

III MONITORING OF THE ADOPTION OF NEW LEGISLATION

1. Law on Electronic Communications

1.1. On June 8, 2010, the Ombudsman Sasa Jankovic submitted to the competent committee of the Serbian Parliament the Amendments to the Draft Law on Electronic Communications which, in accordance with the Constitution, requires that police and secret services cannot have access to citizens' electronic communication data before they acquire a relevant court decision. The amendments also eliminate the possibility of different interpretations of the law so as to narrow the powers of the Commissioner for Information of Public Importance and Personal Data Protection in supervising of lawfulness of data processing. The ruling coalition MP group chief Nada Kolundzija said to Ombudsman Sasa Jankovic that the first Ombudsman's amendment was unnecessary. Kolundzija said that the Law on Electronic Communications could not regulate competences of some other authorities, courts, or Security-Information Agency (BIA). The Serbian Parliament Transportation and Communications Committee rejected this amendment on June 14. Jankovic announced that, if the Law was adopted, he would file a suit with Serbian Constitutional Court. Jovan Stojic, Head of the Cabinet of the BIA Director Sasa Vukadinovic, said that nothing much would be changed with the adoption of this Law since the services and the police had never needed consent of the court to see who was communicating with whom, when, to what extent and where from. "We can do all this based on the Law on BIA, Military Security Agency and Military Information Agency. On the other hand, a court decision is necessary in the case of interception", Stojic said. On June 29, Serbian Parliament adopted the Law on Electronic Communications, without the Ombudsman's amendment.

The Draft Law on Electronic Communications, Article 128, paragraph 1, envisages that every telecommunication operator shall retain the data related to the type of communication, its source and destination, commencement, duration and end, identification of the user equipment, including mobile user equipment, with the aim of implementing the investigation, discovering criminal offenses and conducting criminal proceeding, in accordance with the law governing criminal proceeding, and as required in view of protection of national and public security of the Republic of Serbia, in accordance with the laws governing operations of security services and the operations of police authorities of the Republic of Serbia. The Ombudsman submitted a proposal of the amendment by which the reference to the laws governing the operations of security services of the Republic of Serbia and the operations of police authorities is being avoided. Namely, some of these regulations envisage a possibility of supervising of the telecommunications and information systems in

order to collect data about telecommunication traffic and users' locations, without having access to their content, without a court order; insisting on the order is possible only if access to the content of communication is to be made or, in other words, in the case of interception of communication. The Ombudsman took position that above regulations were not in full compliance with the provision of Article 41 of the Constitution of the Republic of Serbia, which guarantees confidentiality of mail and other means of communication, with aberrations that are allowed only for a limited period of time and only based on a court decision. Notably, on May 28, 2009, the Constitutional Court of the Republic of Serbia ruled that the provision of Article 55, paragraph 1 of the Law on Telecommunications was not in compliance with the Constitution. Before the intervention of the Constitutional Court, Article 55, paragraph 1 of the Law on Telecommunications had envisaged that all activities or the use of devices affecting or impairing privacy and confidentiality of messages transmitted via telecommunication networks were forbidden, unless the user had given his/her consent or the activities were being undertaken in accordance with law or a court order issued in accordance with law. After the intervention of the Constitutional Court, only three words (the law or) were deleted from the above provision since the Court took the position that privacy and confidentiality of messages might be impaired only in the manner provided by the Constitution, namely only based on a court order issued in accordance with law. Considering that the Law on Electronic Communications replaces the Law on Telecommunications, restoration of human rights protection, to the level at which it had been before the quoted Decision of the Constitutional Court was made on May 28, 2009, would be the direct consequence of the adoption of this Law without the amendment proposed by the Ombudsman. On the other hand, it is true that the root of this problem is not in the Law on Electronic Communications but rather in other regulations this Law refers to; accordingly, the issue of powers of the police and security services should be resolved through regulations governing such powers and not indirectly, through telecommunication regulations. As for the consequences that adoption of the Law on Electronic Communications has on media, they mostly relate to the fact that it allows easier identification of journalists' information sources since access to their outgoing and incoming call listings is permitted and this means that the provision of the Law on Public Information guaranteeing journalists the right to protect their sources is being eschewed.

1.2. The Draft Law on Electronic Communications brings inspection supervision over implementation of this Law back under the competence of Ministry for Telecommunications and Information Society, or the Autonomous Province authorities in the territory of Vojvodina. Inspectors will be particularly authorized to, among other things, take measures including prohibition of further operation, sealing and seizure of electronic telecommunication equipment or a part of such equipment, if it has been used contrary to the

prescribed conditions or if it is established that the operation of electronic communication equipment presents a direct and serious threat to public safety or the environment. Inspectors will also be authorized to temporarily suspend performance of business activities by closing down the premises in which such activities are being performed or in other suitable manner, in case they are prevented from performing supervision. An appeal may be filed with the Ministry for Telecommunications and Information Society against a decision issued by an inspector; however, filing of an appeal shall not push back execution of the decision.

The parliamentary debate on the Draft Law on Electronic Communication, but in general public as well, has almost completely turned into a polemic about the extent to which this regulation impairs the constitutionally guaranteed confidentiality of means of communication. What went almost unnoticed, however, were some new solutions that raised hope that the issue with radio piracy, as one of the gravest on the Serbian media scene, would be solved. Namely, in accordance with the Law on Public Administration, inspection supervision could be performed only by the authorities of the Republic and, apart from them and as delegated tasks, only by the authorities of an autonomous province, municipality, town, and the City of Belgrade. The Law on Telecommunications did not envisage the existence of a telecommunication inspection but, instead, the telecommunication controllers within the Republic Telecommunication Agency. Based on the Articles of association of the Republic Telecommunication Agency as an independent regulatory body, its telecommunication controllers were not allowed to perform inspection supervision and, consequently, prohibit further operation or seal and seize equipment. This proved to be a serious obstacle in combating pirate broadcasters who took undue advantage of the fact that telecommunication controllers were not authorized to seize their equipment and simply ignored whatever decisions RATEL issued based on controls that were performed. It is expected that, by restoring fully authorized inspectors, the Law on Electronic Communication will finally allow for fight against radio piracy to be effective.