PANOPTYKON FOUNDATION FINAL REPORT
PROJECT: "WORKING OUT STRATEGIES FOR INTERNET REGULATION"

1.10.2010 – 30.09.2011

The aim of the following report is to present the outcomes of the project "Working out Strategies for Internet Regulation" carried out by the Panoptykon Foundation in cooperation with Internet Society Poland, co-funded by two Open Society Foundations programmes: Information Programme and Think Tank Fund. For the sake of clarity, the report will refer to project goals, outcomes, activities and indicators as stipulated in our project description (attached). The structure of the report will follow OSI reporting guidelines. However, for your convenience, we have prepared an additional summary (Section 1).

1. Summary: key developments and our achievements over past 12 months

In our own assessment, we have fulfilled all project goals. In some aspects – in particular our ability to meet and influence Polish political decision makers – our performance was even more successful than expected at the planning stage. All results planned for the project have been achieved; our predictions as to the political climate in Poland and in the EU as well as the key legislative dossiers have proven mostly correct; we have managed to get involved and bring our expertise every time a significant political decision concerning digital rights was about to be made; our research results and advocacy have been well received by the media, political decision makers and other civic organisations; we have managed to mobilise a network of Polish NGOs and activists to be more active in the area of digital rights.

To mention the most important developments:

- **All legislative dossiers we chose to engage with were active**, which enabled us both the ongoing application of our research results (25 comments to draft laws, position papers and open letters) as well as active campaigning on both domestic and European level (campaigns on ACTA, blanket data retention, Internet blocking, the regulation of on-line audiovisual services and the re use of public information).

- We became **recognised as experts and an important stakeholder by the Polish government, other civil society organisations and industry representatives in Poland**, which has been reflected in a number of invitations to attend public events (11 in Poland) and meetings with regulators, decision makers and governmental experts (23 in Poland). The government finally invited us to join a permanent expert group dealing with Internet regulation, managed by the Minister Chief of Prime Minister's Advisors.

- We have **gained reputation as a reliable source of information and public spokesmen on Internet-related matters** with key Polish daily newspapers (e.g. Gazeta Wyborcza and Rzeczpospolita) and electronic media (Polskie Radio, TOK FM, Wiadomości 24) as well as niche electronic media specialised in Internet regulation (Dziennik Internautów, Vagla.pl). We managed to publish **19 own articles in the mainstream media** (written by Panoptykon's staff or cooperating experts) and registered **63 interviews and important press materials that quote our opinion**.

- We have also managed to **turn our website into an independent source of news and a resource for experts and journalists** seeking information in the area of Internet regulation. Over the last 12 months we **published 166 articles and notes** covering both the broader problematic of Internet regulation, including international affairs, and our project results.

- We became not only a member but also an **active contributor and respected voice within European Digital Rights (EDRi)** (e.g. after 6 months of activity we were offered to join the management board).

- We were able to establish relationships and remain in a regular contact with **decision-makers and experts at the European Institutions** working on the dossiers we decided to follow (e.g. MEPs, their assistants and advisors, members of political cabinets, officials from the Polish Permanent

Representation in the EU[1]), which helped us both monitor legal process in the EU and advocate for changes.

- We managed to build an "ad-hoc", **informal coalition of civil society organisations advocating on digital rights**[2], **which repeatedly appealed to the government**. Our joint campaign resulted in organising a public debate on Internet regulation and fundamental rights, involving the Prime Minister, relevant Ministers and civic organisations (7 April 2011). This debate turned out to be a significant step forward and initiated the series of working meetings involving civil society actors, some industry representatives and the government (18 meetings over 4 months).

- Working with other organisations active in the area of digital rights, we **initiated and fuelled public debates on: blanket data retention, Internet blocking, ACTA, content liability and the role of Internet intermediaries, re use of public information, and the implementation of the audiovisual directive concerning non linear services**. We perceive these campaigns as significant successes. Not only we managed to get our message across in the mainstream media but also to influence some actions taken by the Polish government and other public entities, such as the Ombudsman or Data Protection Authority.

- **Our discussions with the government and the delivery of numerous legal opinions contributed to a shift in their political approach** to the following dossiers: Internet blocking, blanket data retention, content liability and the re use of public information. See Sections 2.5 B and E and 2.7 A for more details.

- **Our final conference attracted practically all relevant stakeholders from the public administration, industry, academia and civil society**, including the Minister Chief of Prime Minister's Advisors, Data Protection Authority, the Head of the Office for Electronic Communication and high level representatives from the chambers, key Internet companies, the Ministry of Internal Affairs, Ministry of Justice, Ministry of Infrastructure and secret services. We managed to invite two foreign speakers, who presented cutting edge approach to the protection of fundamental rights on-line, and inspired a heated debate on the topics we selected as strategically important.

- We were invited to **join an existing multi-stakeholder forum called „Digital Poland" – an interdepartmental working group coordinated by the Ministry of Infrastructure**. The group meets every month to discuss pending regulatory issues and includes the representatives of business, public administration, regulatory bodies and civil society organisations (e.g. Ministry of Infrastructure, Ministry of Internal Affairs, Prime Minister's Advisors, Data Protection Authority, IAB Poland, Polish Chamber for Information Technology and Telecommunications, Polish Chamber of Telecommunications).

- Finally, we became recognised as experts and invited to speak about the challenges for Internet regulation on international forum (e.g. 27C3, Re:publica; EuroDIG, Computers Freedom and Privacy, Internet Governance Forum). See Appendix (Section G) for more details.

2. Achievement of stated objectives and implemented activities

2.1 Setting up project team and planning research

As planned in the project description, we established a Board of Advisors consisting of renowned experts in the field of Internet regulation and a working group of experts responsible for carrying out the actual research and working out final recommendations:

A. Board of Advisors

- Wojciech Wiewiórowski, PhD – formerly the Director of Information Technology Department at the Ministry of Internal Affairs, at present Data Protection Authority; expert in data protection, e-

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[1] E.g. Jan Ostoja Ostaszewski, Ottavio Marzocci, Jacques Veraes, Christian d'Cunha, Alexander Alvaro, Adam Gierek, Joanna Senyszyn, Lidia Geringer de Oedenberg, Michał Fila, Lena Kolarska-Bobińska, Sophie in't Veld, Jan Philip Albrecht, Laurence Vandewalle.

[2] Members of our informal coalition: Modern Poland Foundation, the Foundation for Free and Open Software, Digital Centre Project: Poland, KidProtect.pl, Internet Society Poland, Helsinki Foundation for Human Rights

Government and e-Commerce;

- Prof. Andrzej Adamski – professor at the Nicolas Copernicus University (Toruń) and a renowned Polish criminologist; expert in cybercrime and security-related Internet regulation;

- Prof. Grażyna Szpor – professor at the Cardinal Stefan Wyszyński University (Warsaw), the Head of Information Technology Law Unit, expert in the field of managing public information, e-Government and data protection;

- Prof. Adam Wierzbicki – assistant professor at the Polish-Japanese Institute of Information Technology; expert and researcher in peer-to-peer computing, information security, trust management and fairness in distributed systems and social informatics.

- Mirosław Maj – formerly the Head of CERT unit at the Polish Scientific and Academic Computer Network (NASK), at present the CEO of Safe Cyberspace Foundation; expert in cyber security, information security and Internet networks.

- Jacek Wilczewski – solicitor, adviser for the Polish Chamber of Electronics and Telecommunications; expert in regulatory issues and telecommunication law.

The Board of Advisors met three times at the beginning of the key stages of the project in order to discuss our research progress, the most challenging regulatory issues and final recommendations. In addition, we maintained regular e-mail contact with this group and managed to invite selected advisors to join us for a one and a half day retreat organised to work on the final recommendations (see Section 2.4 below).

B. Experts:

- Grzegorz Pacek - lawyer, expert in content liability in the Internet;

- Tomasz Rychlicki - lawyer, expert in intellectual property;

- Krzysztof Siewicz - lawyer, expert in re use of state-generated information;

- Józef Halbersztadt - expert in intellectual property and data retention;

- Michał Małyszko and Marcin Cieślak – IT consultants, experts in technical aspects of the Internet and their implications for legal regulation;

- Dariusz Adamski – lawyer and academic, expert in managing public information, legal regulation of the use of telecommunication data for security purposes and other aspects of Internet regulation.

The working group of experts was meeting on a regular basis (approx. every 5 weeks) in order to discuss each research phase: from planning and the choice of key problem areas to particular challenges within each of the problem areas. In order to facilitate the exchange of information, peer review and sharing interim research results, we established a dedicated project mailing list and a co-working system (based on Open Atrium, Drupal solution), which contains a sort of working space and an electronic library for each problem area.

2.2. Identifying main problem areas, methodology and key aspects to cover in the research

A crucial part of our work, which determined further steps in our research and advocacy, was the choice of the key problem areas, methodology and the main aspects to cover in our research. We selected the following five problem areas for carrying out deeper research, drafting political recommendations, campaigning and advocating:

- Data retention

- Internet blocking

- Intellectual Property Rights Enforcement

- Re use of public information

- Content liability and the role of Internet intermediaries.

This choice was based on the following criteria: political urgency and predicted time frame; feasibility (in terms of a one year project); availability of expertise; potential for having an impact.

In addition to the choice of problem areas, we agreed on the methodology and the key aspects to be covered in each problem area: a map of stakeholders; identification of conflicting values; key political and legal developments in last 2-3 years; current trends both in Poland and in the EU; relevant legislative dossiers; identifiable challenges for Internet regulation. Relevant documents summarising this process are available in Polish.

2.3 Drafting policy papers, open letters, opinions and statements

Together with experts and with the support of our Board of Advisors, we devoted the first phase of the project (around three months) to **mapping, prioritising and setting the main research problems**. This process helped us realise the challenge of researching and working out recommendations in the areas, which keep developing as we go. We decided to avoid drafting lengthy papers if this were to prevent us from reacting to pending political events.

We knew that there will be a few important public consultations (in particular e-Commerce Directive, Data Protection Directive and IPRED or the implementation of the Re use Directive and e-Commerce Directive in Poland), in which we should take part. At the same time, **we expected the need for much more dynamic advocacy with regard to the following "hot topics": ACTA, blanket data retention and Internet blocking**. Finally, we wanted to gain deeper understanding of each problem area and bring some value-added to existing research, which cannot be achieved by this sort of "reactive writing" only.

Therefore, we decided to apply the following strategy:

- Commission our experts to **prepare five longer policy papers (more than 20 pages) supported with adequate amount of (prior) research** and devoted to the following topics:

  (i) The challenge of shaping content liability in the Internet (Grzegorz Pacek);

  (ii) Reinventing the principles of the re use of state-generated information (Krzysztof Siewicz);

  (iii) The impact of intellectual property rights enforcement on fundamental freedoms in digital environment (Tomasz Rychlicki);

  (iv) How Internet functions and what it means for its regulation? (Michał Małyszko); and

  (v) The use of telecommunication data by the secret services in the context of existing legal regulations (Dariusz Adamski)

- Commission other, external experts to prepare for us **"ad hoc", shorter (up to 15 pages) policy papers in response to particular political events** or to support our main experts in their work:

  (i) Retention of telecommunication data in Poland: does the legal regulation pass the proportionality test? (Prof. Andrzej Adamski) – an expertise prepared for our meeting with DG Home (Brussels, 2010-11-09);

  (ii) How to delete child pornography content from the Internet? (Wociech S. Czarnecki) – a reply to a set of questions posed by the Ombudsman during the "block or delete" debate (Warsaw, 2011-02-10);

  (iii) Intellectual property protection under the Polish law (Urszula Darkowska) – a supporting paper for Tomasz Rychlicki working on intellectual property enforcement.

- Focus the work of the Panoptykon team on the **preparation and delivery of our legal opinions, briefings, public statements and open letters in reaction to important political or legislative developments**. Using our own capacity and support from our experts, we have prepared 25 such documents throughout the project (from 3 to 15 pages), including:

  (i) a few responses in public consultations concerning important directives (IPRED, Data Protection Directive, E-Commerce Directive, revision of Data Retention Directive);

(ii) briefing on Internet blocking and the proposal of the Directive against sexual abuse of children prepared for the Alliance of the Democratic Left;

(iii) a policy paper on Internet blocking prepared in response to the set of questions posed by the Ombudsman during the "block or delete" debate (Warsaw, 2011-02-10);

(iv) a set of open letters to the European Commission and the Polish government dealing with pending challenges of Internet regulation;

(v) a set of legal opinions and comments regarding draft laws prepared by the government and consulted with us during our working group meetings (e.g. draft law implementing the Audiovisual Directive, draft law on the liability of Internet intermediaries, draft law implementing so-called "Cookie" Directive, draft law implementing the Re use Directive), some of them signed also by other civil society organisations.

See Appendix (Section D) for more details.

2.4 Formulating our recommendations and drafting final report

While formulating our recommendations in selected problem areas (see Section 2.2 above) and drafting final report, we realised that **interaction among our experts and advisors is essential if we want to arrive at interesting and well-researched conclusions**. Moreover, we realised that throughout the project it was the Panoptykon team that gained the best understanding of the broader regulatory landscape and political situation both in Poland and in the EU. Therefore, we abandoned the initial concept of ordering short papers with recommendations from individual experts that would then constitute a base for drafting our final report.

Instead, **we organised one and a half day retreat outside of Warsaw involving 12 participants and a professional moderator**, with the view of facilitating interaction between our team, cooperating experts and selected advisors. All workshop materials, including draft research conclusions and policy recommendations, were prepared in advance by our team and some of the cooperating experts. Our **main task was to brainstorm and test these ideas against all possible counter-arguments**. The results we arrived at were documented with charts and video recordings. This initiative turned out to be very successful, allowing us to discuss recommendations and main research conclusions to be developed in the final report.

The final report was drafted by the Panoptykon team on the basis of the material produced throughout the project: papers and "ad hoc" analyses prepared by our experts; research papers drafted by international experts that we came across; first-hand knowledge we gained though participation in meetings with decision makers and public events; legal opinions and statements prepared for the purposes of our pending advocacy; provisional recommendations we arrived at during the half-way seminar (see Section 2.5 D below); and the results we arrived at during the workshop described above.

We realised that **it would not be possible to reach key stakeholders (political decision makers, media, industry representatives) if we produce a heavy, expert-level publication**. Therefore we decided to use the report to promote and popularise our research outcomes and key recommendations but not to reproduce the whole knowledge we gained throughout the project. The basic concept was that **the report should guide the reader through a complex landscape of regulatory challenges and possible political scenarios**. While not going into much detail, the report refers to a number of other sources – including policy papers prepared by our experts in the first phase of the project – that can be consulted by more expert readers who may seek additional information. We were aware that for most of the readers the amount of information contained in the report will be more than sufficient to understand particular regulatory issues and see a broader picture.

For the ease of reference the report was divided in 5 chapters corresponding to the research areas we selected (Internet blocking; content liability and the role of Internet intermediaries; blanket data retention and access to telecommunication data; re use of public information; intellectual property enforcement in the digital environment). **Each of the chapters was given exactly the same structure, reflecting the underlying concept of the report**: (i) introduction setting the topic in a broader political and regulatory

context; (ii) regulatory dilemmas and fundamental values to be affected by potential choices; (iii) possible regulatory scenarios and their implications (including threats); (iv) comparison of good and bad regulatory/jurisprudential practices from other countries and/or Poland; (v) our recommendations and conclusions.

We invested additional time and effort in **designing the content of the report in order to make it as user-friendly as possible** (e.g. exposing the most important thoughts and conclusions in separate frames; using colours and shadows; exposing important data, quotations and references throughout the document etc.). The feedback we received was very positive. The report was quoted in the media and quickly started circulating among industry and civil society representatives. We promoted it at the final conference (see Section 2.5 D below), where we managed to reach the majority of high level government representatives involved in the debate on Internet regulation. Due to pre-election time that came immediately after we published the report we decided to wait with its further promotion until the new government is established. This follow-up activity will be done in the upcoming weeks.

2.5 Communicating our interim results to political decision-makers

A. Meetings with political decision-makers

Throughout the project we arranged for a series of meetings with political decision makers and experts, which – in our opinion – are influential in the process of shaping legal solutions both at national and EU level.

- **On the EU level**

In the first project phase we focused on meeting key people in Brussels in order to gain more awareness in pending dossiers and help us plan further activity. During our first visit to Brussels we met (chronological order): Przemysław Słowik (Lewandowski's cabinet), Jan Ostoja Ostaszewski (Reding's cabinet), Zuzana Roithova (MEP), Ottavio Marzocci (MEP ass.), Jacques Veraes (DG Home), Brigid Stipel (MEP), Alexander Alvaro (MEP), Michał Fila (Polish Permenent Representation), Adam Gierek (MEP), Eva Lichtenberger (MEP), Michael Speiser (Adviser to EPP), Joanna Senyszyn (MEP), Sophie Bots (MEP ass.), Susanne Rothkopf (MEP ass.), Lidia Geringer de Oedenberg (MEP).

This tactic proved quite successful: thanks to these contacts and their advice **we were able to predict much better the pace and future directions of legislative works in Brussels**.

During the project period we visited Brussels three more times: in December to attend a key conference on data retention ("Taking on Data Retention"); in January to attend an annual inter-disciplinary conference on data protection (CPDP 2011), Data Protection Day organised by the Commission and an annual reception hosted by the Polish DPA in Brussels; and in June to attend a workshop for NGOs on the revision of Data Retention Directive, organised by DG Home. On these occasions we were also able to meet informally with some MEPs, their assistants, Commission's officials and NGO experts based in Brussels and join consultative meeting on ACTA held by the European Commission (DG Trade).

Finally, we took advantage of the fact that Polish MEPs travel to their constituencies on a regular basis in order to try and meet them in Poland. We arranged for a private meeting with MEP Lena Kolarska-Bobińska to discuss net neutrality and other topics related to Internet regulation dealt with by the ITRE commission.

A detailed list of meetings and their key implications can be found in the Appendix (Section E).

- **On the national level**

Over the project period we managed to meet all important – from our perspective – political decision-makers, governmental experts and regulators in Poland. **In total we registered 23 meetings that had direct relevance for our pending advocacy**. Each time the meeting was triggered by our actions. The most intense period for our advocacy was **between April and September, when we took part in 18 consultative meetings with high level government and industry representatives**. The topics covered all areas we defined as strategically important in the broad area of Internet regulation and human

rights (Internet blocking; blanket data retention; content liability and the role of Internet intermediaries; intellectual property enforcement and ACTA; regulation of Internet-based audiovisual services; re use of public information; net neutrality).

The most significant implications of the meetings on the national level are described in Section E below (Participation in public consultations) and Section 2.7 A (Running campaigns). Please also see the table in the Appendix (Section E) for the fill list of meeting, including their highlights and key implications.

B. Successful media outreach

As mentioned in the summary, we have gained reputation as a reliable source of information and public spokesmen on Internet-related matters with key Polish daily newspapers (e.g. Gazeta Wyborcza and Rzeczpospolita) as well as niche electronic media specialised in Internet regulation (Dziennik Internautów, Vagla.pl). We believe that as a result of our media outreach we were also able to get the key messages across to some political decision makers. See Section 2.7 B below Appendix (Section A and B) for more details.

We are particularly proud of the following developments, which resulted from our media work:

- After we released the front page news about the outstanding number of requests for telecommunication data made by secret service and police[3], the real public debate about data retention in Poland has started. Prime Minister commissioned an investigation into the use of data retention in Poland, which results were released to the public. Further developments in this dossier are described in Section 2.7 below (Running campaigns).

- We were the first ones to publish critical article about the dangers of the proposed media law, which was meant to implement the Audiovisual Directive in the scope it concerns non-linear services[4]. The law was drafted in such imprecise way that it might have lead to strict regulation of all commercial video content published on-line. Potential threat for both small entrepreneurs and the freedom of expression became a major news in all media a month later. This media pressure resulted in the government's withdrawal from the proposal and an invitation for us to participate as social experts in further works on the implementation of the Audiovisual Directive.

- Our repeated effort in writing open letters to the Prime Minister, pointing to the challenges of Internet regulation, and additional – successful – effort to get this message through to the media[5] resulted in organising a big public debate involving the Prime Minister himself and all relevant Ministers responsible for the dossiers we selected as strategically important. We were placed in a position of a co-organiser of the debate (choosing of guests, setting the agenda, starting the discussion). Further developments in this area are described in Section 2.7 below (Running campaigns).

- We published two influential articles in the daily newspaper Gazeta Wyborcza dealing with Internet blocking[6] in order to fuel and inform public debate on the Polish government's position on the draft Child Exploitation Directive. These articles were essential for our campaign against mandatory

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[3] Ewa Siedlecka, *Całe nasze życie na podglądzie (All our life on a preview), Gazeta Wyborcza 2010-10-07* and Ewa Siedlecka, *Nasze bilingi i internet pod lupą służb (Our billings and internet under the secret services' surveillance), Gazeta Wyborcza 2010-11-09*

[4] Katarzyna Szymielewicz, *Youtube pod kontrolą KRRiT? (Youtube under the control of the* National Board for Radio and Broadcasting*?),* Rzeczpospolita, 2011-01-27 and Rozmowy Rzeczpospolitej, *Rydel – Szymielewicz: multimedia do kontroli? (Rydel-Szymielewicz: multimedia are going to be controlled?), Rzeczpospolita TV*

[5] *Apel do premiera: To bubel prawny! (Appeal to Prime Minister: It is a legal dud!),* Dziennik.pl 2011-03-16*; wg, Organizacje poza-rządowe: Premierze, trzymamy za słowo (The NGO's: Prime minister! We hold You to your word!),* Gazeta Wyborcza 2011-03-17; *Katarzyna Wężyk, Rząd nie daje za wygraną: znów chce ograniczać internet (The Government does not concede: it wants to restrict the internet again*), TVN24 2011-03-14*; Marcin Maj, Premierze: zróbmy prawdziwe konsultacje, o mediach i nie tylko (We appeal to the Prime Minister for real consultation on the media and more),* Dziennik internautów 2011-03-17; Jarosław Stróżyk, Wojciech Wybranowski, *Ustawą w wolność sieci (Atacking internet freeedom with the bill*), Rzeczpospolita 2011-03-16.

[6] Katarzyna Szymielewicz, *Cenzura a sprawa polska [Censorship and the Polish context],* Gazeta Wyborcza, 2011-06-06 and Katarzyna Szymielewicz, Józef Halbersztadt, Jarosław Lipszyc, *Blokowanie w Internecie? To nie działa! [Internet bloking? It does not work!]*, Gazeta Wyborcza, 2011-07-25

blocking at the EU level (described in Section 2.7 below), which also involved a few working meetings with government's representatives (see Section 2.5 A).

- We were among the main voices shaping public opinion in the debate on the implementation of the Re use Directive. We managed to publish two influential articles in the leading daily newspapers Gazeta Wyborcza and Rzeczpospolita[7] in the heat of the debate on the principle of unconditional use of public information and the shape on the new law regulating access to information. It might be the case that this media pressure and our opinions delivered during working meetings with the government's representatives had some influence on the shift in the government's approach while shaping the legal regime on the re use of public information (see Section E below).

C. Participation in public events

We attended 22 public events (conferences, debates, seminars etc.) both in Poland and abroad. To name only the international events: Free Culture Forum; Taking on Data Retention; 27th Chaos Communication Congress, Computers Data Protection and Privacy; INET, Frankfurt; Re:publica, Computers, Freedom and Privacy, EuroDIG, Internet Governance Forum. See Appendix (Section F and G) for more details.

In the majority of these events we took part as speakers or panellists. We believe that this form of public performance constituted an important channel for our advocacy and the way of influencing various stakeholders: experts from other fields (business in particular), media and political decision makers. In particular, our active involvement in EuroDIG and the Internet Governance Forum[8] gave us the opportunity to inspire international debate on Internet and fundamental rights and make sure the civil society's perspective is strongly represented. These events also proved to be perfect networking spaces for meeting political decision makers and other activists.

In the national context, public appearing at certain events contributed to raising our profile as experts and helped us in our advocacy efforts. Just to mention a few examples:

- Data retention

  Right after the first public debate with the Prime Minister, where we discussed – among others – blanket data retention, we received the invitation to meet with relevant governmental experts and discuss the alternatives to data retention ("quick freeze"). Soon it turned out that a special working group for drafting the new law on data retention was set up by the Prime Minister.

  As a result of our public performance both at the debate held by the Ombudsman and the one hosted by the Prime Minister we were also contacted by lawyers from the business sector, offering us new – at times confidential – information about the use of data retention in practice and other "hot" issues. We were able to use this information in further discussions with the government.

  Thanks to our presentations at the Chaos Communication Congress, Re:publica and Computers, Freedom and Privacy conference (all concerning data retention), we were able to get the message about outstanding Polish situation across to the foreign media, which then helped us in running our national campaign[9].

- Internet blocking

  As a result of the public debate on Internet blocking (organised by us at the Ombudsman's premises, 2011-02-10) – where the representative of the Ministry of Justice was invited – we were able to set up a private meeting with him in order to discuss Polish position on blocking in the EU.

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[7] Józef Halbersztadt, Jarosław Lipszyc, *Żeby publiczne było publiczne [Let the public be public],* Gazeta Wyborcza, 2011-08-19 and Katarzyna Szymielewicz, Józef Halbersztadt, Jarosław Lipszyc, *Kto psuje prawo [Who mars the law],* Rzeczpospolita, 2011-09-27
[8] http://www.panoptykon.org/wiadomosc/dwa-dni-debat-o-regulacji-internetu-eurodig-2011 and http://www.panoptykon.org/wiadomosc/fundacja-panoptykon-na-internet-governance-forum
[9] E.g. *Kim Bredesen, Grovt misbruk av datalagringsdirektivet, Le Monde Diplomatique Norway, march 2011* and *Osman Kibar, Hack-tivistene,* Dagens Næringsliv 2011-02-06

We are able to convince him to publish an official communication on this matter, which we then commented upon, fuelling a public debate on the issue[10].

- Setting the agenda for "Internet and human rights" in Poland

As a result of the series of public debates with the Prime Minister, held under the label "Internet and human rights", we became recognised as civil society experts in the area and thus invited to all other events organised by the public administration and industry. The novelty was that beforehand nobody would seek civil society experts to discuss "fundamental rights" perspective because it was not recognised as an important aspect of the public debate.

D. Organising our own events

- **Half-way seminar**

Inspired by the format of Internet Governance Forum, we decided to use the same, multi-stakeholder formula in a small scale, involving public administration, civil society organisations, business and academia. We invited all civil society organisations interested in Internet regulation, a number of experts from public administration (Ministry of Internal Affairs, Prime Minister's Chancellery, Ministry of Justice, Ministry of Infrastructure, Office for Electronic Communications), representatives of key Internet companies in Poland (Google, Microsoft, NK) and Internet Advertising Bureau Poland, the Office of the Ombudsman – the total of 35 experts.

The concept worked quite well and we managed to create space for both networking and dynamic exchange of views. The discussion covered four problem areas (data retention-internet blocking-net neutrality; re use of public information; content liability and the role of Internet intermediaries, and intellectual property enforcement). It took almost 3 hours.

The main purpose of this meeting from the Panoptykon's perspective was to present a broader group of experts with our provisional research conclusions and policy recommendations. We wanted to test their depth and value in an open discussion. We did learn a lot from the feedback we received. In particular, we reconsidered our initial ideas for the shape of notice and take down procedure. In some other topics, in particular intellectual property enforcement, we were able to map the landscape and identify our key opponents from the industry. In addition, this meeting enhanced our communication with selected government's representatives, which we were to meet on a number of occasions during the series of working group meetings between April and September (see Section 2.5 A above).

- **Final conference**

While organising our final conference, we followed the format of the Internet Governance Forum again. We focused our efforts on getting all key stakeholders together for a dynamic discussion on the main challenges for Internet regulation from the human rights perspective. The name of the conference was "Internet at the crossroads. Challenges for Internet regulation in Poland and the European Union". The description of our general concept and the conference programme in English can be found on the conference website under the following link: http://wolnyinternet.panoptykon.org/sites/default/files/internet_at_the_crossroads_concept_and_ag enda_0.pdf.

In order to increase our outreach, we decided to set up a dedicated conference website (http://wolnyinternet.panoptykon.org/), containing our final report, all relevant papers drafted by our experts, bios of our key note speakers, special guests and panellists as well as relevant multimedia and recommended links. Although building this website and filling it with valuable content was a significant effort we are convinced that it was the right choice. The website proved very efficient in promoting the very idea of human rights in the context of Internet regulation as well as rising awareness about related challenges. After the conference it was used to publish all presentations and video recordings.

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[10] http://www.panoptykon.org/content/rz-d-wyja-nia-panoptykon-komentuje-dalszy-ci-g-rozmowy-o-blokowaniu-stron-internetowych

The event itself turned out to be quite successful. It attracted practically all relevant stakeholders from the p public administration, industry, academia and NGO. We registered over 90 participants including the Minister Chief of Prime Minister's Advisors, Data Protection Authority, the Head of the Office for Electronic Communication and high level representatives from the chambers, key Internet companies, the Ministry of Internal Affairs, Ministry of Justice, Ministry of Infrastructure and secret services.

We invited two foreign key note speakers, who presented cutting edge approach to the protection of fundamental rights on-line and inspired heated debates on data retention and content liability. Approximately half of the time at the conference was devoted to open discussion, which worked out very well due to the amount of experts willing to share their views. We received a lot of positive feedback from NGOs, industry and public administration and we recorded quite significant increase in media attention.

E. Official correspondence and taking part in public consultations

We believe that our consistency in carrying out official correspondence with relevant departments of the Polish government, European Commission and MEPs (in particular Polish ones) as well as taking part in public consultations played a substantial role in building up our expert position and influencing political process. Over past 12 months we issued 25 open letters, public statements, briefs and opinions – all of them communicated to both relevant decision makers and the media.

We responded to all relevant public consultations regarding the dossiers we decided to follow both on the national and EU level (e.g. e-Commerce Directive, Data Protection Directive, IPRED, draft law on content liability and the role of Internet intermediaries, draft law implementing the Audiovisual Directive, draft law implementing the Re use Directive). See Appendix (Section D) for more details.

The lesson we learnt quite quickly was that media attention is of an essence in the process of our official communication with decision makers. It was more than evident in our communication with the Prime Minister. In the first part of the project we send two joint letters, signed by our "ad hoc" coalition of civil society organisations[11]. Since the first of these letters went almost unnoticed by both media and the government, we decided to send the second one in the middle of the fuss around the proposed media law threatening Internet-based audiovisual services. The right choice of the political moment together with some additional media work resulted in immediate response from the government – an invitation to meet and discuss Internet regulation and fundamental rights.

This first public meeting with the Prime Minister (7 April 2011) resulted in the series of working meetings involving high level government representatives, some industry representatives and civil society organisations involved in digital rights advocacy. For a brief description of these consultative meetings see Section 2.5 A (Meetings with decision makers on the national level).

The most significant implications of our involvement in public consultations:

Both our involvement in working meetings with the government's representatives and our participation in formal public consultation regarding draft laws dealing with Internet regulation resulted in some significant effects:

• The majority of our amendments to the draft law on content liability and the role of Internet intermediaries was accepted (incl. the shape of notice and take down procedure);

• While working on the draft law implementing the Re use Directive, the government made a radical shift in their approach to regulating re use of public information, from conditionality (fees and other conditions to be imposed by public entities) to the principle of unconditional disclosure of public information, including for the purposes of its re use. At one meeting, the Prime Minister announced

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[11] Appeal to the Prime Minister on continuation of dialogue about Internet regulation in Poland (2011-01-21) [http://panoptykon.org/content/rok-po-nadal-chcemy-rozmawia-na-temat-wolno-ci-w-internecie-organizacje-pozarz-dowe-wzywaj-p] and Open letter to the Prime Minister on the social dialogue in the subject of internet regulation (2011-03-16) [http://panoptykon.org/content/czy-b-dzie-powa-na-rozmowa-o-regulacji-internetu-zapytali-my-dzi-premiera]

that everything, which has been created for public money should be "owned by the public"[12];

- The principles underpinning the draft law implementing the Audiovisual Directive (affecting nonlinear audiovisual services provided on-line) were modified in accordance with our recommendations, to exclude from the scope of such regulation any video content except for professional, TV-like services provided by specialised, commercial entities.

Please also see other results attributed to our campaigns on Internet blocking, data retention and ACTA (Section 2.7 below).

2.6 Supporting other NGOs and delivering expertise to the "third sector"

A. Daily communication (mailing lists)

We communicated on a regular basis with other NGOs both from Poland (in particular: Modern Poland Foundation, the Foundation for Free and Open Software, Digital Centre Project: Poland, KidProtect.pl, Internet Society Poland, Helsinki Foundation for Human Rights and Nobody's Children Foundation) and abroad (EDRi members and observers, in particular Bits of Freedom, La Quadrature du Net, AK Vorrat, MOGIS, EFF), exchanging between 5 and 15 e-mails a day. Substantial part of this communication was channelled through thematic mailing lists ("Rejestr"; EDRi-members; EDRi-dr; EDRi-ab).

B. Coalition building: acting together

As mentioned above, we managed to build an "ad-hoc", informal coalition of civil society organisations advocating on digital rights consisting of: Modern Poland Foundation, Foundation for Free and Open Software, Digital Centre Project: Poland, KidProtect.pl, Internet Society Poland and Helsinki Foundation for Human Rights. Together we repeatedly appealed to the government to "talk to us" about the challenges of Internet regulation, naming particular problems and dangers (e.g. data retention, Internet blocking, repressive media law etc.). This joint campaign resulted in organising a public debate on Internet regulation and fundamental rights, involving the Prime Minister, relevant Ministers, some industry representatives and civil society organisations (7 April 2011) and further consultative process. We believe that such results would not be possible if we acted independently.

In order to enhance our communication with other civil society organisations and activists, we arranged for a number of informal working meetings. We took additional efforts to support their independent actions and develop their capacity for digital rights activism. Our half-way seminar and the final conference provided a space for all interested organisations to do the networking, exchange views and build up their own expertise. Apart from civil society organisations, we invited renowned foreign speakers, a number of experts from public administration (Ministry of Internal Affairs, Prime Minister's Office, Ministry of Justice, Ministry of Infrastructure, Office for Electronic Communications), representatives of key Internet companies in Poland (Google, Microsoft, NK) and Internet Advertising Bureau Poland, the Office of the Ombudsman and the Office of the Data Protection Authority. We believe that these events – in particular the final conference – created a good opportunity for invited organisations and activists to have their voice heard by important stakeholders as well as learn new ideas in the field of Internet regulation and fundamental rights.

2.7 Getting key messages across to the media and broader public

A. Running campaigns

(i) Blanket data retention

We took active part in EU-wide campaign against data retention directive, including meetings with political decision makers and drafting reports, thus raising awareness of this issue and pressuring the Commission to change its position. We also initiated and fuelled public debate on data retention in Poland.

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[12] http://www.panoptykon.org/wiadomosc/premier-cos-co-powstaje-za-publiczne-pieniadze-jest-wlasnoscia-publiczna-sukces-w-rozmowac

We published a few "big news" on data retention in the media (see Section 2.5 B above). After we released the news about the outstanding number of requests for telecommunication data in Poland, the Prime Minister commissioned an investigation into the use of data retention. The results were released to the public, proving our point that Poland faces systemic problem with data retention (lack of control mechanisms, very broad scope of purposes for which data retention can be used etc.). We were invited by the Ombudsman to meet and present her with our arguments against blanket data retention. Soon after the Ombudsman organised a public debate on the issue, inviting us to confront the Minister responsible for supervising secret services.

A couple of months later the Ombudsman issued a "general address" to the Prime Minister calling the government to change data retention law, while a group of left-wing MPs filed a complaint against data retention law to the Constitutional Tribunal. The Ombudsman herself filed a constitutional complaint addressing not only blanket data retention but the broad scope of surveillance powers attributed to secret services. We are still waiting for the Constitutional Tribunal's decision in this case.

As a result of this multi-channelled pressure, the Prime Minister announced the shift in approach to data retention and promised changes in legal regulation, backed by adequate evidence. After four months of deliberations a working group chaired by the Minister supervising secret services has just announced their proposed amendments in existing legal regulations. We will deal with this proposal in the upcoming weeks.

We were also involved in drafting EDRi shadow report on Data Retention Directive (which we managed to bring to the Polish news) and the guidelines on its impact assessment (in the context of the upcoming proposal to revise the Directive). These submissions allegedly had certain influence on the line adopted by the European Commission.

(ii) Internet blocking

We initiated and fuelled the debate on Internet blocking in the context of child pornography, which resulted in: a number of publications in the media; a public discussion hosted by the Ombudsman (but initiated, organised and moderated by the Panoptykon Foundation); and an Internet-based campaign against blocking.

The Internet-based campaign against blocking had a few phases:

- signing international petition (and encouraging others to do so);
- writing letters to MEPs (and encouraging others to do so);
- appealing to the Prime Minister;
- calling and writing to the Ministry of Justice (and encouraging others to do so).

As a consequence of these events we managed to meet with the representatives of the Ministry of Justice, discuss Polish government's position on Child Exploitation Directive and convince them to publish an official communication on this matter. We tried to fuel and inform public debate with our articles (see Section 2.5 B above). Finally, we managed to make Internet blocking one of the key topics during our public meetings with the Prime Minister (see Appendix, Section E).

All this effort might have contributed to certain shifts in the Polish government's position on mandatory blocking of the websites containing child abuse material. The standpoint of the Polish government on Child Exploitation Directive was clarified and eventually Poland supported a good compromise reached the European Parliament (Internet blocking accepted only as a facultative measure and only with concrete human rights safeguards). Moreover, at the final meeting with civil society (13 July 2011) the Prime Minister promised that no Internet blocking will be introduced in Poland without a serious human rights impact analysis and only if it has been proven beyond doubt that Internet blocking does actually lead to certain benefits that outweigh potential harm to fundamental rights.

(iii)   Regulation of non linear audiovisual services

We were also involved in a successful campaign against repressive media law, which was recently proposed by the Polish government. The idea was to regulate all non-linear audiovisual services provided on-line by subjecting their providers to administrative supervision of the National Board for Radio and Broadcasting. The law was presented as a "must" in the process of implementing the Audiovisual Directive but, in fact, it was inconsistent with the goals behind the harmonisation. We published an open letter to the Prime Minister and criticized this concept in the media. Soon after, the problem was spotted by business organisations as well as "the Internet", which resulted in a very dynamic campaign. We were among the most quoted experts on this issue. Eventually, the government withdrew from this controversial proposal and announced that it would propose different solutions, subject to public consultations. We were invited as social experts to comment on the new draft law, which constitutes significant progress (see Section 2.5 E).

(iv)   ACTA

We joined international campaign against ACTA, which involved: signing petition (and encouraging others to do so), sending letters to MEPs (and encouraging others to do so), convincing selected Polish MEPs to become more active on this dossier and publishing information about the process of negotiation and the treaty itself. We participated in the official consultative meeting on ACTA held by the DG Trade in January 2011 and reported about its outcomes to the public[13]. Finally, in May we sent an open letter to the MEPs concerning the legality of ACTA and the need to obtain prior clarification from the European Court of Justice, demanding that the European Parliament requests such opinion from the Court.

We also managed to introduce ACTA as another "hot issue" during our working meetings with the government's representatives and public meetings with the Prime Minister. We briefed the government officials on potential implications of signing this agreement. As a result we received an official promise that no steps will be taken without requesting all documents related to the negotiation process from the European Commission and clarifying all legal doubts.

(v)   "Internet and Fundamental Rights" – setting the political agenda

Two years ago, when we were about to start our persistent activity in the area of digital rights, our diagnosis of the main problem was that Poland lacks human rights perspective in the debate on Internet regulation (see the original project proposal). Therefore, we made repeated efforts to explain to political decision makers and the media that misconceived regulation in this field may pose serious threats to fundamental rights. As mentioned above, writing open letters to the Prime Minister and getting this message across to the media resulted in a series of public debates involving the Prime Minister himself and relevant Ministers.

At the end of this process, **the Prime Minister made a few important political declarations**, which we communicated to the media in order to create a benchmark for our advocacy in the future. On July 13th Donald Tusk:

- explicitly announced in his public speech that "**we have made him change the initial point of view and adopt our perspective in looking at the challenge of Internet regulation**". He made an explicit promise that from now onwards human rights perspective will be applied to Internet regulation;

- promised that **every potential limitation of fundamental freedoms will have to undergo a proper proportionality and necessity** test before it is accepted by the government;

- responded directly to our criticism that legal regulation in Poland stumbles over the lack of evidence based policy making, promising that **the government will present clear and**

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[13] http://www.panoptykon.org/content/dialog-na-zako-czenie-negocjacji-burzliwe-spotkanie-komisji-europejskiej-i-ngo-w-sprawie-act

> **verifiable arguments to support its policies**, in particular whenever fundamental rights are to be limited.

B. Media outreach

We took a lot of effort to bring our key messages to the broader public, using all available media. **We published 19 articles in the mainstream media on pending or strategic issues for Internet regulation**. Some of them were co-authored by our cooperating experts. In addition, we managed to build up reputation as a reliable source of information in the field of Internet regulation, which resulted in **above 60 interviews and press materials (including radio and TV), which quote us or comment about our work**.

See Section 2.5 B above for the examples of our successful media outreach and Appendix (Section A and B) for more details.

C. Running our own website

We kept publishing all relevant information about project-related activities (research results, campaigns, public events, summaries of important meetings, new political developments, legal interventions, our publications, important news from the media etc.) on our website. In particular, we reported in details the results of our working meetings with the government's representatives in order to ensure full transparency on our side.

We designed our website to be both an additional channel of outreach to the public and a resource for ourselves and other NGOs, experts or activists, which can be referred to in the future. Over the last 12 months **we have published 166 articles and notes concerning either the problematic of Internet regulation or our project directly**. We received a positive feedback on this resource and our role as important medium in the field of Internet regulation from a few renowned Polish journalists, e.g. Ewa Siedlecka and Edwin Bendyk. All articles related to this project can be accessed under the following URL: http://www.panoptykon.org/taxonomy/term/125.

2.8 Establishing relationships with selected foreign NGOs and civic coalitions

As planned in the project proposal, we became a member of European Digital Rights (EDRi). We attended both General Assemblies that happened over last 12 months (in Barcelona and Amsterdam). Our activity in this network turned out to be quite visible and our voice respected. We could feel that when we were offered to join the management board of EDRi. We contributed to ongoing discussions on all relevant EDRi mailing lists (at present 3) and, occasionally, to the biweekly newsletter (EDRi-Gram).

With regard to research and expertise, we contributed to all public consultations organised by the European Commission in the scope of the five problem areas we decided to follow. We contributed to drafting EDRi shadow report on Data Retention Directive, which we also managed to bring to the Polish news. We joined pan-European campaigns on data retention, Internet blocking, ACTA and net neutrality (sending out letters to MEPs and the European Commission, publishing articles, calling people to action etc.)coordinated by EDRi.

Though our participation in various international events, we were able to establish friendly relationships with the key civil society organisations advocating on digital rights in Europe and in the US: Bits of Freedom, La Quadrature du Net, AK Vorrat, MOGIS, IURI, Electronic Frontier Foundation, Access, EPIC.

3. Lessons learnt for the future

3.1 What is needed to continue effective advocacy in the field of digital rights?

Having analysed our past activity as well as existing and upcoming regulatory challenges, we have identified the following needs as far as research and advocacy in the field of digital rights in Poland is concerned:

   (i)   transfer of knowledge (i.e. legal and political analysis) and experience from "the West" (i.e. from activists, researchers and NGOs based in the UK, US, Netherlands, Belgium, Spain);

   (ii) coordinated research and advocacy in the field of digital rights;

(iii) coherent vision and leadership;

(iv) rising awareness and explaining the problems we see to the public.

A. Transfer of knowledge / contributing to common resources

Regulatory challenges and surveillance-related issues that arise in Poland hardly ever are "new", when compared to other countries, in particular other EU Member States. All issues we deal with have international relevance. At the same time, there is far more research and experience in dealing with these types of issues already available in more developed countries (e.g. "older" EU Member States) than we could generate in Poland. Therefore we believe that – at this stage – it makes much more sense for us to focus on gathering knowledge from existing intellectual centres in Europe and in the US than reinventing similar concepts ourselves.

Building on these resources, we can cooperate with colleagues from abroad and contribute to this "common pool" of policy research (refine legal arguments, exchange practical experience, discuss particular political circumstances etc.). EDRi offers a perfect platform for this type of activity. In addition, we managed to establish direct relationships with a number of activists and civil society organisations through our involvement in international campaigns and visibility at key international events. This network can now be used for the benefit of our activity in Poland.

B. Strengthening cooperation and sharing workload

While we understand that researching, intervening, advocating and rising awareness in the field of digital rights is our job, we have also realised that we should explore the possibilities of sharing the workload we face, resources and know-how with other organisations. Otherwise, being a relatively young and small organisation we face the risk of spreading ourselves thin or even reinventing the wheel in some cases. Therefore **we would like to continue our work on strengthening existing structures of cooperation both within Poland and abroad**.

The biggest challenge we have faced while working in Poland was to find experts who had both time and intellectual capacity to deliver policy-related research. At the same time we realised that in many cases some basic, good quality research on the topic we deal with is already available from other sources (e.g. Oxford Internet Institute, Berkman Center for Internet and Society, EFF or any other EDRi member). Therefore, **cooperation with these intellectual centres seems extremely worthwhile in our case**. Obviously, some additional research will always be needed in order to account for our local specificity and political situation (e.g. how data retention directive has been implemented in Poland; what particular arguments are used to justify Internet blocking; what data is available on cybercrime etc.). However, building on existing international expertise will help us grow our own intellectual resources much faster.

C. Leadership

Our experience also proves that there is a need for a leader organisation, which will inspire actions of other civil society organisations and coordinate advocacy in a given field. Every collective process needs to be managed and the more complex it becomes, the more significant the role of such management is. Coordinating such activities as research, monitoring of legislative process and advocacy does require a lot of specialised knowledge, existing network and specific know how. We believe that Panoptykon Foundation can fulfil such a role for digital rights in Poland. Being active on the topic for more than two years – including coalition building, coordinating social campaigns, talking to the government, working with the media and taking part in various activities of EDRi – we have gained sufficient know how and reputation.

D. Outreach and public awareness

The feedback we keep receiving from the media, politicians and the broader public is that "our topics are difficult". Essentially, the problematic of fundamental rights in the context of digital technologies is perceived as complex, requiring expert knowledge of both law and technology and hardly understandable for "ordinary people". We do believe that this perception can and should be changed, however it does require a lot of work (reinventing conceptual framework, changing the language we

speak, searching for individual cases to be used as examples etc.). Comparing our Polish experience with what we observe in some Western countries (UK, Netherlands, Germany), we see entirely different level of public debate and base knowledge about such issues as surveillance and digital rights. This problem has to be addressed by educating selected journalists, politicians and, to the extent it is possible for us, rising awareness of the broader public.

3.2 What next?

We are going to use these lessons in the new project starting October 2011, named "Digital surveillance, digital rights". Two Open Society Foundations programmes: Information Programme and Think Tank Fund kindly agreed to co-fund this project. Its goals and objectives are similar to the ones pursued over the past 12 months. The key changes, made on the basis of the lessons learnt from this project, concern our working methods and the scope of our activities. For more details and full project description please see the project proposal together with the background paper as send to the Open Society Foundations team on the 1st of August 2011.