

Disciplining Independent Regulators

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Political Pressures on the Communications Regulatory Agency of Bosnia and Herzegovina

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Editorial abstract: *The Communications Regulatory Agency (CRA) is the foundation for an independent radio-television sector in Bosnia and Herzegovina. During the past decade, the Agency has made important contributions to the development of electronic media in the country, the elimination of hate speech, the setting up of standards for public radio and television broadcasting and, in general, has created order in the once chaotic electronic media sector.*

The success of this institution has to a large degree made impossible the misuse of electronic media by political elites for their own party or personal goals and opened up a space for the media to freely report on politics and politicians with no fear of drastic repressive countermeasures.

However, in the past six months, there has been an increase in the quantity and intensity of politically motivated attacks on the CRA, seriously endangering the independence of the agency. The case of the CRA indicates that the struggle for the independence of regulatory institutions and the freedom of the media is always ongoing and that authoritarian political structures continually aim to circumscribe the newly acquired media freedoms while disregarding laws and international obligations that they have previously accepted.

Mehmed Halilović, a respected former journalist and editor, today the Vice Ombudsman of the Federation of BiH in charge of media, writes about the most recent attacks by political structures on the Communications Regulatory Agency and about the possible results of these attacks on the independence of the agency in particular and electronic media in BiH in general.

Introduction

Although the Communications Regulatory Agency (CRA) is the most successful post-war international investment in the Bosnian-Herzegovinian media space and enjoys an extremely good reputation in European and local media circles, it is currently facing very serious political threats endangering its independence and financial survival.

This paradox is typical for the Bosnian-Herzegovinian political situation where those who rise above the local standards and avoid political control are punished. CRA's "cardinal sin" is that it managed to rise above the current situation and resist the control of political centres of power. Therefore, it is now under attack.

In Accordance with the Wishes of Political Elites

Politics did not completely leave the Communications Regulatory Agency alone even before the current situation. For example, following the orders of political structures, the police entered the CRA offices and examined their records. Also, at the beginning of 2006, the BiH State Information Protection Agency (SIPA) spent a number of weeks investigating alleged criminal activities by the Agency. Although the investigation yielded no results, the Agency was never officially informed that the investigation was closed (!).

However, the newest attack is so aggressive and serious that it has unsettled all those involved. Concern has been expressed not only by representatives of the local media scene - again typically divided into political opportunists and professionals - but also by international bodies, including the OSCE, the Council

of Europe, the European Parliament and the European Commission, ambassadors in BiH, etc. The excuse for this most recent political attack was the election of the Agency's new Director General that took place in the middle of last year.

The Director's first four-year mandate was drawing to a close and so, on 2 October 2007, the Agency Council published a public invitation for bids (in the BiH Official Gazette and, although they were not legally obliged to do so, also in three daily newspapers). The invitation was open for thirty days. There were seven applications in total. Five applications did not formally and legally meet the published conditions since they did not contain all the necessary documentation. The remaining two complete applications, submitted by the current Director Kemal Huseinović and by Goran Duka, were taken into consideration.

The special conditions of the public invitation indicated that priority would be given to the candidate with several years of leadership experience in the fields of radio and television telecommunications and the radio frequency spectrum. The Agency Council came to a unanimous conclusion that Kemal Huseinović had the obvious advantage of many years of experience in the field of telecommunications and broadcasting, as well as proven leadership skills, and that he was therefore the only candidate to fulfil all the conditions.

The procedure for electing the Director General is regulated by the Law on Communications (BiH Official Gazette no. 31/03 and 75/06) and, in this case, was followed to the letter. Also, the 21 October 2002 Decision of the High Representative, published as an integral part of the Law, clearly states that "...the implementation of this Law and its objectives requires a politically independent Communications Regulatory Agency that relies on the exceptional expertise and competence of the members of the Council of the Agency and the Director General" and that it is "necessary to ensure that the members of the Council of the Agency and the Director General are exclusively appointed on considerations based on their integrity, knowledge and professional merit."

Following legal procedures, the Agency Council delivered to the Council of Ministers of BiH a unanimous suggestion to name Kemal Huseinović the Director General for another mandate as he was the only candidate fulfilling all of the conditions set down by the Law. However, on 27 September 2007, the Council of Ministers of BiH rejected the suggestion of the Agency Council (although the vote was undecided with four against and four in support of the suggestion).

Also, the Council of Ministers ordered that within fifteen days a new public invitation for electing a Director General be published.

On 1 October 2007, the president of the Regulatory Agency Council, Neven Tomić, reacted by sending a letter to the Council of Ministers stating that they were informed about the aforementioned decisions through the media although a month had passed since the Council of Ministers had come to the conclusion in question (!) - and that afterwards they saw it on the Government Web page.

Tomić regrets that "in this way an attempt was made to undermine the Communications Regulatory Agency Council and the enacted procedure," also stating that "it is apparent from the comments accompanying the conclusion that the Council of Ministers was not in possession of the relevant facts and did not discuss them, rather it is obvious that a political action was in question, absolutely going against the Law on Communications and the role of the Agency."

Judging by some media speculations and frequent statements by key political leaders in the country, these events could be foreseen even before the conclusion of the Council of Ministers. Milorad Dodik, the leader

of SNSD, the strongest political party in Republika Srpska, openly announced that “there will be no endorsement of the election” making it clear to everyone who is the boss. It is not a coincidence that at this time Fokus, the daily newspaper from Banja Luka, published a text with the indicative title of “RAK u metastazi¹” accusing the Agency of working “according to the instructions of the SDA elite” (*Fokus*, 30.08.2007).

After the Council of Ministers refused to accept the decision of the Agency Council, Nikola Špirić, the Chairman of the Council of Ministers, and Milorad Dodik initiated the publishing of a new public invitation that would result in electing a Croat as the Agency Director according to a national quota. This initiative was backed by the five remaining leaders of key political parties, at one of their informal meetings, held in the autumn of last year, in Laktaši. After this, the media started publishing the names of “the best Croat candidates,” drawing up their own lists, obviously at the request of the political elite (*Večernji list*, 15 Dec 2007, *Dnevni avaz*, 06 Jan 2008, *Glas Srpske*, 19 Feb 2008, *Dnevni list*, 18 May 2008...).

Most of these texts mention Rudo Vidović as the “most serious” candidate. Rudo Vidović is the Vice-president of the HDZ 1990 political party and a member of the House of Peoples of the BiH Parliament, i.e. he holds a political position and has a political mandate, which is a conflict of interest.

Paradox of the “Legal State”

As dictated by Dodik’s and Špirić’s party, the Council of Ministers, obviously for political reasons, decided to violate the Law on Communications, just as they and other parties and ministers have done or have attempted to do (!) on other occasions regarding other laws.

Špirić, the executor of Dodik’s wishes and plans, made a complete fool of himself in countless statements issued on this occasion. He contradicted himself, first defending “the necessity of ethnic quotas” and later, after criticism, denying this and stating that ethnic criteria “need not be crucial.” He complained that “institutions do not wish to work in accordance with agreements and the law” (thinking of CRA) and again later stating that he was “for the construction of a legal state”...

What a strange legal state – a state in accordance with party agreements, ethnic rotation and based on political dictates and barter! On 21 February this year, at a Council of Ministers meeting, the Chairman was criticised for endangering the independence of the Agency. Reaching the height of political ignorance, he wisely stated: “What does the election of a Director have to do with independence?” (?!)

It is important to note that the Law on Communications does not leave any possibility for the Council of Ministers to reject the suggested candidate for the Director General (unless the legal procedure has not been followed). Also, the Regulatory Agency Council is not under any obligation to provide the Council of Ministers with a list of candidates allowing it to choose candidates according to its wishes, as the Chairman would like. It is true that, according to the Law on Communications, the Council of Ministers can (in accordance with Article 42) fire a Director General under specific circumstances, which of course does not include political reasons.

According to the Law, the Agency Council suggests to the BiH Council of Ministers only one candidate and not a list of candidates who fulfil the criteria. The Law also states that the suggestion is only formally confirmed by the Council of Ministers since the choice and election of a candidate is exclusively the responsibility of the Agency Council. In particular, the Law does not allow the Council of Ministers to independently initiate or manage the election procedure and appointment of the Agency Director General

or to influence the election procedure and appointment of the Director General in any way.

On the contrary, the Law (Article 36, Paragraph 3) explicitly states that “Neither the Council of Ministers, nor individual Ministers nor any other person shall in any way interfere in the decision-making of the Agency in individual cases.”

However, at least in Bosnia and Herzegovina, the law obviously does not apply to political elites, unless, as the widespread local interpretation of “the legal state” would have it, their current political interests are taken as law. Obviously, this kind of interpretation has negative consequences for the entire nation.

The leading six have included independent bodies such as the CRA in party agreements on the distribution of “staff” in state institutions according to ethnic and political quotas. This goes directly against the basic principle of the Agency being politically independent, as well as against the law and the independent (unbiased) nature of the Agency in making decisions. Furthermore, this directly derogates the Law on Communications, as well as international agreements and documents concerning the accession of Bosnia and Herzegovina to the EU according to which the state is obliged to guarantee the independence of regulatory bodies.

Also, this undermines, even negates, all the results achieved so far and the international recognition received by CRA for the successful application of the best European practices in the field of independent regulation for telecommunications and broadcasting.

Endangering Financial Independence

In the meantime, the Bosnian-Herzegovinian government has undertaken new financial measures against the Agency, again with a formal excuse: the drafting of a new Law on Salaries and Compensations of BiH Civil Servants. Their intention was to more than double the salaries of leading civil servants, especially ministers and members of parliament, while lowering the salaries of “independents” as much as possible. The goal was to show the Regulatory Agency, and other independent agencies, that they are the boss and that everyone must do as they say.

If this Law is adopted it will make null and void certain parts of the Law on Communications, as well as the decisions of the Agency Council, made in accordance with the Law, concerning CRA staff not falling under the Law on Civil Service and having the right to determine baseline salaries, salary categories and additions for salary accounting for Agency staff. Obviously, this is not a problem for the ruling elite.

Article 44 of the Law on Communications provides for the financial independence of the Communication Regulatory Agency by stating that the CRA is financed from the following sources: recurrent technical licence fees for the regulation and supervision of the telecommunications operators and broadcasters and grants and donations. Agency funds are placed in a special CRA account, as the CRA is the only BiH institution that has its special account besides the state account and budget.

Other CRA funds come from fines collected by the agency and state support for using the radio frequency spectrum. According to the Law on Communications, these funds are placed directly into a special account for the BiH Institutions budget – the unified treasury account – and are therefore not a source of financing for CRA, but rather for the state.

Therefore, CRA is not financed from the BiH Institutions budget and is not a budget user as defined by

Article 1, Paragraph 1 (c) of the Law on the Salaries and Compensations of BiH Civil Servants which states that "an Institution of BiH, in the sense of this Law, is a budget user financed from the Budget of the Institutions of BiH and BiH's international obligations in accordance with the Law on the Financing of the Institutions in BiH," and that "[t]his law regulates [...] salaries and compensations of civil servants in the institutions of BiH financed from the Budget". Also, the Law on the Financing of Institutions in BiH (BiH Official Gazette, no 61/04) defines regulatory agencies as "independent bodies, established on the state level, with legal personality and in line with the laws of BiH that are entirely self-financed," and requires (in Article 9) a special treatment for authorizing the budgets of regulatory bodies.

The Reactions of the International Community

That this political attack on the Regulatory Agency was taken seriously can be seen both in the determined resistance of the Agency Council that has not abated even after ten months (except that two members of the Council, Branislav Bošković, from Banja Luka and Branislav Božić, from Mostar have in the meantime withdrawn their support from the current Director and publicly backed the demands of the Council of Ministers) and in the fact that numerous international warnings have been issued in the past six months.

Some of these reactions from diplomatic circles have been mild (e.g. the reaction of the Office of the High Representative in Sarajevo and the Office of the European Commission in Sarajevo) while others were much harsher.

OSCE Representatives (in Sarajevo and Vienna) have been the loudest, followed by the European Commission in Brussels and the Council of Europe. The results of these reactions remain to be seen. Judging by some of the signs so far and by the silence of the High Representative, it cannot be concluded that international protagonists will remain persistent and steadfast. Some form of political bartering with local leaders is also a possibility, as it has already been the case countless times before with other political concessions.

Still, it is useful to note some of the more significant and determined reactions by international institutions. Viviane Reding, a member of the European Commission, sent a letter to the Chairman of the Council of Ministers in which she emphasises that "preserving and guaranteeing the independence of regulatory bodies from any kind of political or economic pressures, including the preservation of their financial independence, as well as respect for the procedure of electing a Director General" is one of the priorities of BiH in the context of signing the Stabilisation and Association Agreement.

In the same letter (dated 12 Nov 2007), she also notes that "the Communications Regulatory Agency holds a unique position and the independence that it has achieved is of crucial importance for the development of the communications and broadcasting market" and "it is therefore (...) important that the independence of the Agency is guaranteed in the future."

Recently, on 8 May, at the OSCE press conference in Sarajevo, the OSCE Representative on Freedom of the Media Miklos Haraszti stated that the attacks by the government and political representatives on BHT and CRA "must end" and that the politicians unsatisfied with what is being published about them "must use legal mechanisms for protection" instead of acting in ways that aim to destroy these institutions.

On 17 March, the American Ambassador in Bosnia and Herzegovina, Charles English, stated for FTV as a guest of the "60 Minutes" program, that "the CRA must be a completely independent body" and that "reports claiming the CRA is under growing political pressure" are disconcerting. The Ambassador also stated that,

“We see this in the media and we reject this type of pressure. We absolutely support the CRA in their attempts to stay independent.”

CRA Success to Date

In less than a decade, since it was established, the Communications Regulatory Agency of Bosnia and Herzegovina has achieved an extraordinary reputation and level of respect in the world, especially in the regional Southeast European context. A more important and challenging achievement has been complete affirmation and recognition from local media.

The Agency has achieved three feats that may have seemed impossible in post-war Bosnia and Herzegovina: it has applied a common law to all electronic media in the country, put an end to total anarchy on the airways and in time contributed to a more or less total eradication of hate speech.

By April 2002, the Agency completed the process of issuing long-term licences to radio and television broadcasters based on three fundamental principles – the program, technical equipment and financial self-sufficiency – leaving 184 emitters on the airways of almost 300 that existed at the end of the 1990s.

At that time, the Agency was under constant media and political pressure and criticism. However, it held up a high professional level in its work and in applying the Broadcasting Code of Practice for Radio and Television Programme.

In cases when moral and program standards were not respected, the Agency often had to use the unpopular measure of issuing financial fines, often for large sums ranging from 20 to 50 thousand KM, or the measure of temporary suspension of broadcasting, while in one case (Radio Sveti Georgije from Banja Luka, in 2001) it revoked the already issued broadcasting licence.

Although the CRA is an independent agency, its decisions can be challenged in the courts. It is not by accident that all such cases have ended with the upholding of the Agency Council's decisions. This includes the aforementioned decision to revoke the broadcasting licence for Radio Sveti Georgije that was upheld by the BiH Human Rights Chamber, which concluded that the freedom of speech had not been endangered.

In the past few years, and especially since the Regulatory Agency has been taken over from representatives of the international community, the Agency has displayed maturity and a capacity to successfully and independently regulate the communications sector, despite occasional political attempts to usurp its responsibilities.

Is the Agency suffering the most vicious attacks to date precisely because of its success? This is very much a possibility, since the success of local people in a local context has never been locally recognised. However, this can not be taken as the main reason. Apart from the obvious political ambitions of ruling parties to rule over everything and anything, in this case to control the majority of the media through the CRA, we should not overlook some possible petty, even private interest of the campaign initiators.

First and foremost, we must note their individual discontent with their image in the media. Milorad Dodik, the SNSD leader, has frequently asked for “protection of his reputation and dignity” from the CRA because of being criticised on television. However, he did not receive what imagined he should. Also, other subjects who have unsuccessfully attempted to push their people into certain positions within the Agency, had motives for applying pressure onto the CRA.

Instead of a Conclusion

Recently, on 11 April, as a guest of the “Eye to Eye” program on Republika Srpska Radio Television, Chairman Nikola Špirić revealed what may be the main reason behind the attacks on the CRA stating that, “the CRA is worth 15 billion Euros which will enter BiH through this institution” adding that “international circles, and not the six leaders of the parties, are fighting over this money.”

Should we believe him? Neither on that occasion, nor later, did the Chairman explain where those billions of Euros are to come from. Therefore, it can only be assumed that he was thinking of and counting on investments in the nation’s telecommunications sector and in the digitalisation of radio and TV broadcasters. However, even without these additional explanations, can we believe him that it is only international circles fighting over this money and that the leaders of our political parties are “for the construction of a legal state”?

Whatever the real reasons may be, the damage has been done. The politicisation of the election of the Director General and the “enlisting” of Regulatory Agency staff into the ranks of civil servants damages its reputation, limits its independence and endangers Bosnia and Herzegovina’s path to the European Union. If this continues, the consequences could be dire. This does not concern the local political elites since they have shown to be most successful precisely in this type of activity.

If the CRA topples because of political attacks, the media will become even more vulnerable and we will all be moving backwards - towards the 1990s.

NOTE: The opinions expressed in this text are exclusively those of the author and do not reflect the position of the Office of the Ombudsman of the Federation of BiH.

¹The B/C/S acronym for the Communications Regulatory Agency is RAK, also meaning cancer in B/C/S. The title of the article is a play on this and states „Metastasis of CRA/cancer“.