

## THE ACTION PLAN FOR CHAPTER 23: STRATEGIC FRAMEWORK FOR IMPROVING RELATIONS BETWEEN THE JUDICIARY AND MEDIA IN THE REPUBLIC OF SERBIA\*

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*Accession negotiations with the EU (Chapter 23) are an ideal opportunity for overview and systematical approach to resolving of numerous issues that have been treated ad hoc, partially and/or inconsistently for decades in the Serbian judiciary. Relations between judiciary and media belong to this category and have to be considered from three perspectives: The first of all, the improvement of the transparency within judiciary, seen as a right of media to inform citizens on all important facts of judiciary, shouldn't grow in inappropriate commenting of judicial decisions and pressure that harms independence of that branch of power but also of the judicial office holders; In parallel, relations between judiciary and media are of the significant importance when it comes to criminal proceedings. Namely, there is a need to find an ideal balance between the right on information about committed crimes and criminal proceedings on one side, and obligation to respect presumption of innocence of accused person. Also, media coverage shouldn't jeopardize safety of victims and witnesses or cause secondary victimization. In addition to this, media coverage has a strong influence on efficiency of criminal proceedings, especially through the leakage of information during the criminal investigation. The last, but not less important factor that determinates quality of the judiciary-media relations lies in efficiency of their mutual, but also cooperation with police, in protecting journalists and efficient prosecution of crimes against journalists. All above-mentioned issues are subject of the European Commission's recommendations that Serbia should implement in accordance with the Action Plan for Chapter 23.*

**KEYWORDS:** *independence of judiciary / transparency / media coverage / EU / Chapter 23 / criminal proceedings*

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## 1. THE ACTION PLAN FOR CHAPTER 23-AN OVERARCHING STRATEGIC DOCUMENT

The intensive process of preparation for opening the accession negotiations with the EU (Chapter 23) started during the second half of 2013. The first step was explanatory screening organized in September 2013, when the European Commission (hereinafter: EC) presented relevant EU acquis and standards to Serbian delegation. The second step (bilateral screening) included assessment of an alignment level of Serbian normative and institutional framework with abovementioned standards. This phase resulted in submission of the Screening Report<sup>1</sup>- document that represents analytical base for planning future reform steps and contains the list of recommendations. Based on these recommendations, the Negotiation group for Chapter 23 organized comprehensive, inclusive and transparent consultative process to develop a new strategic document in line with the EC recommendations. The Action Plan for Chapter 23<sup>2</sup> (hereinafter: APCH23) which was adopted by the Government of Republic of Serbia on 27<sup>th</sup> April 2016 follows the course mapped out in various relevant national strategic documents, but also advances the process by defining objectives and activities for which the subsequent need arose or it was necessary to identify more detailed evaluation. In this sense, the Action Plan for Chapter 23 represents the overarching strategic document with which all the other strategic documents shall be aligned. This enabling precise definition of the public policy in this area, whereas implementation, coordination, timing and funding of the reforms shall be significantly improved.<sup>3</sup> Having in mind comprehensiveness of the Chapter 23 and the fact that it includes three important subchapters: Judiciary, Anticorruption and Fundamental Rights, the APCH23 and its implementation became the unique opportunity to overview all issues relevant for relations between judiciary and media but also to coordinate policies and actions needed to improve it, not just at the normative level but through the implementation of relevant legislation, guidelines and protocols.

## 2. JUDICIAL INDEPENDENCE AND MEDIA

There are two group of relevant issues when it comes to relations between judicial independence and media. The first of all, media could be easily used as a tool for an inappropriate political pressure on judiciary as the branch of power but also on particular judge who should render or has already rendered some decision. Article 4 of the Constitution<sup>4</sup> provides for the separation of powers in Serbia and the independence of the judiciary. Article 142 says that courts shall be separated and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts. As regards guarantees for the internal independence of judges,

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<sup>1</sup> Screening Report for Chapter 23, available on:

[http://seio.gov.rs/upload/documents/eu\\_dokumenta/Skrining/Screening%20Report%2023\\_SR.pdf](http://seio.gov.rs/upload/documents/eu_dokumenta/Skrining/Screening%20Report%2023_SR.pdf), last accessed on April 27<sup>th</sup> 2017.

<sup>2</sup> Action Plan for Chapter 23, available on: <http://mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>, last accessed on March 17<sup>th</sup> 2017.

<sup>3</sup> Action Plan for Chapter 23, page 3.

<sup>4</sup> The Constitution of the Republic of Serbia ("Official Gazette of the RS", No. 98/06)

Article 149 of the Constitution stipulates that, in performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law. Any influence on a judge while performing his/her judicial function shall be prohibited. Article 71 of the Law on the Organization of Courts prohibits interfering with the autonomy and independence of courts and judges. In parallel, article 145 of the Constitution stipulates that court decisions are based on the Constitution and Law, the ratified international treaty and regulation passed on the grounds of the Law, but also that court decisions are obligatory for all and may not be a subject of extrajudicial control. Moreover, they may only be reconsidered by an authorized court in a legal proceedings prescribed by the Law. According to the Constitution (Article 151) and the Law on Judges (Article 5), judges enjoy functional immunity in a sense that a judge may not be held accountable for an expressed opinion or voting in the process of rendering a court decision, except in cases when he/she committed a criminal offence by violating the law.

Despite all of these guaranties, the EC concluded that more precise rules and procedures are needed to regulate the conduct of the persons who are the potential sources of political pressure on judiciary. Also, the EC identified the lack of knowledge among judicial office holders, police officers and journalists in this regard. With respect of the role that the High Judicial Council (hereinafter: HJC) and the State Prosecutorial Council (hereinafter: SPC) have in protecting independence of judiciary, the recommendation 1.1.5. in the ScreeningReport says that Serbia needs to establish a clear procedure for both Councils to react publicly in cases of political interference in the judiciary and prosecution. In order to implement this recommendation the APCH23 contained two activities that provides for amendments of the Rules of Procedure of the HJC and same for the SPC (activities 1.1.5.1 and 1.1.5.2. of the APCH23) to regulate and define clear procedure for public reacting in cases of political interference in the judiciary which includes regular/periodic, as well as extraordinary public reacting, concerning the political interference in the judiciary and its effective implementation. While the HJC fulfilled its obligation at the session held on 25 October 2016<sup>5</sup>, the SPC has just implemented it with significant delay. Provisions of the new Regulation on work of the State Prosecutorial Council<sup>6</sup>, are prescribing procedure of the State Prosecutorial Council public reactions in cases of political influence to work of public prosecution office, including regular/periodic informing the public on existence of political or other illegal influence to work of public prosecution offices by the State Prosecutorial Council, once every year. In addition to that, it is also regulated procedure of extraordinary addressing of the State Prosecutorial Council to the public related to political or other illegal influence to work of public prosecution offices, if needed. Article 9 of the Regulation defines that the Council Deputy President is informing on existence of political or other illegal influence to work of public prosecution offices, and he/she is in that case acting as the Commissioner for independence, whereas manner of the Commissioner's acting and informing shall be regulated in detail by the Council special decision.

In addition to abovementioned procedures, the EC recommended the activities needed to ensure the full respect of court decisions including by raising the awareness that criticizing decisions, in particular by politicians puts the independence at risk (rec. 1.1.6).

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<sup>5</sup> Amendments to the Rules of Procedure of the High Judicial Council, which was published in the "Official Gazette of the RS", no. 91/16.

<sup>6</sup> Regulation on work of the State Prosecutorial Council, ("Official gazette of the Republic of Serbia"), No. 29/17, adopted at the Council session held on 23rd of March 2017

Based on this activities the Republic of Serbia planned set of the measures aimed at regulation of conduct of public functions holders /politicians. Activities 1.1.6.1 and 1.1.6.2. stipulate adoption and effective implementation of the codes of conduct for Members of Parliament and Members of the Government of the Republic of Serbia that regulates commenting judicial decisions and procedures. The Government fulfilled its obligation in January 2016<sup>7</sup> but the Code of Conduct for Members of Parliament is still on hold due to frequent pauses in its work in pre-election stages.

The third group of activities in the action plan are directed to strengthening capacities of the judges, public prosecutors and journalists in order to avoid inappropriate media reporting on judicial decisions, regardless political background of that coverage. In accordance with the activity 1.1.6.4. from the APCH23 the Department for Public Relations of the Republic Public Prosecution Office and the State Prosecutorial Council, with support of the GIZ project, the Ministry of Justice and with participation of the media representatives, has made a manual – The guide for communication between public prosecution offices, the media and the public with recommendations for concrete actions of both persons in charge of public relations from public prosecution offices and the media reporting on work of public prosecution offices. The stated manual contains the necessary review of leak of information, as well as concrete recommendations for better cooperation, explanation of the institute and method of work of the prosecution offices, but also rules for the PR employees with a view to establish the best possible cooperation with the media. In addition to dissemination of relevant information through the Manual, introduction of European standards relating to respect of judicial decisions and limits of permissible critique of judicial decisions and procedures in the context of respect of judiciary's independence in the program of the Judicial Academy and the implementation of such training program in this field was the way to work on capacities of judicial office holders in protecting their own independence and integrity of its work but also of the court proceedings. In parallel, there were planned and implemented workshops for journalists in order to adopt European standards and national regulations concerning respect for judicial decisions and concerning respect of reporting on court proceedings. (activities 1.1.6.5. and 1.1.6.6.)

### 3. MEDIA AND CRIMINAL JUSTICE

There are two specific groups of issues that deriving from relations between media and criminal proceedings. The first group of issues is related to media coverage of criminal proceedings that assumes finding an ideal balance between right of public to be informed about most important aspects on certain criminal proceedings without challenging presumption of innocence and the rights of victims and witnesses. In parallel, the criminal judiciary appears as a last defense line in protecting journalists from victimization related to their profession.

How badly the situation in this sector has been assessed it is obvious from the EC's recommendation no. 3.5.2. that insists on reviewing and amending the legislative and institutional framework for the protection of media freedom by implementing the Media strategy with a view to appropriately regulating state funding and putting an end to control of media by the State. Additionally, Serbia should take urgent measures to stop threats and

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<sup>7</sup> The conclusion on its adoption was published in the "Official Gazette of RS", No. 6 on 28 January 2016

violence against journalists as well as information leaks related to ongoing or planned criminal investigations.

The AP23 recognizes the both group of issues and contains the comprehensive list of activities in order to implement the EC recommendations in this regard.

Namely, the recommendation 3.5.2. from the Screening report says that Serbia needs to review and amend the legislative and institutional framework for the protection of media freedom by implementing the Media strategy with a view to appropriately regulating state funding and putting an end to control of media by the State. The EC also recommended to take urgent measures to stop threats and violence against journalists as well as media leaks related to ongoing or planned criminal investigations. In parallel, recommendation 3.5.1. emphasizes that Serbia has to ensure protection of journalists against threats and violence, in particular through effective investigations and deterrent sanctioning of past attacks.

### 3.1. Media coverage and criminal proceedings

The public violation of presumption of innocence became in last few decades more or less usual practice not only in author texts of journalists but in public speeches of politicians and state officials. Despite the art. 73 from Law Public information and Media and the role that the Ministry of Culture and Information has in monitoring over the respecting the presumption of innocence in media there were no track record concerning misdemeanor proceedings. In this regard, the APCH23 (activity 1.1.6.7.) stipulates more efficient implementation of abovementioned provision. The positive circumstance enabling tracking this type of cases was development of the SIPRES case management system in misdemeanor courts from 2016. However, according to official reports submitted to the Council for Implementation of the APCH23<sup>8</sup>, there are still minor number of proceedings.<sup>9</sup>

Beside the presumption of innocence, as it already had been said, media reporting can seriously harm rights of victims and witnesses and challenge efficiency of criminal proceedings. The importance of self-regulation mechanisms has been recognized in the APCH23 that stipulates (activity 3.5.2.8.) more effective monitoring of the implementation of the Code of Ethics for Journalists in order to promote self-regulation and respect of ethical and professional standards, strengthen professional integrity and increase visibility of the Press Council. The important factor in self-regulation is awareness of the limits and rules in reporting on criminal proceedings that can be significantly improved through regular trainings considering EU best practices, through training in the field of human rights, media ethics and hate speech (activity 3.5.2.9.) Additionally, common training for public prosecutors, deputy public prosecutors, police officers and representatives of relevant associations of journalist, are planned with regard to: prevention of media leaks related to ongoing or planned criminal investigations; prevention of media leaks related to respect for privacy with regard to vulnerable persons (3.5.2.21.).

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<sup>8</sup> Council for Implementation of the Action Plan for Chapter 23: Report 1/2017 on implementation of the Action Plan for Chapter 23, available on: <http://www.mpravde.gov.rs/files/Report%20ono%20%201-2017%20on%20implementation%20of%20Action%20plan%20for%20Chapter%2023.pdf>, last accessed on April 29<sup>th</sup> 2017.

<sup>9</sup> Based on the data submitted to the Supreme Court of Cassation by Misdemeanor Appellate Court on March 16, 2017, in the period between December 1, 2016 and March 15, 2017 no misdemeanor proceedings for the breach of Art. 73 of the Law on Public Information and Media were initiated. Out of all proceedings pending on December 1, 2016 before all misdemeanor courts (more precisely Belgrade Misdemeanor Court), one was completed in 2017.

In addition to preventive actions dedicated to journalists the APCH23 contains the set of activities that should prevent unethical conduct of police officers and public prosecutors. Namely, in activity 3.5.2.16. the APCH23 prescribes amendment and supplements to the Code of Ethics and the Rules of the disciplinary proceedings and disciplinary responsibilities of public prosecutors and deputy public prosecutors in the part relating to the accountability of public prosecutors and deputy public prosecutors for unauthorized communication of information about ongoing or planned investigations to the media.

The similar measures (activities 3.5.2.17. and 3.5.2.18.) are planned for police officers, through amendments and supplements to the Law on Police and the Code of Police Ethics. The abovementioned Law was adopted in 2016. Subsequently, the Code of Ethics amended in early 2017<sup>10</sup> in the article 7 under the name "Protection of official information" prescribes that police officers do not disclose and do not use, without an authorization, data which they acquire in service or in connection to the service, and especially those which could threaten legal proceedings or the rights of third parties. Article 12 prescribes that behavior that is opposite to the provisions of this code represents behavior that is harmful to the reputation of the Ministry and police profession. However, these provision remained on declaratory level having in mind that there are no sanctions prescribed in case of non-compliance with Code of Ethics. Also, no progress has been made with regard of planned amendments and supplements to the bylaws governing the procedures of confidentiality and safety of planning and conducting criminal investigations in order to improve the privacy and protection of police procedures for the planning and implementation of criminal investigations. The same stands for adoption a by-law which establishes procedures for issuing statements of police officers to the media (activities 3.5.2.19. and 3.5.2.20.)

The best practices showed that development and adoption of the communication strategies could have a positive impact on media coverage of criminal proceedings. Having that in mind the APCH23 stipulates adoption of such a document for the Ministry of Interior (activity 3.5.2.15). Namely, the Communication Strategy of the Ministry of interior the Republic of Serbia with the media was adopted in 2012 and expired by the end of 2016. However, preparation of a new communication strategy is still in progress but with significant delays.

### 3.2. Protection of journalists

The mechanism of protection of journalist is based on three milestones: preventive measures, interinstitutional cooperation and efficient court proceedings in cases where journalists are victims/injured parties.

Importance of prevention and proactivity was recognized in activity 3.5.1.5. of the APCH23 that particularly emphasizes: Analysis of the risk of vulnerability of journalists conducted in cooperation with representatives of journalists' associations and continuous monitoring of the situation in the printed and electronic media in order to determine the risk of vulnerability of journalists. In addition to this, the APCH23 refer to the Media Strategy and its effective implementation but also insists on taking urgent measures to stop threats and violence against journalists as well as media leaks related to ongoing or planned criminal investigations.

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<sup>10</sup> Police Code of Ethics ("Official Gazette of RS", No. 17/17)

The mutual understanding and cooperation is the key factor for improving relation between media and relevant stakeholders in charge of investigation and prosecution of violence against journalists. The key step on that way was development and signing the Cooperation Agreement among the Public Prosecutors' Office, Ministry of Interior and relevant associations of journalists (activity 3.5.2.4.). On 26 December 2016, the Republic Public Prosecutor's Office, Ministry of Interior, the Association of Journalists of Serbia, the Independent Journalists' Association of Serbia, Journalists' Association of Vojvodina, the Association of Independent Electronic Media, the Media Association and the Association of Online Media signed the Agreement on Cooperation and Measures to Raise the Level of Safety of Journalists. The solid base for this agreement was the Cooperation Agreement earlier signed Republic Public Prosecutor and the Minister of Interior (signed on 11th April 2016 based on activity 3.5.1.4.). The Agreement enabled continuous dialog among media representatives and the Republic Public Prosecutor's Office. This Agreement aims at establishing system of measures which will ensure more efficient legal protection of journalists. Accordingly, a permanent working group was established whose members are authorized high-level representatives of the contractual parties. The working group choosed to work through the specialized working groups. One of them was established for analysis of the provisions of the Criminal Code in order to assess the need for the amendment of this Code and prepare recommendations for the competent institutions (activity 3.5.1.1.). The Agreement, among others, resulted in harmonization of data on criminal offences committed against journalists during 2016 and ongoing criminal proceedings. This is in line with activity 3.5.1.3. that stipulates adoption of instructive guidelines by the Republic Public Prosecutor on forming the separate records of criminal offenses committed against journalists and attacks on media internet sites, and designating priority in acting upon these criminal offenses. There was also established the subgroup for analysis of the way of communication and the openness of the state institutions towards the media.

In the activity 3.5.1.2. the APCH23 stipulates the continuation of the work of the Commission for consideration of the facts obtained during the investigations conducted on the killings of journalists and provision of regular reports. Without dispute about the previous results of the Commission, it's not clear what the time frames for finishing its work are but also what is the purpose of its existence in parallel with the regular institutional framework.

#### 4. ASSESSMENT OF THE ACHIEVEMENTS AND FUTURE STEPS

From the all mentioned above it's clear that both- the EC and Serbia used comprehensive approach to identify problems in the field of relations between judiciary and media and to propose solutions to deal with them. However, the results of implementation of the APCH23 a year after its adoption do not look encouraging. Beyond a limited activities on improvement of normative framework and defining internal proceedings, it doesn't seem significant progress has been made.

Namely, there is a still gap between unofficial claims about exposition of judiciary to political pressures<sup>11</sup> and application of the newly established procedures of public reaction

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<sup>11</sup> It is hardly possible to find any "independent" assessment or analysis that deals with independence of the judiciary in Serbia that doesn't contained

for the HJC and SPC that unexplainable doesn't exist in the Communication Strategy of the HJC<sup>12</sup> neither in the Action Plan for Implementation of the Communication Strategy of the HJC.<sup>13</sup> That could be explained on three ways: One possible explanation is that there are no political pressures on judges and public prosecutors; The second one is that judicial office holders still not see the HJC and the SPC as bodies with the full capacities for governing judiciary and defend its independence, despite the fact that significant majority of their members are judges and prosecutors elected by the peers; Finally, there is a possibility that the HJC and the SPC do not recognize on the right way their own roles in this regard avoiding to publicly share their official position and assessment of (non)existence of political pressure on judiciary. That bring us to the consequent question: Does the HJC's and the SPC's silence means that Serbian judiciary functions independently without inappropriate pressures coming from other branches of power or the HJC and the SPC have some reasons for non-sharing their concerns in this regard with public? The only logical conclusion and the clear message for the HJC and the SPC should be: If there are political pressures on Serbian judiciary, please, say it so! That's your duty arising from the leading position that you have in Serbian institutional set up according to Constitution. That's also the best way for the Councils to justify their capacities in defending independence of the judiciary.

The progress made in previous 18 months regarding respecting presumption of innocence and protection of victims in media and/or prosecution and punishment of inappropriate reporting on criminal proceedings, the only visible positive movement is development of the case management tools (SIPRES) enabling tracking and automatic production of reports that show number and results of these type of proceedings. Beside this, the general impression not only among professionals but in general public is that situation in media getting worse in this regard. The transition from the newspapers to social networks as a key communication channel resulted in speeding up information share that may have more serious consequences in cases of non-respecting of presumption of innocence. Having this in mind, there is a need to use efficient prosecution and punishment of such a cases counting on general prevention effects. In addition to this method that can show positive effects in short time, education of journalists should be seen as a long term investment in quality of media coverage.

Finally, when it comes to protecting journalists, the trilateral agreement and its current implementation should be used as a solid base for establishing permanent dialog as an additional element in mechanism of police and judicial protection. The continuity and constructiveness of the dialog within existing normative and institutional framework can potentially give better results than continuous normative amendments followed by antagonism between journalists and judiciary.

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<sup>12</sup> Communication Strategy of the High Judicial Council, available on: <http://vss.sud.rs/sr-lat/dokumenti/akti-saveta>, last accessed on May 8<sup>th</sup> 2017.

<sup>13</sup> The Action Plan was adopted in 2017 and it is available only in Serbian on: <http://vss.sud.rs/sr-lat/dokumenti/akti-saveta>, last accessed on May 8<sup>th</sup> 2017.



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## AKCIONI PLAN ZA POGLAVLJE 23 KAO STRATEŠKI OKVIR ZA UNAPREĐENJE ODNOSA PRAVOSUĐA I MEDIJA U REPUBLICI SRBIJI

*Proces pristupnih pregovora sa Evropskom unijom u okviru Poglavlja 23 predstavlja idealnu priliku za temeljno sagledavanje i sistemsko rešenje, čitavog niza problema koji se, decenijama unazad, pristupalo površno, stihijski ili nekonzistentno. U ovu grupu pitanja, bez sumnje, spada i odnos pravosuđa i medija, koji je neophodno tretirati u tri paralelne ravni: Najpre, kroz unapređenje transparentnosti rada pravosuđa, odnosno pravo medija da izveštavaju o svim bitnim aspektima njegovog rada, koje ne sme prerasti u neprimereno komentarisanje sudskih odluka i time ugroziti nezavisnost ove grane vlasti i samih nosilaca pravosudnih funkcija; Druga ravan od značaja za odnos pravosuđa i medija vezuje se za krivične postupke, odnosno iznalaženje idealnog balansa između prava javnosti da bude obaveštena o izvršenim delima i toku krivičnih postupaka, s jedne strane, i obaveze poštovanja pretpostavke nevinosti ali i zaštite svedoka i žrtava, kako bezbednosne, tako i od sekundarne medijske viktimizacije. Poseban aspekt ovog odnosa tiče se i uticaja medijskog izveštavanja na efikasnost krivičnih postupaka, kroz curenje informacija (naročito u fazi istrage). Najzad, kvalitet odnosa pravosuđa i medija, uz značajnu ulogu policije, ogleda se i u efikasnosti njihove saradnje na unapređenju zaštite novinara, odnosno u efikasnom procesuiranju učinilaca krivičnih dela čije je bitno obeležje profesionalna pripadnost žrtve iz domena medija. Sva pomenuta pitanja predmet su preporuka Evropske komisije, koje Republika Srbija sprovodi rukovodeći se aktivnostima predviđenim Akcionim Planom za Poglavlje 23.*

**KLJUČNE REČI:** nezavisnost pravosuđa / transparentnost / medijsko izveštavanje / EU / Poglavlje 23 / krivični postupak