commission deciding upon the allocations, the independence of the members of the commission from the media expecting to receive the funds, as well as from other stakeholders that would want to influence their work, whether the politicians will interfere in the work of the commission, etc. The recently adopted Law on Public Information and Media brought about major changes in this field, providing for project funding based on the dominant form of state aid to the media. However, the legal norms are not precise enough and the problems are to be expected when choosing the priorities for financing, the composition of the competition commissions, the criteria and the final decision of the bodies (to what extent the decision of the commission will be respected). On top of all these issues (which may be partially alleviated by introducing a quality bylaw that should be drafted by the Ministry of Culture and Information looms perhaps the most important one – there will certainly not be enough money in the budget.

The financing of media through other forms of state aid. The media may be also be financed indirectly from the budget, through various forms of state aid, such as tax exemptions, discounted public services, free use of property, preferential prices of raw material, reduced customs fees for equipment, reprogramming of tax debts, guarantees for loans taken by media and the like. All these forms of aid carry the same risks as direct budget financing. From the standpoint of independence, these risks may be even greater, since the law stops short of regulating the implementation of these measures in much detail. Meanwhile, due to their low value, the latter are often not subject to any controls under the Law on State Aid Control.

Payment for media services. State authorities, local self-autonomies, public companies and other public institutions are also present on the market as users of media services. Such position sometimes arises from the obligations of state authorities (for example, to publish advertisements about the privatization and public sales of property and such obligation hitherto existed for public procurement too). The second type of services emerges when public institutions carry out campaigns related to their work (e.g. environmental or health campaigns, etc.). In all such cases, the question arises as to which media outlet the service will be paid to and the scope of such service. Choosing the media may have repercussions for the independence thereof relative to the body that is being advertised for the same reason that corporate advertising may affect media independence. Simply, there are many media outlets and far fewer advertising opportunities. To further exacerbate the problem, it is not easy to establish objective criteria for selecting media suppliers that might result in unbiased public procurement. The lowest price offered may not be the sole criterion, nor can the client be completely objective when setting other parameters (e.g. the target group of readers and viewers covered by a media outlet).

Main problems after the establishment of the legal framework

The recently adopted Law on Public Information and Media is a step forward relative to the current situation. It stops short, however, of successfully tackling the insufficiency of public information about media financing. The proposals aimed at dealing with these issues were tabled at the public debate, but the reasons for their rejection were not explained.

The provisions of this Law may enable to the public easier access to some information relevant for getting an impression about the influences on the editorial policy of media, which information stems from ownership of media or financing of media by the state. These are particularly the provisions of Article 39, paragraph 1, subparagraphs 9 and 10, which will enable better insight in the level of income generated by the media from government authorities on various grounds (subsidies, project-based financing, advertising, etc.).

The Law also brought changes in terms of transparency of ownership, since it entails mandatory release of information about the "legal and natural persons owning, directly or indirectly, more than **5% of the founding capital**" in the media.

The biggest problem, that remained unsolved, is the fact that the Law failed to ensure public access to other data that might help the citizens to gauge other forms of influence on editorial policy, which was provided for by the state Media Strategy from 2011 and is cited as one of the problems in the report of the government Anti-Corruption Council from the same year. Namely, a company establishing a media outlet may be set up with a very modest initial investment by a natural or legal person (e.g. 60.000 RSD), but the activities of the media may undoubtedly be affected by big advertisers, sponsors and lenders. The Law stops short of mentioning the possibilities for influencing editorial policy on these grounds, which may be far more significant than ownership itself. Addressing this problem was part of the political program of the government from 2012, but apart from officials referring to the "Verica Barac's Report" every now and then, the problem has clearly been abandoned.

View of the future

The independence of the media in Serbia is far from certain in the future and it is highly likely that the challenges faced by those wanting to do their job professionally will only increase. There are no signs that the purchasing power of media content consumers could improve anytime soon; the same goes for the companies financing the media advertising market or the capacity of the state to ensure greater support to unbiased public information. In addition, traditional media (not only in Serbia) face other various problems making their financial situation even more difficult. Only the hope remains that other factors, those in favor of independence, will be stronger. By that I mean the heightened interest of the citizens to put information received from the media to an objectivity test and to take them with a grain of salt. For that purpose, they may collect information themselves and cross-check information from different sources, mainly owing to the (still mainly) free Internet. All this will make the media become more objective and professional, if they want to convey their messages to the public.

Dilemmas Related to Recording and Releasing Footage from Criminal Trials

Siniša Važić[1]

Courts of law, trials and testimonies in criminal proceedings have always fascinated the public. That interest is even greater if information about such trials are accompanied by pictures or footage of the defendants, key witnesses and representatives of the prosecutor, defense or the court. Should broadcast media attend trials, along with newspapers, which have attended them for long time, is a question that has always remained topical, especially in view of the fact that the vast majority of our citizens rely on television as their main, if not the only source of information. Therefore, the adequate presentation of trials on television, is important not only for enjoying the right to information (enshrined in Article 51 of the Serbian Constitution), but also as the opportunity for every citizen to better understand how the judiciary works.

The arguments pro et contra broadcast coverage of trials are actually dilemmas emerging from the possibility to have television cameras introduced in courtrooms, thus bringing such trials to the homes of the citizens. Is the presence of cameras and live transmissions of trials merely "just a bit of public touch" on top of the existing transparency of trials? Doesn't it amount to merely increasing the number of the people attending the trial, sitting in the courtroom? These questions deserve a valid answer.

It is clear that the key of the problem contained in the aforementioned constitutional warranties is finding equilibrium between the duty of the state to protect the rights of the defendant in criminal proceedings and the obligation to enable the citizens to enjoy their right to be informed.

The transparency of criminal proceedings is enabled not only by the presence of the parties to the criminal proceedings and that of the relevant professionals (court officials, scientists, experts and public figures), but also by the right of the citizens to attend trials and be informed by the media about the related deliberations. Since it is not technically possible to ensure the unrestricted direct attendance of the general public (all the citizens that would like to attend a trial), the state must enable the representatives of the media to attend, thereby representing the general public.

One of the recommendations of the CoE Council of Ministers speaks about the need to take the necessary measures for the implementation of principles such as informing the public by means of the media, the need for live reporting and coverage in the courtrooms, support to media coverage, while attending to the protection of the rights of witnesses and plaintiffs.

The legislators and the courts should strike a balance between the undisputed need to inform the public about the course of trials and the related evidence, while also presenting the events that are the subject of a criminal trial and the interests of the proceedings itself, bearing in mind the principle of legality and efficiency of criminal trials. The protection of persons appearing in the proceedings should also be factored in and especially the witnesses, plaintiffs (victims) and finally the defendants.

One of the greatest threats that might undermine the legality and efficiency of criminal proceedings appears in the situation when unrestricted media coverage of hearings and statements made by the participants thereof and media presentation of other evidence may affect and even threaten the statements of persons that are yet to be heard.

A commonplace and a general objection made by those opposing the presence of cameras in courtrooms is the claim that they affect the very essence of the proceedings, namely the court (i.e. the judges), the parties and the witnesses.

[1] Judge of the Appellate Court in Belgrade

The advocates of such a position believe that the introduction of cameras in criminal trials turn real life stories and legal issues into entertainment. This may result in the "trivialization" of trials and the erosion of the legal system. It also may make not only attorneys at law, but also prosecutors and judges "media-interesting" and break the veil of their hitherto "anonymity". The question arises whether this, in turn, will affect the conduct of judges and prosecutors and even influence the decisions they need to make while doing their difficult and responsible job? Moreover, will showing pictures of judges, prosecutors and court employees on TV screens make them more recognizable and thus more vulnerable and exposed to potential provocations and threats?

Our country, just like its neighbors in the region, is fairly inexperienced when it comes to recording and broadcasting court proceedings. Any surveys about the matter would not thus be productive, since they would refer to imaginary situations and not empiric experience. Therefore it is pertinent to examine the results of the polls about recording and broadcasting trials at the International Criminal Tribunal for the former Yugoslavia (ICTY).

Surveys and analysis that have been conducted on the topic of recording and broadcasting ICTY trials contained questions about the work of court employees and the influence of the presence of cameras on their activity and behavior. The same applied to witnesses, judges, counsellors and defendants. The conclusions of these surveys have shown that the majority of respondents claimed the effects of cameras on their work in the court to be negligible. They said it was primarily due to their overall focus on work. Views about the influence of cameras on witnesses were less precise. The majority of respondents believed that the very statements made by witnesses and the content thereof make it difficult to assess the potential camera interference.

As for the judges, a significant majority of believes that they are not influenced by cameras and that their professionalism and experience in daily televised trials enables them to discharge their duties properly; they stress that their views and conduct may not be affected by the presence of cameras.

As for the attorneys/counselors, the majority believes they are not affected by cameras. Still, some have criticized the use thereof for political ends and for the benefit of their client. Many respondents were unable to estimate if the attorneys have been theatrical in their performances because of camera presence or if such conduct was merely part of their defense arsenal.

When it comes to the defendants, the fact that they play a quite passive role in trials before the ICTY has made it impossible to judge the potential influence of cameras on them.

The general conclusion about the presence of cameras in ICTY trials and the broadcasting of footage from trials is positive and supports the opinion of those that believe recording and public broadcasting of trials is desirable and needed.

As already mentioned, trials are public, which means that not only citizens, but also journalists of the press and broadcast media attend and report about the course of the proceedings in their articles, reportages and news programs. They often do it from in front of the court building. By listening and watching the trial they collect information, select it and convey it to their readers, listeners and viewers, bringing them closer to the developments in the courtroom.

The number of those attending trials ranges from several to several hundred, depending on the interest to watch the proceedings and the physical space available. In other words, a specific number of citizens listens, watches, memorizes and conveys to other citizens what they have heard and seen during the trial. One may ask should not other citizens be enabled to directly hear and see a trial and make their own conclusions about it? Is allowing the limited number of people to attended fully in compliance with the proclaimed public nature of criminal proceedings? Are not courts of law and trials public domains belonging to everybody and available to everyone as information about the proceedings?

Why should we accept the possibility of the press or broadcast media recording, filtering and releasing information about a trial? While the personal objectivity and integrity of the journalists is not brought in question, every person has their own capacity of perception, memory and reproduction of what they have seen and heard, as well as their own criteria about the pertinence and interest. These circumstances in every report from a trial, regardless of the efforts invested to be objective and professional, leave a personal and subjective mark.

Allowing the media to record and air footage from trials would also make the work of the judiciary as a whole more transparent and accessible. After all, the judges have been elected for a permanent term of office. Recording and airing footage from trials would allow insight in their work, conduct, attitude towards their job and an opportunity for the citizens to better understand the judicial branch as a whole.

Furthermore, the televising of the trials may also have an educational component. It would allow both the professionals and lay persons among the citizens to familiarize themselves with how the application of the law works in practice.

The public may undoubtedly influence the proceedings. The intensity of such influence and possible effects on the lawfulness and fairness of the proceedings depend on several factors. These are: the presence of such proceedings in the media (the number of articles in the press and reportages in broadcast media), the degree of objectivity of the reports (objectivity greatly depends on the person assessing the degree thereof), statements made by public figures, especially politicians and political parties (those in government in particular) regarding a trial. The latter concerns the statements and positions voiced by influential politicians or other renowned public figures that an individual is most certainly the perpetrator of a crime, although the charges have only been pressed or the investigation has just started; or such persons saying that the trial is going to be completed by a specific time, etc. Such claims not only directly violate the presumption of innocence of the defendant, but may undermine the lawfulness of the criminal proceedings.

The impression that the public may influence the course of the trials and the outcome thereof becomes even greater when the courts start making “expectative” rulings, after being exposed to a “gauntlet” of justified and unjustified criticism (often inappropriate and containing foul language) in a situation where a decision adopted by the court is not “liked” by the public. These are typically decisions to release someone from custody, which are usually interpreted as freeing the defendant from all charges; or the decision to postpone a hearing or inappropriate commenting the severity of a prison sentence. The public typically looks for the reasons for such rulings and decisions in “illegal” and “unfair” views and conclusions of the court, explained as corruption, political bias of the judges, negligence and incompetence. The legitimacy of the courts’ arguments is seldom accepted.

The consequence is that the courts may begin to make decisions that satisfy the wishes and views of the public, primarily the “lay” public, while not excluding the “political public”, if such category may be established. The cases in point are decisions about placing somebody in custody and extending custody
under pressure from numerous and biased articles in the press. Concerned by perceived public anxiety, the courts find legal grounds to leave the defendant in custody.

Naturally, the key element for concluding if such pressure really exists is the “degree of resistance” of the courts to such perceived or actual influences.

It is easy to conclude that all the aforementioned actors of this important public work – the judiciary in particular, followed by the media and the politicians - must strengthen their professional capacity and integrity.

As one of the remedies that could boost the healing process and restore at least part of the trust in the judiciary is, in my opinion, the introduction of cameras in the courtrooms, namely the filming and broadcasting of certain trials. I am convinced that it would help the public to get to know better not

only the work of the courts and judges, but also prosecutors, attorneys, court experts, the police and various agencies and inspectorates; in a nutshell, all those appearing in court proceedings. It would be an opportunity to have better insight in their work and contribution to the successful completion of trials.

I think that it is important and would be good for our country to take a courageous step towards allowing cameras in courtrooms. Fear of cameras and reluctance to become used to their presence will have lost relevance after the realization that we are monitored by CCTV cameras in public places on daily basis – both outdoors and indoors.

It is my opinion that, at least during a trial period, proceedings should not be transmitted live, but as a delayed broadcast and with the necessary trimming of the duration thereof, while not affecting the substance of testimonies and statements.

The final conclusion could be the following: the ban on cameras in courtrooms (though it was relaxed over time, but not lifted) was instituted in the very early days of television, when the experience of using it was negligible.

While courts should not care about their positive and negative popularity, they must take interest in the degree of public confidence they enjoy. Trust in the judiciary and the rule of law is, after all, one of priorities on the road to the European Union. Nothing will build trust in the courts better than transparency and openness. The citizens should be allowed to witness "truth in action", as Disraeli called justice. There is no better place for that than the court and the court proceedings.

Note: This text is the adapted and shortened version of the more extensive article published in the Almanac of Works and presented on the Symposium of the Serbian Association of Criminal Law Theory and Practice in Zlatibor in September 2014.

European Court of Human Rights
Information Notes on the Court's Case-Law[1]

Information Note No. 174 **May 2014**

ARTICLE 10

Freedom of expression

Award of damages for defamation on account of publication of article criticizing Constitutional Court decision ordering dissolution of a political party: *violation*

Mustafa Erdoğan and Others v. Turkey - 346/04 and 39779/04
Judgment 27.5.2014 [Section II]

Facts – The applicants were ordered by the civil courts to pay damages for defamation on account of the publication of an article written by the first applicant, a constitutional law professor, criticizing a decision of the Constitutional Court to dissolve a political party and questioning the professional competence and impartiality of the majority of judges who heard the case.

Law – **Article 10:** The final judgments given in respect of the defamation actions brought by the three members of the Constitutional Court had interfered with the applicants' right to freedom of expression. The interference in question was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others.

The subject matter of the article in question, written by an academic, concerned an important and topical issue in a democratic society – the functioning of the system of justice – which the public had a legitimate interest in being informed of. It therefore contributed to a debate of general interest.

The claimants in the three sets of proceedings were members of the Constitutional Court who had voted in favour of the dissolution of the political party. Whilst it could not be said that they knowingly laid themselves open to close scrutiny of their every word and deed to the same extent as politicians, members of the judiciary acting in an official capacity could nevertheless be subject to wider limits of acceptable criticism than ordinary citizens. At the same time, however, the Court had on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

The domestic courts considered that certain expressions used in the article were defamatory of the claimants and that the author had overstepped the boundaries of acceptable criticism. The Court accepted that some of the language and expressions used were harsh and could be perceived as offensive. That said, they were mostly value judgments, coloured by the author's own political and legal opinions and perceptions. In this connection, they were based on the manner in which the Constitutional Court had ruled on certain issues and the rulings concerned, including the decision to dissolve the political party, were already subject to virulent public debate, as the applicant had sought

[1] Excerpts from the official "Information Notes on the Court's case-law" of the European Court of Human Rights, available on its web site www.echr.coe.int

to demonstrate in the domestic proceedings. They could therefore be considered to have had a sufficient factual basis. The domestic courts had not attempted to distinguish the statements of fact in the impugned article from value judgments, and did not appear to have examined whether the "duties and responsibilities" incumbent on the applicants within the meaning of Article 10 § 2 of the Convention were observed or to have assessed whether the article was published in good faith. In particular, they had omitted to place the impugned remarks within the context in which they were expressed. In that connection, the Court reiterated that style constitutes part of the communication as the form of expression and, as such, is protected together with the content of the expression. When account was taken of the content of the article as a whole and of the context, the impugned remarks could not be construed as a gratuitous personal attack against the claimants. Moreover, the article was published in a quasi-academic quarterly as opposed to a popular newspaper.

In the light of the above, and notwithstanding their margin of appreciation, the national authorities had not adduced sufficient reasons to show that the interference with the applicants' freedom of expression had been necessary in a democratic society to protect the reputation and rights of others. This finding made it unnecessary for the Court to determine whether the amount of damages the applicants were ordered to pay was proportionate to the aim pursued.

Conclusion: *violation (unanimously).*

Article 41: reimbursement of damages paid by the first applicant in domestic proceedings and EUR 7,500 to the first applicant in respect of non-pecuniary damage.

Information Note No. 175 June 2014

ARTICLE 10

Freedom to impart information
Freedom to receive information

Failure by authorities to comply with final court orders requiring them to disclose public information to journalist: *violation*

***Roşiianu v. Romania* - 27329/06**
Judgment 24.6.2014 [Section III]

Facts – At the relevant time, and for the previous six years, the applicant had presented a television programme broadcast on a city's local channel, which discussed, among other issues, how public funds were used by the municipal administration. With a view to exercising his profession, the applicant contacted the city's mayor requesting that certain items of information of a public nature be disclosed to him. He submitted three successive requests on various subjects. The mayor replied to the applicant in three laconically worded letters. Considering that these letters did not contain adequate replies to his requests for information, the applicant brought three separate sets of proceedings before the administrative court, attempting, *inter alia*, to obtain an order instructing the mayor to disclose the information to him. In three separate decisions, the court of appeal allowed the applicant's requests and ordered the mayor to disclose to him the bulk of the requested information. According to the applicant, the court of appeal's final decisions remained unenforced, despite his numerous complaints.

Law – Article 6 § 1 (civil) (enforcement) – Access to court: The applicant had obtained three final judicial decisions ordering the mayor to disclose to him certain information of a public nature. The domestic courts had concluded that letters inviting the applicant to come and obtain photocopies of several separate documents containing information which was open to a variety of interpretations

could not possibly be analysed as appropriate execution of the judicial decisions. In addition, the Court was unable to determine whether the documents referred to in those letters did in fact contain the information requested by the applicant, given the Government's failure to submit the documents to the Court or to send a summary of them.

The Court acknowledged that access to a tribunal could not require a State to enforce all judgments in civil cases regardless of their nature and the circumstances. However, the authority in question in this case was part of the municipal administration, which formed one element of a State subject to the rule of law, and its interests coincided with the need for the proper administration of justice. Where the administrative authorities refused or failed to comply, or even delayed doing so, the guarantees under Article 6 enjoyed by the litigant during the judicial phase of the proceedings were rendered devoid of purpose. Furthermore, it was inappropriate to require an individual who had obtained judgment against the State at the end of legal proceedings to then bring enforcement proceedings to obtain satisfaction. Nonetheless, in the present case, the applicant had taken multiple steps to obtain execution of the judicial decisions, by requesting that a fine be imposed on the mayor, by lodging a criminal complaint and even by requesting enforcement of one of the decisions by a bailiff. Moreover, the applicant had never been informed, through a formal administrative decision, of any grounds which would have made it objectively impossible for the authorities to execute the decisions. These factors sufficed to conclude in the present case that, by refusing to enforce the final judicial decisions ordering disclosure to the applicant of information of a public nature, the domestic authorities had deprived him of effective access to a court.

Conclusion: *violation (unanimously).*

Article 10: There had been an interference in the applicant's rights to freedom of expression as a journalist. Like the case of *Kenedi v. Hungary*, this application concerned the applicant's access to information of a public nature which was necessary for the exercise of his profession. The applicant had obtained three court decisions granting him access to the information. The applicant had been involved in the legitimate gathering of information on a matter of public importance, namely the activities of the municipal administration. In addition, given that his intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, the applicant's right to impart information had been impaired. Equally, there had not been adequate execution of the judicial decisions in question. The municipal authorities had also never alleged that the requested information had been unavailable. The complexity of the requested information and the considerable work that would have been entailed for the municipal authority in compiling it had been referred to solely to explain the impossibility of providing that information rapidly. Having regard to those circumstances, the Government had adduced no argument showing that the interference in the applicant's right had been prescribed by law, or that it pursued one or several legitimate aims. Accordingly, the Government's objections had to be dismissed.

Conclusion: *violation (unanimously).*

Article 41: EUR 4,000 in respect of non-pecuniary damage.

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