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COMPARATIVE STUDY

ON

BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT

Excerpt, pages 88-99

This document is part of the Comparative Study on blocking, filtering and take-down of illegal Internet content in the 47 member States of the Council of Europe, which was prepared by the Swiss Institute of Comparative Law upon an invitation by the Secretary General. The opinions expressed in this document do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of Council of Europe member States, the Council of Europe's statutory organs or the European Court of Human Rights.

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National reports current at the date indicated at the end of each report.

I. INTRODUCTION

On 24th November 2014, the Council of Europe formally mandated the Swiss Institute of Comparative Law (“SICL”) to provide a comparative study on the laws and practice in respect of filtering, blocking and takedown of illegal content on the internet in the 47 Council of Europe member States.

As agreed between the SICL and the Council of Europe, the study presents the laws and, in so far as information is easily available, the practices concerning the filtering, blocking and takedown of illegal content on the internet in several contexts. It considers the possibility of such action in cases where public order or internal security concerns are at stake as well as in cases of violation of personality rights and intellectual property rights. In each case, the study will examine the legal framework underpinning decisions to filter, block and takedown illegal content on the internet, the competent authority to take such decisions and the conditions of their enforcement. The scope of the study also includes consideration of the potential for existing extra-judicial scrutiny of online content as well as a brief description of relevant and important case law.

The study consists, essentially, of two main parts. The first part represents a compilation of country reports for each of the Council of Europe Member States. It presents a more detailed analysis of the laws and practices in respect of filtering, blocking and takedown of illegal content on the internet in each Member State. For ease of reading and comparison, each country report follows a similar structure (see below, questions). The second part contains comparative considerations on the laws and practices in the member States in respect of filtering, blocking and takedown of illegal online content. The purpose is to identify and to attempt to explain possible convergences and divergences between the Member States’ approaches to the issues included in the scope of the study.

II. METHODOLOGY AND QUESTIONS

1. Methodology

The present study was developed in three main stages. In the first, preliminary phase, the SICL formulated a detailed questionnaire, in cooperation with the Council of Europe. After approval by the Council of Europe, this questionnaire (see below, 2.) represented the basis for the country reports.

The second phase consisted of the production of country reports for each Member State of the Council of Europe. Country reports were drafted by staff members of SICL, or external correspondents for those member States that could not be covered internally. The principal sources underpinning the country reports are the relevant legislation as well as, where available, academic writing on the relevant issues. In addition, in some cases, depending on the situation, interviews were conducted with stakeholders in order to get a clearer picture of the situation. However, the reports are not based on empirical and statistical data, as their main aim consists of an analysis of the legal framework in place.

In a subsequent phase, the SICL and the Council of Europe reviewed all country reports and provided feedback to the different authors of the country reports. In conjunction with this, SICL drafted the comparative reflections on the basis of the different country reports as well as on the basis of academic writing and other available material, especially within the Council of Europe. This phase was finalized in December 2015.

The Council of Europe subsequently sent the finalised national reports to the representatives of the respective Member States for comment. Comments on some of the national reports were received back from some Member States and submitted to the respective national reporters. The national reports were amended as a result only where the national reporters deemed it appropriate to make amendments. Furthermore, no attempt was made to generally incorporate new developments occurring after the effective date of the study.

All through the process, SICL coordinated its activities closely with the Council of Europe. However, the contents of the study are the exclusive responsibility of the authors and SICL. SICL can however not assume responsibility for the completeness, correctness and exhaustiveness of the information submitted in all country reports.

2. Questions

In agreement with the Council of Europe, all country reports are as far as possible structured around the following lines:

1. **What are the legal sources for measures of blocking, filtering and take-down of illegal internet content?**

Indicative list of what this section should address:

- Is the area regulated?
- Have international standards, notably conventions related to illegal internet content (such as child protection, cybercrime and fight against terrorism) been transposed into the domestic regulatory framework?

- Is such regulation fragmented over various areas of law, or, rather, governed by specific legislation on the internet?
- Provide a short overview of the legal sources in which the activities of blocking, filtering and take-down of illegal internet content are regulated (more detailed analysis will be included under question 2).

2. What is the legal framework regulating:

2.1. Blocking and/or filtering of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content blocked or filtered? This part should cover all the following grounds, wherever applicable:
 - the protection of national security, territorial integrity or public safety (e.g. terrorism),
 - the prevention of disorder or crime (e.g. child pornography),
 - the protection of health or morals,
 - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
 - preventing the disclosure of information received in confidence.
- What requirements and safeguards does the legal framework set for such blocking or filtering?
- What is the role of Internet **Access** Providers to implement these blocking and filtering measures?
- Are there soft law instruments (best practices, codes of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

2.2. Take-down/removal of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content taken-down/ removed? This part should cover all the following grounds, wherever applicable:
 - the protection of national security, territorial integrity or public safety (e.g. terrorism),
 - the prevention of disorder or crime (e.g. child pornography),
 - the protection of health or morals,
 - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
 - preventing the disclosure of information received in confidence.
- What is the role of Internet Host Providers and Social Media and other Platforms (social networks, search engines, forums, blogs, etc.) to implement these content take down/removal measures?
- What requirements and safeguards does the legal framework set for such removal?
- Are there soft law instruments (best practices, code of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

3. Procedural Aspects: What bodies are competent to decide to block, filter and take down internet content? How is the implementation of such decisions organized? Are there possibilities for review?

Indicative list of what this section should address:

- What are the competent bodies for deciding on blocking, filtering and take-down of illegal internet content (judiciary or administrative)?
- How is such decision implemented? Describe the procedural steps up to the actual blocking, filtering or take-down of internet content.
- What are the notification requirements of the decision to concerned individuals or parties?
- Which possibilities do the concerned parties have to request and obtain a review of such a decision by an independent body?

4. General monitoring of internet: Does your country have an entity in charge of monitoring internet content? If yes, on what basis is this monitoring activity exercised?

Indicative list of what this section should address:

- The entities referred to are entities in charge of reviewing internet content and assessing the compliance with legal requirements, including human rights – they can be specific entities in charge of such review as well as Internet Service Providers. Do such entities exist?
- What are the criteria of their assessment of internet content?
- What are their competencies to tackle illegal internet content?

5. Assessment as to the case law of the European Court of Human Rights

Indicative list of what this section should address:

- Does the law (or laws) to block, filter and take down content of the internet meet the requirements of quality (foreseeability, accessibility, clarity and precision) as developed by the European Court of Human Rights? Are there any safeguards for the protection of human rights (notably freedom of expression)?
- Does the law provide for the necessary safeguards to prevent abuse of power and arbitrariness in line with the principles established in the case-law of the European Court of Human Rights (for example in respect of ensuring that a blocking or filtering decision is as targeted as possible and is not used as a means of wholesale blocking)?
- Are the legal requirements implemented in practice, notably with regard to the assessment of necessity and proportionality of the interference with Freedom of Expression?
- In the case of the existence of self-regulatory frameworks in the field, are there any safeguards for the protection of freedom of expression in place?
- Is the relevant case-law in line with the pertinent case-law of the European Court of Human Rights?

For some country reports, this section mainly reflects national or international academic writing on these issues in a given State. In other reports, authors carry out a more independent assessment.

BOSNIA AND HERZEGOVINA

1. Legal Sources

Bosnia and Herzegovina (**BH**) does not have specific laws on blocking, filtering or take-down of Internet content. However, blocking and take-down of Internet content is available through judicial review. Also, blocking, filtering or take-down of content is also available through voluntary actions of content providers, as outlined in more detail below.

The obligation to follow standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (**ECHR**) is rooted in the Constitution of BH.¹ In fact, the ECHR is a constituent part of the Constitution. The Constitution sets forth that the rights and freedoms set forth in ECHR shall apply directly in Bosnia and Herzegovina and shall have priority over all other laws in Article II.2 of the Constitution which reads:

„International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other laws.”

Therefore, where the principles set forth in the ECHR differ from the national laws of BH, the ECHR principles will supersede the principles of BH national laws. In fact, it is common for the BH Constitutional Court to cite judgments of the European Court of Human Rights (**EctHR**) when delivering its ruling. Thus, the ECHR principles and jurisprudence of the EctHR are embodied in the constitutional system of Bosnia and Herzegovina.

Other international standards relevant for blocking, filtering and taking down of Internet content have been largely transposed into the national legislation. BH is a signatory to the Convention on Cybercrime, Additional Protocol to the Convention on Cybercrime, Convention on Prevention of Terrorism, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (**Conventions**).²

The Convention on Cybercrime, Additional Protocol to the Convention on Cybercrime, Convention on Prevention of Terrorism and Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse have been largely transposed into the Criminal Codes in BH,³ whereas the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data is transposed into the Data Protection Law.⁴

¹ The current Constitution of Bosnia and Herzegovina is the Annex 4 of The General Framework Agreement for Peace in BH. The full text is available at http://www.ohr.int/dpa/?content_id=372 (29.09.15).

² The list of Conventions where Bosnia and Herzegovina is a signatory is available at http://www.mpr.gov.ba/organizacija_nadleznosti/medj_pravna_pomoc/bilateralni_ugovori/Konvencije.aspx?langTag=b-s-BA (29.09.15).

³ Four Criminal Code are currently in force in BH: Criminal Code of BiH – Official Gazette BH nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 22/15, 40/15; Criminal Code of BD – Official Gazette of BD no. 33/13; Criminal Code FBH – Official Gazette nos. 36/03; 37/03, 21/04, 18/05, 42/10, 42/11, 59/14, 76/14 and Criminal Code RS nos. 49/2003, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13.

⁴ Law on Personal Data Protection, Official Gazette of BH nos. 49/06, 76/11 and 89/11.

The transposition of the Conventions to the national legislation reflects the complexity of the BH structure. Specifically, BH consists of:

- the entity the Federation of Bosnia and Herzegovina (**FBH**), which is further divided in 10 cantons;
- the entity the Republic of Srpska (**RS**); and
- Brčko District (**BD**).

FBH, RS and BD have independent legislative powers. As a result of such a complex constitutional and political structure, enforcement agencies in BH operate on different levels of the government. That is, the police enforcement agencies are established and operate on BH, FBH, RS and BD levels.

Also, the structure of the judicial system is not coherent throughout BH. For example, in contrast to RS, FBH and BD do not have specialized commercial courts which are competent to hear copyright infringement cases and commercial disputes in general. Rather, the copyright and other intellectual property infringement cases are heard by the courts in FBH having general jurisdiction or the Basic Court in BD. Therefore, the practice of the courts and the enforcement agencies may differ as they are independent of each other, which may result in less harmonized application of the international standards within the territory of BH.⁵

In the absence of laws or regulations governing blocking, filtering and taking-down of illegal Internet content, BH as a contracting party to the ECHR has general safeguards on freedom of expression, including in the field of Internet. Although not specifically drafted for blocking or taking-down of the illegal Internet content, the standards set in provisions of the Criminal Codes, defamation and intellectual property laws will apply in filtering/blocking/taking-down cases, depending on the circumstances of a specific case.

2. Legal Framework

BH belongs to the category “B” of the countries since it does not have the law(s) governing Internet in general or blocking, filtering or taking down of Internet content in particular.

In the absence of specific Internet regulation, the general rules of protection of offline content are applicable for online content as well. This means that blocking and/or filtering and/or taking-down of illegal Internet content can be initiated or ordered if the material is considered illegal/against the law under the offline laws. This can be done ex officio in criminal cases or pursuant to a complaint filed by a third-party in criminal or civil cases.

As an example, in the criminal proceeding against the **copyright** infringer for the unauthorized use of copyrights, the court can order that objects intended or used for the perpetration of the criminal offence or resulting from the perpetration of the criminal offence will be forfeited and destroyed.⁶

Under Article 156 of BH Copyright Law, if an exclusive right under this Law is infringed, the holder of such right may seek, among other things, prohibition of the continuation of infringement and of future similar infringements by means of cessation or refraining from the acts infringing such right, remedying the situation caused by infringement, complete removal of the objects of infringement from the channels of commerce and destruction of the objects. Similar provisions are available in other legislations governing intellectual property.

⁵ BH does not have a Supreme Court at the level of BH (only at the levels of entities) which can contribute to different application of the international standards through Bosnia and Herzegovina.

⁶ Article 243 of the Criminal Code of BH.

In civil cases, the plaintiffs can seek removal of specific content under the laws governing **defamation** and in the infringement of the intellectual property.

The same rights, including the right for removal of the objects are recognized by Article 103 of BH Patent Law; Article 80 of BH Trademark Law; Article 79 of BH Law on Industrial Design and Article 71 of BH Law on protection of Indications of Geographical Origin.

Under the laws governing defamation, there is a possibility to seek interim court orders to prohibit the dissemination or further dissemination of false facts only if a damaged party can show with the greatest certainty the likelihood that the expression caused the damage to the reputation and that damaged party suffered irreparable harm as a result of dissemination or further dissemination of the expression. Permanent court orders to prohibit the dissemination or further dissemination of an expression of false fact may only be applied to the specific expression found to be defamatory and to the specific person who is found to be responsible for the making or dissemination of the expression. After review of the available sources of judicial decisions, we did not find any interim orders issued by the courts in this sense.

Under Article 40 of the **Data Protection** Law, the Data Protection Agency can order blocking, deleting or destroying personal data, processing of personal data, although this authority has not been exercised to date by the Data Protection Agency.

2.1. Blocking and/or filtering of illegal Internet content

The laws governing intellectual property, laws on defamation and the Criminal Codes on all levels of the government, as the relevant laws on the matter, do not have specific rules for **blocking and/or filtering** of the illegal Internet content. Rather, they provide for the legal ground for removal and destruction. These legal grounds may also apply to take-down or removal the illegal Internet content.

Theoretically, the parties in civil or criminal proceedings are not prohibited to file for blocking or filtering measures, citing the legal basis for content removal. Thus, the measures described for take-down/removal below could apply to blocking or filtering as well.

1.2. Take-down/removal of illegal Internet content

The intellectual property laws, laws on defamation and Criminal Codes in BH provide at a certain extent the legal basis for take-down/removal of the illegal Internet content. For the purpose of clarity, we have analysed several relevant provisions, which, *inter alia*, may give rise to application of the take-down measures.

Ex officio take-down measures

Copyright infringement represents a criminal offense under Articles 242 and 243 of the Criminal Code of BH, but in practice, it is not common to see copyright infringement cases initiated *ex officio*. From the available case law of the Court BH, which has jurisdiction to hear copyright cases in criminal proceedings, it can be concluded that the Court BH ruled on several classical cases of piracy while no cases were identified involving online copyright infringement.

The impermissible use of **copyright**⁷ is a criminal offence under Article 243 of the BH Criminal Code. According to this Article: *“(1) Whoever, without the authorization of the author or other holder of copyright, or the person entitled to give authorization, where such authorization is required under the provisions of the law of Bosnia and Herzegovina, or contrary to their prohibition, fixes on a material*

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Art 243 of the BH Criminal Code.

*surface, reproduces, multiplies, distributes, rents, imports, brings across the state border, **presents, performs, broadcasts, transmits, makes available to the public**, translates, adapts, arranges, alters or uses the in any other form the work of an author, shall be punished by a fine or imprisonment for a term not exceeding three years. (...) (6) Objects intended or used for the perpetration of the criminal offence or resulting from the perpetration of the criminal offence referred to in paragraph 1 through 3 of this Article **shall be forfeited and destroyed.**"*

If content made available online qualifies as a criminal offence under Article 243, the Court BH will order mandatory destruction of the objects related to the criminal activity. The authority relevant for enforcement of destruction will be the Court of BH and this measure could be reviewed in the process of appeal. However, there are many outstanding questions on how this provision could be enforced. i.e. how the illegal content available on the Internet would be "destroyed –" specifically, would the Court BH order that specific content be removed or that the entire website be shut down if, for example, the whole site provides for content infringing the copyright of another. In the absence of case law, it is difficult to provide a guideline on the available legal mechanisms for enforcement on the one hand, and protection, on the other.

All four Criminal Codes (BH, FBH, RS and BD) contain a provision regulating forfeiture of objects in criminal proceedings. Specifically, "*forfeiture shall be ordered with regard to objects **used or destined for use in the perpetration of a criminal offence**, or to those that **resulted** from the perpetration of a criminal offence, when there is a danger that those objects will be used again for the perpetration of a criminal offence or when the purpose of protecting the public safety or moral reasons make the forfeiture seem **absolutely necessary** (...).*"⁸

According to the laws government enforcement of criminal sanctions, detention and other measures, the relevant authorities for forfeiture of objects are generally the courts which impose such measures in the first instance.⁹ The range and type of the criminal sanctions has to be proportional with the degree and nature of the danger against personal liberties, human rights and other basic values.¹⁰ Effective judicial review is provided before the courts of second instance in the appeal process.¹¹ Also judicial review is available before the Constitutional Court of BH regarding the constitutional rights and rights guaranteed by the ECHR.

Hypothetically, if the prosecutor in the criminal proceedings would claim that illegal content on the Internet is used as an instrument to perform certain criminal offence, then the prosecutor could ask that such content is removed or blocked on the Internet. If the prosecutor invokes the forfeiture of objects provision, it is clear that in order for such a measure to be imposed (1) the illegal content would have to be in connection with the criminal offence, (2) the authority relevant for enforcement of such a measure would be the court of the first instance, (3) the imposed measure would have to be proportional with the degree of the danger against the rights of third parties and (4) the measure could be reviewed in the process of the appeal.

However, the cited provisions do not provide for specific guidelines, but rather set the general standards for courts to develop specific rules of proportionality in each particular case.

⁸ Art 78 (1) of the FBH Criminal Code.

⁹ Art 213 of the BH Law on Enforcement of Criminal Sanctions, Detention and Other Measures, Art 59 of the BD Law on Enforcement of Criminal and Misdemeanour Sanctions, Art 234 of the RS Law on Enforcement of Criminal Sanctions.

¹⁰ Art 3 of the BH Criminal Code.

¹¹ Art 292 of the BH Code of Criminal Procedure.

Take-down measures at the requests of the parties

Following the jurisprudence of the EctHR, defamation has been decriminalized in Bosnia and Herzegovina in 1999. At the moment, there is no law on the level of the state ensuring protection against defamation. The Laws on Protection against Defamation were adopted in 2001¹² (RS), in 2002¹³ (FBH) and in 2003¹⁴ (BD), collectively referred to as the **Laws on Protection against Defamation**. Since these laws are relatively new, from the inception of the new defamation laws, the courts have relied on international standards such as standards from the ECHR and the judgments of the EctHR. The Laws on Protection against Defamation do not differentiate between offline and online defamation, nor provide for specific measures related to mitigation of damages in case of false expressions available online. Rather, they provide for a general rule that courts may prohibit or limit false expressions which are published, without specifying the method of violation or the publishing mode (printed or online).

Due to the lack of court practice in cases of online defamation, following the strict line of general provisions of the Laws on Protection against Defamation, the courts are competent to impose blocking or filtering measures only upon the plaintiff's request. Thus, the courts will only consider such measures if the plaintiff: (1) files the complaint with the court, and (2) seeks the removal of the identified content violating his/her rights.

When deciding on whether specific action constitutes defamation and the amount of compensation in defamation cases, the court will take into account the proportionality of measures against the caused harm. The court is obliged to take into account all circumstances of the case, particularly any measures taken to mitigate damages.

Under the BH legal system, it is possible to seek preliminary injunction during the proceeding. The preliminary injunction on prohibition of the transmission of certain content (for example preliminary measure to block or take-down certain content) may be ordered only if the injured party can prove that the expression likely caused damage to his/her reputation and that such person will suffer irreparable harm as a result of transmission or further transmission of the expression. Permanent court orders to prohibit the transmission or further transmission of an expression may only be applied to specific expression found to be defamatory and to the specific person who is found to be responsible for the making or transmission of the expression.¹⁵

The Copyright and Related Rights Law¹⁶ stipulates for different remedies, including but not limited to requesting that an infringing content be removed.¹⁷ However, that option is not often used since the civil cases in BH may take up to several years before the final decision is rendered.

In case of copyright infringement, the holder of the right may require *inter alia* (1) declaratory judgment, (2) prohibition of the continuation of the violation and the future similar violations or refraining from actions violation of the law, (3) removal of conditions caused by the infringement, (4) withdrawal of the objects of infringement from the channels of commerce, (5) destruction of infringing objects, (5) destruction of the resources that are exclusively or predominantly intended or used for the violation, and that are owned by the infringer, etc. When deciding on the measure, the court will take into account all circumstances of the case, in particularly the proportionality between the severity of the violation and the request, as well as the interest to ensure the effective protection

¹² Law on Protection of Defamation, Official Gazette of RS no. 37/01.

¹³ Law on Protection of Defamation, Official Gazette of FBH no. 59/02.

¹⁴ Law on Protection of Defamation, Official Gazette of BD no. 14/03.

¹⁵ Art 10 of the FBH Law on Protection of Defamation.

¹⁶ The Copyright and Related Rights Law, Official Gazette BH no. 63/10.

¹⁷ Art 156 of the Copyright and Related Rights Law.

of rights. Therefore, as in defamation cases, in copyright infringement the court is bound by the ratio of the interest of the right holder and severity of the sanction.

The Trademark Law¹⁸ and the Law on Protection of the Geographical Origin¹⁹ also provide for legal ground for removal of the illegal content. Specifically, both laws stipulate that in civil proceedings the party may seek removal of the conditions caused by the infringement, which may give rise to measures of take-down or removal of the illegal Internet content. When deciding on the measure, as in the case of the copyright infringement, the court has to evaluate the proportionality of the violation versus the protected interest, which is decided on a case-by-case basis.²⁰

In conclusion, the legal basis for removal of internet content will depend on whether the underlying content is forgiven by substantive laws and will have to be done using the general procedural requirements stipulated in the procedural law.

Voluntary measures and soft law instruments

In BH, there are no regulations which specifically govern the conduct of internet host providers and social media or other platforms. Also, to date, there has been no case law on taking down content and liability issues of the host providers and the social media. Nevertheless, host providers and social media and other platforms self-regulate these issues independently via their own procedures for talking-down or removing illegal content.

On the international level these measures are not often invoked. According to Google's Transparency Report,²¹ Google received two take-down requests citing defamation as the basis, starting 2009 until now from BH. Similar situation is with Facebook which received 11 requests, in total, during the course of 2014.²²

On the domestic level, the Press Council was established in BH as the organization responsible for self-regulation of online and print media content. The Press Council is a mediator for print and online media in BH and its mission is to improve journalism and professional media standards. According to the 2015 Cases Outline of the Press Council²³ accessed on 13 September 2015, 132 cases were reported to the Press Council in 2015 by citizens and other institutions.

According to the publicly available information, the Press Council either (1) mediated cases which resulted in removal of the Internet content by the websites themselves, or (2) issued decisions deciding whether the complaints are grounded or not. As the Press Council is a self-regulatory institution, decisions of the Press Council are not binding on the related parties. In deciding whether the practice of the journalists adheres to the relevant standards, the Press Council applies the provisions of the Press Code.²⁴

¹⁸ The Trademark Law, Official Gazette of BH no. 53/10.

¹⁹ Law on Protection of the Geographical Origin, Official Gazette of BH no, 53/10.

²⁰ Art 80 of the Trademark Law and Art 71 of the Law on Protection of the Geographical Origin.

²¹ Available at <http://www.google.com/transparencyreport/removals/government/BA/?hl=hr> (30.09.15).

²² Available at <https://govtrequests.facebook.com/country/Bosnia%20and%20Herzegovina/2014-H2/> (30.09.15).

²³ Press Council in Bosnia and Herzegovina, 2015 Cases Outline, available at http://english.vzs.ba/index.php?option=com_content&view=article&id=2079%3Ayear-2015&catid=22%3Acases-outline&Itemid=23&lang=en (13.09.15).

²⁴ Available at http://english.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs (30.09.15).

The Press Code contains material provisions, such as provisions defining public interest, incitement, discrimination, gender equality, accuracy and fair reporting, misrepresentation, privacy, etc. It does not contain rules of the procedure or legal safeguards to be taken into account when the Press Council decides whether certain content follows protected standards. Thus, the standards applied by the Press Council are not clearly defined.

2. Procedural Aspects

Blocking, filtering or removal of illegal Internet content in BH may take place only upon issuance of the judicial order or other judicial decision. In principle, no agency should order or block specific content without due process of law before the local courts.

The courts, in both criminal and civil proceeding, may render judgments to block, remove or filter certain content.

BH criminal system, following the criminal reform from 2002, is based on the accusatory principle, but the system itself is a hybrid of common and civil law legal traditions. Most standards set forth in the Conventions, including protection of security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, and copyright infringement constitute criminal acts under either BH Criminal Code or Criminal Codes of the FBH, RS or BD.

If the Internet activity or its content falls under the definition of a criminal offence, then the criminal proceedings against the offender(s) may be initiated *ex officio* or on the basis of the complaint filed by a third-party. Depending on the outcome of the proceeding, which are completed under the principle of equality of arms between the prosecution and the defense, the access to such content may be restricted. Once the parties to the case have presented the evidence, when deciding on the measure, the court has to apply the rule of the proportionality i.e. that the range and type of the criminal sanction has to be proportional to the degree and nature of the danger against personal liberties, human rights and other basic values.²⁵ The courts have to provide a rationale for the decision regarding its outcome.

The criminal proceedings have to comply with the Codes of Criminal Procedure.²⁶ Under the Codes of Criminal Procedure, the defendant cannot be an unnamed person which makes it extremely difficult to prosecute Internet related crimes.²⁷ Also, the suspect has to be informed of the investigation by the end of the investigative phase in the criminal proceedings, at which time there is a notice to the defendant of the pending investigation. The prosecution is also required to make available to the defense any exculpatory evidence at the possession of the prosecutor.²⁸ During the criminal proceeding the prosecutor has the burden of proof to prove every element of the crime for which the defendant is charged with.²⁹ The right to appeal a criminal judgement cannot be denied.³⁰

The civil proceedings have to comply with Laws on Civil Proceedings.³¹ In the civil proceedings, such as copyright infringement and defamation, the court could impose removal of Internet content which

²⁵ Art 3 of the BH Criminal Code.

²⁶ There are four Codes of Criminal Proceedings in BH: at the level of the BH, FBH, RS and BD.

²⁷ Art 227 of the BH Code of Criminal Procedure stipulates the mandatory elements of the indictment, which are among other the personal data of the defendant.

²⁸ Art 47 of the BH Code of Criminal Procedure.

²⁹ Art 3 of the BH Code of Criminal Procedure.

³⁰ Art 292 of the BH Code of Criminal Procedure.

³¹ There are four Laws on Civil Proceedings in BH: at the level of the BH, FBH, RS and BD.

violates the rights of the plaintiff, under the condition that the plaintiff requested such measure and that the evidence presented substantiates such measure. The principle of disposition which is set forth in all civil proceedings laws in BH, obliges the court to decide solely upon requests of parties.³² The civil proceedings also can be initiated only against the named defendant.³³ The plaintiff has the burden of proof to show that the infringement occurred, however the defendant may present the facts and evidences to rebut the allegation from the complaint.³⁴ The judgement is enforceable only after it becomes final and the right to appeal is always guaranteed to the defendant.³⁵ As explained in more detail above, when deciding on the imposed measure, as in the case of the copyright infringement, courts have to evaluate if the imposed measure will be proportional to the occurred damages.

All judicial measures may be enforced through the Regulatory Agency for Communication (CRA) which has the competency to order to the ISPs to carry out blocking, filtering or take-down measures imposed by court decisions.

CRA is an independent regulator with competencies to issue rules which are binding. ISPs are licensed by the CRA and are required to perform activities in accordance with the CRA's Rule 60/2012 and Rule 69/2013 of the CRA. Article 8 of the Rule 60/2012, among other things, stipulates for the obligation of the ISP to act pursuant to any special regulations or decisions of competent institutions in BH by which certain contents are designated as illegal. In particular, the ISPs are required pursuant to **special regulations or decisions of competent institutions** in BH to apply appropriate technical measures to deny access to Internet addresses that are harmful and illegal, especially if they contain child pornography and other harmful content, allow illegal online gambling, spread computer viruses or dangerous programs, allow for illegally obtained personal information, jeopardizing general security, public order, allow unlawful use of computer programs and applications, or represent other hazards to the safe use of the Internet. The CRA Rule 69/2013 further stipulates the conditions of the ISPs and their relationship with the customers. This Rule stipulates that ISPs are required to have general terms of service which are publicly available and which must include, among other things, provisions on protection of minors and protection of privacy.

According to the cited rules, CRA and ISPs have the major role in blocking, filtering or take-down of illegal Internet content, but on the basis of the relevant court decision or state institutions decision in BH or special regulation. No special regulations have been issued to date.

Also, there is no case-law publicly available regarding ISPs obligations to block, filter or take down specific content on the basis of the judicial orders or other institution' decisions. Although, blocking and taking-down of illegal internet content is available, in general, through judicial review, Article 8 of CRA Rule 60/2012 imposes an obligation on the ISPs to apply appropriate technical measures to deny access to Internet addresses pursuant to any special regulations or **decisions of competent institutions** in BH.

The Rule 60/2012 does not define competent institutions and therefore the Rule may be interpreted that other institutions save for courts are also competent to demand the ISPs to block, filter or take-down illegal content from the Internet. The right granted to the CRA to take down content pursuant to non-judicial (administrative) decision has created much debate and the position of the CRA we obtained is that this is not enforced and will be taken out when the rule is revisited. In fact, the CRA confirmed that this provision is rarely enforced and there was only one case of online gambling

³² Arts 2 and 3 of the FBH Law on Civil Proceedings.

³³ Art 334 in connection with the Art 53.

³⁴ Art 123 of the FBH Law on Civil Proceedings.

³⁵ Art 203 of the FBH Law on Civil Proceedings.

(2013) where the CRA ordered ISPs to block on-line gambling websites on the basis of the request of the FBH Ministry of Finance (which was revoked a day after). The decision was shortly revoked.

This practice of the CRA clearly demonstrates that (1) it has the competences to order ISPs to block, filter or take-down illegal content and that (2) decisions of other institutions may also be the cornerstone for such measures in addition to the judicial measures. However, since there was only administrative decision which was applied, and since the information is unavailable regarding procedures and safeguards FBH Ministry of Finance applied when it requested CRA to block the websites, if any, we cannot assess their adequacy.

Also, it is important to note that the role of the ISPs might become stricter in relation to acts of terrorism and radicalism. The Ministry of Security of BH recently published the Strategy for Preventing and Combating Terrorism for 2015 -2020³⁶ (**Strategy**).³⁷ One of the objectives of the Strategy is to develop monitoring and supervision procedures over critical websites which support terrorism and radicalism. The Strategy cites the Delfi Case in order to emphasize the intent to put greater control on ISPs, although the remit of Strategy is limited to the acts of terrorism and not to other activities, such as defamation. The bodies in charge for implementation of such objective, according to the Strategy, are CRA, prosecutors' offices and Ministry of Transport and Communication of BH.

The Strategy is a soft law instrument, it is not binding and it is a question whether it will be ever implemented (through laws and other bylaws). The Ministry of Security of BH confirmed that the rationale behind such Strategy is to impose a stricter obligation on the ISPs to (1) monitor illegal internet content related to terrorism and radicalism and (2) act upon a complaint of the ISPs users if an Internet content is related to terrorism and/or radicalism.³⁸

Regarding other EU standards imposed on the ISPs, according to the Progress Report published by the European Commission in 2014,³⁹ in BH there was no alignment with the E-Commerce Directive or with the implementing legislation related to conditional access services.

Regarding voluntary website blocking, filtering or take-down measures, they are not subject to any mandatory rules nor are they reviewed by any state agencies.

3. General Monitoring of Internet

In BH, there is no specific internet monitoring agency.

Monitoring can be done pursuant to a valid legal ground set forth in the law.

Also, the judicial system in BH does not have special police or court units specialized in cybercrime.

³⁶ Ministry of Security BH, The Strategy for Preventing and Combating Terrorism (2015-2020), available at (13.09.15).

³⁷ This Strategy is a non-binding instrument.

³⁸ The position of the CRA, received unofficially, is that they will not support new amendments where their competencies will include monitoring policies.

³⁹ European Commission, Bosnia and Herzegovina Progress Report 2014, available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf (13.09.15).

However, in cases of threats to security of BH, the Security Agency of BH (**Agency**) subject to a prior approval of the court may monitor the online content. Specifically, the Law on the Intelligence and Security Agency stipulates that surveillance in non-public places, the surveillance of telecommunication, and other forms of electronic surveillance, as well as the search of property without consent of the owner or temporary occupant, may only be used in cases where there has been a prior authorization by the President of the BH Court or a judge of the BH Court designated by the President.⁴⁰

That is, if the Director General of the Agency has reasonable grounds to consider that the measures to monitor and search is required to investigate threats to the security of BH, the Director General of the Agency will send a written request to the judge for approval for such monitoring.

The application for monitoring must be substantiated and include the following:

- type of communication proposed to be intercepted, type of information, records, documents or things proposed to be obtained, and the means to be used;
- name of person or persons to be monitored;
- general description of the place or places that are proposed to carry out surveillance or search, if it is possible to give a general description of that place;
- justification for the surveillance to enable the Agency to investigate a threat to the security of BH;
- declaration that the requested information cannot be obtained in the required period of time in any other way;
- the time limit not exceeding 60 days, in which the validity of the search warrant;
- Information on any previous application made in relation to the person or place subject to the surveillance or search, the date when the application was made, the name of the judge who was sent to the judge's decision on this application.

The judge makes a decision within 48 hours after application. No appeal is possible against this decision. A citizen of BH who was a subject to surveillance or interception should be, after the end of the monitoring or interception, informed on the measures within 30 days after the procedure. In carrying out surveillance or searches pursuant, the Agency has to use the least intrusive techniques available.

Also in criminal proceedings, following the request of the prosecutor, the court may order special investigative measures such as surveillance and recording of telecommunications and access to computer systems. Such measures may be imposed against the suspect under the investigation for criminal activity punishable by at least 3 years of imprisonment, including terrorism, crimes against the integrity of BH/RS and crimes against humanity and international law. The length of these measures is up to 6 months in total.⁴¹ Special investigative measures will be imposed only if it not possible otherwise to obtain evidence or acquisition of evidence is associated with a great difficulty.

4. Assessment as to the case law of the European Court of Human Rights

BH does not have a specific blocking and taking-down of illegal Internet content law. However, the legal ground for take-down or blocking of illegal Internet content can be found across several different laws.

⁴⁰ The procedure is governed by the Security Agency Law, Official Gazette of Bosnia and Herzegovina no. 12/04, 20/2004, 56/06, 12/09.3.

⁴¹ Art 116 of the BH Criminal Procedure Code.

The laws under which internet content could be blocked or taken down are drafted for offline situations so they lack precision and foreseeability as the EctHR safeguards in the online environment.

The lack of precision in cases of *ex officio* actions stands out the most. In particular, in criminal cases, the content can be blocked or removed under the conditions that such illegal content is connected to the (1) criminal offence and that (2) the court when deciding on the measure makes the proportionality assessment, as the imposed measure has to be proportional with the degree of the danger against the rights of third parties. However, the law does not provide for any guidelines how to make the proportionality assessment, and the courts will decide on a case-by-case basis. Having in mind the fact that the enforcement agencies and courts in BH operate on different levels, the practice of the courts may be differently developed throughout BH.

On the other hand, the situation is slightly different for private parties seeking protection in civil proceedings. Intellectual property laws and defamation laws impose proportionality assessment which is more precise and thus makes the outcome of the case more foreseeable. The quality of civil proceedings goes more in line with the EctHR standards. However, as in case of *ex officio*, these laws lack specific guidelines for online situations; although online illegal content is the most often seen case of intellectual property rights infringement (copyright infringement in particular). Thus, in the absence of the publicly available case law, it is not possible to anticipate whether the practice of the Bosnian courts will be foreseeable, accessible, clear and precise, when developed.

As previously mentioned, the EctHR safeguards in BH have direct application. The ECHR is a constituent part of the BH Constitution as has supremacy over all other laws in BH. Therefore, the courts are bound to apply ECHR and EctHR standards in the entire process and decision making. If the courts deliver a decision which breaches the Constitution and ECHR, such decision can be reviewed by the BH Constitutional Court. Thus, in the lack of the direct application of the EctHR safeguards by Bosnian courts in *ex officio* or civil cases, the application EctHR standards is provided in the appeal process before the BH Constitutional Court.

In practice, in BH the freedom of expression is guaranteed and in practice Internet content is never blocked, filtered or removed. The only public information is that such measure was imposed by the CRA one time at the request of the FBH Ministry of Finance, but it was revoked shortly afterwards.

On the other hand, the removal of the Internet content is more often on the level of self-regulation. Most of the websites have their own self-regulation procedures and they often remove Internet content upon notice of any subject or via mediation of the Press Council. The procedure of self-regulation is not provided by law and self-regulation process is not bound by any standards.

In summary, both substantive and procedural laws are silent on issues governing online illegal content. However, specific principles applicable to offline content could be used for online content well, but to date no cases have been identified in BH regarding online content blocking, removal or take-down and it is not possible to evaluate whether the safeguards of the EctHR are applied in BH. Thus, in the absence of the case law, it is not possible to predict whether the practice of the Bosnian courts will be EctHR compliant.

The courts will face a great challenge when the time comes to start with enforcing take-down or blocking measures, as they will have to deal with them without any significant guidelines. However, the corrective measure to ensure the freedom of expression is in the hands of the BH Constitutional Courts which serves as the guardian of the BH Constitution and ECHR application throughout Bosnia and Herzegovina.

