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HUMAN RIGHTS AND RULE OF LAW

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EXPERTISE BY COUNCIL OF EUROPE EXPERTS[1] ON HUNGARIAN MEDIA LEGISLATION:

ACT CIV OF 2010 ON THE FREEDOM OF THE PRESS AND THE FUNDAMENTAL RULES ON MEDIA CONTENT

and

ACT CLXXXV OF 2010 ON MEDIA SERVICES AND MASS MEDIA

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INTRODUCTION

This expert analysis covers two Hungarian laws - *Act CIV of 9 November 2010 on the freedom of the press and the fundamental rules on media content* (Act CIV) and *Act CLXXXV of 30 December 2010 on media services and on the mass media* (Act CLXXXV) (and together called "the Media Acts").

The two Acts were adopted by the Hungarian Parliament at the end of a complicated process, surrounded by some controversy, lasting a mere 8 or 9 months following the April 2010 elections when the Hungarian Civic Union - Christian Democratic People's Party (*Fidesz-KDNP)* coalition obtained more than two thirds of the seats.

In the wake of their adoption, the Media Acts attracted widespread criticism from both domestic and international organisations, such as the European Commission, the European Parliament[2], the OSCE Representative on Freedom of the Media[3] and the Commissioner for Human Rights of the CoE[4], as well as academic institutions[5], media professional organisations and the media themselves. Misgivings in respect of the Media Acts are compounded by concern about governance changes resulting from other recently adopted laws which, together, are seen as a threat to fundamental democratic freedoms.

Due to these criticisms, some amendments were introduced to the media laws after their enactment. However, these reforms have been considered by many as insufficient and critics continue to express serious concern. Decision 1746/B/2010 of 19 December 2011 of the Constitutional Court, which is an important milestone in this process, supported some of the concerns expressed and various amendments to the two acts have since been proposed. This analysis takes account of the suggested amendments submitted in May 2012.

The purpose of this Council of Europe (CoE) expertise is to assess compliance of the Media Acts (as proposed to be amended in May 2012) with the European Convention on Human Rights (ECHR), the European Convention on Transfrontier Television (ECTT) and CoE recommendations and other standard-setting texts in the field of media and freedom of expression. It takes into account relevant case law in the European Court of Human Rights. Recommendations for amendment of the Media Acts are made to reduce the risk of legal action being taken against the Hungarian authorities for breaches of European law.

The expertise was conducted using English translations of the two Acts produced for and by the CoE, which were compared with other English language versions available publicly. It was written at the request of the CoE by Ms Eve Salomon, Regulatory and Media Law Expert, UK, and Dr Joan Barata Mir, Blanquerna Communications School, URL, Spain.

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[2] See the Resolution of 10 March 2011
[3] See the analysis and assessment prepared by Karol Jakubowicz: http://www.osce.org/fom/71218
[4] See the Report dated on 25 February 2011: https://wcd.coe.int/ViewDoc.jsp?id=1751289
[5] See the Report prepared by the Center for Media and Communication Studies on the consistency of Hungary's media laws with European practices and norms: https://cmcs.ceu.hu/news/2012-01-05/new-study-hungarian-media-laws-in-europe-an-assessment-of-the-consistency-of-hungary.

In addition to examining the Media Acts (primary source), the Council of Europe experts evaluated a wide range of commentaries, including that contained in the correspondence between the Council of Europe's Commissioner for Human Rights and the Hungarian Minister of State for Government Communication and in the Commissioner's Opinion published on 25 February 2011. They were also apprised of commentary posted at *hunmedialaw.org* and that produced by the Centre for Communication Studies at the Central European University in Budapest[6].

Relying on secondary sources, the experts also took account of Decision 1746/B/2010 of the Hungarian Constitutional Court, including commentary posted at *hunmedialaw.org* by the Media Council of the National Media and Infocommunications Authority.

The existence of a free, pluralistic media sector is universally acknowledged as a cornerstone of democracy. Good regulation of the media (including, where appropriate, *no regulation*) creates an environment in which the media can perform the functions required of them by society. European standards seek to secure media freedom and underpin democracy; departure from those norms may undermine democracy.

Regulators are subject to laws that define their responsibilities and procedures. The overall governance of a regulatory system has to be capable of guaranteeing, and be seen to guarantee, independence from political influence and control. Regulators should be accountable to Parliament (and to the regulated industries and the general public). Flaws in this basic set-up are likely to upset the desirable balance and can, as a result, have adverse consequences for media freedom.

There is no doubt that the political environment in which politicians operate is fraught with conflicting interests, pressures and constraints, including those related to electoral processes or stemming from political aspirations. This may well lead to interference by politicians in regulatory processes if the independence of regulators is not secured. It is therefore imperative that as many structural safeguards as possible are in place to shield the regulator from political pressure or interference. In particular, the means of appointment (and dismissal) of regulators and the funding of the regulatory authority should not be politically motivated.

In the case of the Media Acts, the processes for appointments to the media regulatory bodies (the Media Council, the Board of Trustees of the Public Service Foundation, and the Public Service Board) do not ensure political neutrality or independence. Existing safeguards in Act CLXXXV are greatly undermined by the fact that the current government of Hungary has a two-thirds parliamentary majority. This overwhelming majority unbalances the checks that were intended to ensure political independence. To comply with Council of Europe standards – and to allay criticism – the appointments process should therefore be revised.

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[6]https://cmcs.ceu.hu/sites/default/files/field_attachment/news/node-27293/Hungarian_Media_Laws_in_Europe_0.pdf

Another major criticism levelled in respect of the Media Acts is the inclusion of all media (including online) services within its purview. There is no democratic European precedent regulating print and comparable online media content (i.e. excluding on-demand audiovisual media services) *beyond the scope of general legislation*.

On 19 December 2011, the Hungarian Constitutional Court in its Decision 1746/B/2010 ruled many of these provisions unconstitutional insofar as they related to the press and should therefore be repealed (in particular as regards the need to defend human dignity, constitutional order and privacy, and the right to retract an interview). They were considered too vague to be applied and interpreted by an administrative authority.

The Constitutional Court also decided to annul provisions that did not adequately safeguard the right of journalists to keep secret the identity of sources where there was no overriding public interest reason otherwise; such decision is to be taken by a court. This was regarded inconsistent with relevant European Court of Human Rights case law and Council of Europe standard-setting texts.

The Court did not, however, annul the obligation for the printed and online press to register with the Media Council. The broad terms of this obligation renders it largely unenforceable and it serves little purpose (especially given that a number of content requirements have been annulled). The related, considerable, criticism would subside should the Hungarian authorities rescind this obligation when revising the Media Acts.

The Court also annulled some of the inspection powers conferred to the media regulatory authority and the powers conferred to the Media and Telecommunications Commissioner. The Hungarian authorities have proposed amendments to the powers conferred on the Media and Communications Commissioner insofar as they refer to media providers and press services but problems remain as regards the Commissioner's ability to influence media regulatory authorities and with the lack of a right of appeal for electronic communication service providers.

RELEVANT COUNCIL OF EUROPE STANDARDS

This expertise is based primarily on binding legal instruments which provide protection for the right to freedom of expression and information in the Council of Europe member states. It refers to Article 10 (and related provisions) of the European Convention on Human Rights (ECHR) and the related case law developed over several decades by the European Court of Human Rights (ECtHR).

The Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE) have adopted numerous recommendations, declarations and other non-binding texts which clarify and develop principles, requirements and minimum standards regarding the effective protection of rights included in Article 10 ECHR.

This set of documents includes:

1. European Convention on Human Rights

In particular, Article 10 which states that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Regard must also be had to Article 6 which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

And Article 8:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Hungary is a member of the Council of Europe and a signatory to the European Convention on Human Rights.

2. European Convention on Transfrontier Television, as amended by the Protocol (ETS No.171). Hungary ratified on 1 October 2000 the Convention which sets out a number of provisions to facilitate the transfrontier transmission and retransmission of television programmes.

3. European Charter for Regional or Minority Languages 1992. Hungary ratified in 1995 the Charter, which includes an undertaking by the Parties (Article 11) to encourage and/or facilitate the creation of at least one radio station and one television channel in the regional or

minority language, and to ensure that the interests of users of such languages are represented or taken into account within bodies set up to guarantee media freedom and pluralism.

4. Committee of Ministers Recommendation (96)10 on the guarantee of the independence of public service broadcasting which includes detailed guidelines on the establishment and governance of public broadcasters.

5. Committee of Ministers Recommendation No. R (97)20 on 'hate speech', which defines the term as follows: "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".

6. Committee of Ministers Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector recommends that the Member States, *inter alia*, "include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation".

7. Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 26 March 2008

8. Committee of Ministers Recommendation Rec(2002)2 on access to official documents which states that member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

9. Committee of Ministers Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting which sets out principles for member states to apply to the development of digital broadcasting.

10. Committee of Ministers Recommendation R (2000)7 on the right of journalists not to disclose their sources of information ensures the right of journalists to protect their sources of information in accordance with Council of Europe standards.

11. Declaration of the Committee of Ministers on the protection and promotion of investigative journalism, adopted on 26 September 2007.

12. Parliamentary Assembly (PACE) Recommendation 1950 (2011) on the protection of journalists' sources.

13. Committee of Ministers Recommendation Rec(2007)2 on media pluralism and diversity of media content which highlights the need to monitor and act on undue media concentration, and stresses the importance of public broadcasting and not-for-profit broadcasters to increase plurality and diversity.

14. Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration, adopted on 31 January 2007.

15. PACE Resolution 1636 (2008) on Indicators for Media in a Democracy which includes principles (8.25 and 8.26) encouraging media self-regulation, including a right of reply and correction or voluntary apologies by journalists. These measures should be recognised legally by the courts. The Resolution also, at 8.15 includes a principle that print and internet-based media should not be required to hold licences or registrations other than for business or tax purposes.

16. Committee of Ministers Recommendation CM/Rec(2009)5 on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment and CM/Rec(2007)11 on promoting freedom of expression and information in the new information and communications environment both of which reinforce the importance of Article 10 ECHR and promote the empowerment of individual users through the provision of 'safe places' for children on the internet, encouraging labelling, and media literacy training rather than censorship.

17. Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue, adopted on 11 February 2009.

18. Committee of Ministers Recommendation CM/Rec (2011)7 on a new notion of media, which lists the standards to be applied to media in the new eco-system.

19. Committee of Ministers Recommendation CM/Rec(2012)1 on public service media governance.

20. Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights, adopted on 13 January 2010.

21. Declaration of the Committee of Ministers on protecting the dignity, security and privacy of children on the internet, adopted on 20 February 2008.

22. Committee of Ministers Recommendation CM/Rec (2007)16 on measures to promote the public service value of the Internet, adopted on 7 November 2007.

23. Committee of Ministers Recommendation CM/Rec (2007)15 on measures concerning media coverage of election campaigns, adopted on 7 November 2007.

24. Committee of Ministers Guidelines on protecting freedom of expression and information in times of crisis, adopted on 26 September 2007.

25. Committee of Ministers Recommendation Rec (2007)3 on the remit of public service media in the information society.

26. Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted on 27 September 2006.

27. Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society (CM (2005)56 final).

28. Committee of Ministers Recommendation Rec (2004)16 on the right of reply in the new media environment.

29. Declaration of the Committee of Ministers on freedom of political debate in the media, adopted on 12 February 2004.

30. Declaration of the Committee of Ministers on cultural diversity, adopted on 7 December 2000.

31. Committee of Ministers Recommendation No. R (99)15 on measures concerning media coverage of election campaigns.

32. Committee of Ministers Recommendation No. R (99)1 on measures to promote media pluralism.

33. Committee of Ministers Recommendation No. R (97)21 on the media and the promotion of a culture of tolerance.

34. Committee of Ministers Recommendation No. R (94)13 on measures to promote media transparency.

35. Declaration of the Committee of Ministers on freedom of expression and information, adopted on 29 April 1982.

36. Committee of Ministers Recommendation No. R (81)19 on the access to information held by public authorities.

37. Resolution of the Committee of Ministers (74)43 on press concentrations.

38. Resolution of the Committee of Ministers (74) 26 on the right of reply - position of the individual in relation to the press.

MAIN ISSUES and DETAILED COMMENTARY

General scope and clarity

Act CIV establishes some basic norms regarding the general scope and protection of freedom of the press and freedom of information in Hungary. Act CLXXXV contains detailed rules for the regulation of the Hungarian media, within the general framework of Act CIV. Thus, Act CLXXXV elaborates in detail the general provisions established in Act CIV.

The main feature of laws in any legal system should be clarity and certainty. Certain provisions in the Acts might be confusing in terms of scope and applicability. For example, the definition of "press products" potentially covers any online news provision, regardless of whether or not that is the main purpose of the site, as well as all printed periodical magazines whether or not they include news.

As the Commissioner for Human Rights of the Council of Europe Thomas Hammarberg said in his Opinion, regulations and law which interfere with the rights and freedoms set out in the ECHR must be precise and foreseeable. In other words, regulations must be drafted with sufficient clarity for those who are regulated to know what compliance looks like and what the precise consequences of non-compliance are. This has also been borne out in relevant case law of the ECtHR[7].

Recommendation: concepts used by the legislator should be simplified, eliminating those that are repetitive and may generate interpretative uncertainties, in particular regarding provisions in which the present wording uses both "subjective" and "objective" application criteria.

Jurisdiction

Under Article 2 of *Act CIV*, the law applies to the activities of media content providers established in Hungary. However, Article 3 of *Act CIV* and Article 1 (5) and (6) of Act CLXXXV widen the scope to media services and press products that are targeted at or distributed in Hungary. Apparently, this not only determines the applicability of "substantive" regulations (for example, in terms of content regulation), but also implies that the regulatory authority "may proceed and apply sanctions" to media content providers that are not otherwise subject to Hungarian jurisdiction.

[7] The Court points out that the expression "prescribed by law", within the meaning of Article 10 § 2, refers, not only to the need that there be a provision in domestic law, but also to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law (see *Kruslin v. France*, judgment of 24 April 1990, Series A No. 176-A, p. 20, § 27 ; *Sunday Times v. UK n° 1*, judgment of 26 April 1979, Reports of Judgments and Decisions No. 30, p. 31, § 49).

The circumstances in which this can happen (Article 178.1(a) of Act CLXXXV) are wider than the derogations permitted under Article 10.2 of the ECHR**.** In any event, it is not acceptable for an administrative body, rather than a court, to determine whether there has been a breach of Article 10 or whether interference by such a body is proportionate. ***This must be reserved to the Court***[8]**.** Furthermore, any intervention concerning the dissemination of online content could only amount to blocking of that content, contrary to Council of Europe recommendations (with the possible exception of child sexual abuse content).

Questions also arise as to the enforceability of these provisions, given that the Media Council will, as matters stand, have no authority to require registration of press products or websites outside the jurisdiction, nor will it be able to enforce sanctions. It is therefore doubtful that these legal provisions serve a useful purpose.

Article 10 ECHR clearly establishes that freedom of expression and, as a corollary, freedom of the press should be exercised "regardless of frontiers". European Union regulations on audiovisual media services have established criteria to deal with problems that may arise in services which are established in other jurisdictions. However, Act CIV can be interpreted to mean that most Hungarian legal substantive and administrative burdens are extended to providers that are not established in the country, irrespective of the kind of media service involved.

Such regulations and the uncertainties that they raise may have a chilling effect. Foreign media content providers may be reluctant to be subjected to a regulatory system that could conflict with their domestic jurisdiction. This may lead to a situation of "protectionism" for Hungarian content and could theoretically establish complete control by the Hungarian authorities over any media content available to Hungarian citizens.

Recommendation: In order to ensure compliance with ECHR requirements, Act CIV should be amended so that Hungarian media regulation only applies to media content providers established in Hungary, without prejudice to the introduction of specific, proportionate and clear rules and exceptions in this area (e.g. those that derive from EU Directives and other international agreements in the field of audiovisual media services); this would entail certain consequential changes to Act CLXXXV.

Registration and transparency

Several provisions of Act CIV (and consequently of Act CLXXXV) apply without distinction to print and to audiovisual media.

[8] According to ECtHR case law, a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power (Association *Ekin v. France*, n° 39288/98, Judgment of 17 July 2001, Reports of Judgments and Decisions, 2001-VIII, § 58. See also *Lombardi Vallauri*, n° 39128/05, 20 October 2009, § 46)

Article 10 ECHR and the case law of the ECtHR accept the intervention of administrative authorities in regulation (licensing in respect of high impact audiovisual media which employ scarce spectrum resources, including for the purpose of ensuring pluralism and diversity in the media offer). By contrast, no Council of Europe standard declares an express need for registration of the printed and online press: PACE Resolution 1636 (8.15) says, "8.15. Regulatory authorities for the broadcasting media must function in an unbiased and effective manner, for instance when granting licences. Print media and Internet-based media should not be required to hold a state licence which goes beyond a mere business or tax registration."

Articles 41-46 of Act CLXXXV relate to registration procedures for media services. It is not clear from the provisions contained in these Articles what exactly should be registered. It seems that different singular services should be separately registered, even if they are offered by one single provider. However, the detailed wording of these Articles, in particular if we look at the requirements and information to be filled in, seems to be focused on the provider, rather than on the different services that it may offer, apparently with the exception of those cases in which services are of different kinds (for example, providing both linear audiovisual and press services).

The obligation to register has caused a considerable unease amongst media, international organisations and commentators. Hungary does not require ownership of (non-media) businesses to be put on the public record, yet all businesses must register at the competent court of registration[9]. It is not clear why additional registration requirements are applied to media businesses, especially the printed and online press. This should be revised, following the December 2011 decision of the Constitutional Court, given that the Media Council will have a limited role in this respect. Registration is not a purely administrative procedure which in itself would duplicate existing business obligations and should therefore be considered disproportionate and burdensome given the sanctions (up to HUF one million) that can be imposed for failure to register. This duplicative administrative procedure is contrary to Hungary's own regulation and administrative burden reduction programme in place since 1987.

In his letter dated 30 May 2011 to Commissioner Hammarberg, Dr Zoltan Kovacs, on behalf of the Ministry of Public Administration and Justice, justifies registration on the grounds of transparency so that "copyright holders, enterprises or individuals" can seek remedies if their rights are violated. Given the information that must be published in accordance with the provisions of Article 37 of Act CLXXXV, the objective advanced by Dr Kovacs can be achieved without further registration requirements; Dr Kovacs offers no additional reasoning why registration with the Media Council is required.

[9] http://ec.europa.eu/youreurope/business/starting-business/setting-up/hungary/index_en.htm

Recommendation: Act CLXXXV (and the whole legal framework) should clearly separate the general rules that apply to all kinds of media (including print media), to be enforced by ordinary courts, from those specific rules that only cover audiovisual media services and are primarily enforced by a specialised administrative regulatory body. The registration process for linear media services that do not make use of scarce resources should be substituted by a simple ex ante notification procedure. [10] ***Moreover, registration should not be required of printed and online press services by an administrative media authority; ordinary business registration requirements should apply. To require registration is contrary to the principles of proportionality clearly established by the jurisprudence of the ECtHR*** [11]**.**

Article 42 (6) of Act CLXXXV establishes several reasons to justify a refusal to register a linear media service: among others, they include the fact that the designation of the notified media service is identical with another designation already registered, or that the notifier fails to pay the administrative service fee. These two reasons are excessive for limiting the exercise of freedom of expression and information, when it is obvious that the law and the administrative authority could use several instruments to correct and to redress such failures. This is also the case, except for the requirement to have paid the administrative fee, in Article 45 of Act CLXXXV regarding the notification process for on-demand media services.

Recommendation: some of the reasons to refuse to register linear media services and on-demand media services should be revised and substituted with a more proportionate and less cumbersome administrative intervention. Article 44(1) of Act CLXXXV should also be amended so that no fees are payable by the printed and online press services.

Under Articles 45-47(5)(d) of Act CLXXXV, a provider will be struck off if there is a court order for trademark infringement concerning the use of the provider's name.

Recommendation: This should be amended so that it only applies if the provider fails to abide by the terms of the court order; such consequences should not apply if the name is changed.

Article 37 of Act CLXXXV states that media service providers shall at all times make available to the general public information including the name, address, telephone number, competent authorities for jurisdiction and self-regulatory organisations to which they adhere. Transparency is a key tool for promoting effective media pluralism. The Hungarian law establishes an obligation to make public a few elements

[10] See Article 10.1 ECHR in fine.
[11] See *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95 ECtHR

on media outlets, whilst ignoring those that probably are the most important ones, as remarked by the Council of Europe in several documents[12]:

- persons or bodies participating in the structure of the media and the nature and the extent of the engagement of these persons or bodies in the structure concerned,
- nature and extent of the interests held by the above persons and bodies in other media or in media enterprises,
- other persons or bodies likely to exercise a significant influence on the programming policy or editorial policy,
- support measures granted to the media,
- procedure to be applied in respect of the right to reply and complaint, etc.

Recommendation: this Article should be amended in order to incorporate an effective and comprehensive obligation of transparency for all media outlets.

It might be recalled that provisions in Article 175 of Act CLXXXV on disclosure of data have been declared unconstitutional by the Constitutional Court.

Content regulation

A number of provisions included in Act CIV establish rules which can serve to limit freedom of expression and information. Some of these restrictions cause concern when analysed in light of the relevant Council of Europe standards. Article 10 of Act CIV, for example, establishes that all persons shall have the right "to receive **proper** information on public affairs…" and that the media system shall provide "**authentic**, rapid and accurate information on those affairs and events". In the same vein, Article 13 states that linear media services which supply information shall provide "**comprehensive**, **factual**, up-to-date, **objective** and **balanced** coverage" on public issues. (This Article was amended in March 2011 so that the "balanced coverage" requirement applies only to linear media services and no longer to non-linear media services). Finally, Article 17, (which was also amended in March 2011), after stipulating that media content may not be discriminatory, says that "media content may **not exclude** persons, nations, communities, national, ethnic, linguistic and other minorities or any majority as well as any church or religious groups".

Article 10 ECHR and the related ECtHR jurisprudence are clear that public authorities must refrain from undue interference in media content. The protection provided by Article 10 for freedom of expression and information requires that any

[12] See in particular Committee of Ministers' Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content (adopted on 31 January 2007), according to which member states should encourage the media to empower the public to make its own analysis of information, ideas and opinions expressed in the media.

restriction should be prescribed by law and necessary in a democratic society. Legal provisions cannot be vague or too broad, and must be interpreted narrowly, connected always to the aims, principles and rights that ultimately justify the imposition of such limits. Thus, any restriction must be established and applied taking into account its tangible impact and the need for strict proportionality. Norms that govern freedom of communication should be clear, both in terms of establishing a general substantive regime and in determining the legal consequences of possible violations. If these main criteria are not respected, there is not only a serious risk of lack of protection of Article 10 ECHR rights in individual cases, but also of producing a chilling effect on general media freedom and independence, to the extent that citizens and media companies would not be able to foresee in which cases they will be infringing the law.

Consequently, some aspects of the provisions mentioned above do not conform to these Council of Europe standards or at least they create the risk of a possible inappropriate application according to such criteria.

The accumulation of adjectives in the law, such as "proper", "authentic", "factual", "objective" and "balanced", raises several concerns of state control of the dissemination of information. Council of Europe standards require that dissemination of information should meet some minimum requirements in order to be protected. However, the presence of the above-mentioned wide range of criteria in the Hungarian legislation leads to a situation of intolerable uncertainty. They clearly open the door to subjective interpretations in which reports on complex or controversial matters (especially regarding politics) might be seen as "inappropriate", "unauthentic" on not completely "factual". Despite the fact that in other European legislations requirements of objectivity or balance may be legitimately imposed (for instance, in the UK), domestic norms usually provide an accurate definition of such terms. In these cases, a well-balanced distinction is made between the interpretation of these notions when applied to private media (in a lighter version) or to public-service media (more strict). At any rate, it must be guaranteed that the imposition of such requirements does not hinder the media outlets' ability to establish and follow their own editorial guidelines and orientation.

The requirements set out in the Media Acts pose a risk, within the concrete Hungarian environment, of granting excessive discretion to authorities to punish information providers who give particular relevance or coverage to issues that are not in line with the majority political mainstream, or media outlets that legitimately construct and conduct their informative agenda according to their own editorial perspective.

The Constitutional Court ruled in December 2011 that certain content requirements should not apply to the printed and online press services. The amendments proposed to Act CIV in 2012 appear to satisfy the Constitutional Court's objections. However, Act CLXXXV has not been amended in this regard so that problems of scope, excessive administrative intervention and above all, serious legal uncertainty still remain valid.

For example, the requirement imposed in Article 12 of Act CLXXXV to all media clearly to differentiate between information and opinion could be used to punish the effective exercise of editorial independence by media. Despite the legitimate need to guarantee a reasonable degree of separation between information and opinion – particularly in the broadcast media - such a strict distinction is impossible to apply to new emerging media and may have the effect of making certain media refrain from expressing their views when covering public affairs.[13]

Recommendation: this matter should be urgently clarified; in particular, the Media Council should not retain administrative regulatory authority (whether in terms of content or licensing) over print (and online) media. Moreover, as regards media that remain under the regulatory authority of the Media Council, the criteria mentioned above should be withdrawn from Act CIV and Act CLXXXV and be substituted with clearer and simpler requirements (for example accuracy and balance), in line with European standards and the legislation of other Council of Europe member states. The law must also provide its interpreters with a definition of such mandates, in order to eliminate possible margins of discretion which would be in breach of European law.

Section 14(2) of Act CIV applies to the press as well as other media services. The amendments proposed in 2012 require that "no self-gratifying and detrimental coverage of the deceased and persons in humiliating or defenceless situations is allowed in the media content."

It should be noted that there remains a serious risk that Article 14(2) could be challenged as unacceptably extending the derogations permitted in Art. 10(2) of the ECHR. In particular, the blanket prohibition on "detrimental coverage of the deceased" is difficult to justify: should there be no criticism of dead tyrants or criminals? There do not appear to be any rights regarding the reputation of the deceased in Hungary's defamation laws and it is therefore bizarre to be adding such a provision to the media laws. Whereas it may be justified to prohibit, for example, the portrayal of corpses in news programmes broadcast while children are viewing, it is difficult to justify any general extension of special privilege to the deceased.

Recommendation: The restrictions set out in Article 14(2) must be circumscribed to ensure they do not extend beyond the limited derogations permitted in Article 10.2

[13] The Court "in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (see, for example, *Pedersen and Baadsgaard*, § 76).

ECHR and relevant case law. Whereas some restrictions may be justifiable to audiovisual media services, there is no justification for extending them to the press.

Article 15 provides that any statement by or concerning anything "official" cannot be modified without consent. This amounts to a pre-publication right to censorship even though, in cases of significant inaccuracies, the right of correction set out in Article 12 should suffice. These concerns remain valid even after the proposed amendment of Article 15, in which most of these elements of pre-publication consent remain. In any case, a specific regulation regarding the publication of such kind of statements looks intrusive and difficult to justify within the framework of Article 10.2 ECHR. It should be noted that although the proposed amendment of section 182 (c) of Act CLXXXV eliminates any administrative intervention in this area, leaving this issue to the competence of civil and criminal courts, any pre-publication rights must be properly circumscribed and limited[14].

It should be recalled that one key aspect of the protection provided to freedom of expression and information by Article 10 ECHR is the fact that it particularly safeguards the capacity of media outlets and professionals to disseminate negative information and critical opinions about the status quo, in particular regarding current political affairs. Citizens should be able to criticise as well as to have access to critical views in respect of majority political viewpoints, to any kind of idea, dogma of belief and, of course, in respect of public institutions. According to the ECtHR, these elements are pre-requisites for an effective scrutiny of political figures and a key factor in the democratic process. This would even include those opinions that may "offend, shock or disturb the State or any sector of the population" (in the famous wording of *Handyside v. the United Kingdom*, 7 December 1976).

Bearing all this in mind, the wording of section 16 of Act CIV should be analyzed. In its current version it establishes that media service providers "shall respect the constitutional order of the Republic of Hungary and shall not violate human rights in the course of their operations", whereas the proposed amendment states that media content "shall not violate the constitutional order". This apparently less intrusive new wording does not solve the problems raised by the first version of the legal text. This idea of respect or even non violation of the constitutional order may lead to an interpretation that any editorial criticism against the current institutional system could potentially be seen as illegal. In other words, it is too wide and ambiguous to establish that the constitutional order as a whole should not be violated, bearing in mind that the essential mission of the legislative power is to establish specific duties and obligations in order to develop and concretize the constitutional framework. At the same time, it is difficult to understand why the original requirement not to violate human rights has been proposed to be eliminated. At any rate, in this delicate area it

[14] See the EctHR decision *Mosley v. United Kingdom* of 10 May 2011.

seems that only a remit for public service media to actively promote constitutional values and principles would be acceptable under the Council of Europe standards.

Along the same line, the wording of Article 17 of Act CIV raises important concerns when it prohibits the exclusion of persons, nations, communities, national, ethnic, linguistic and other minorities or any majority as well as any church or religious groups. While it is true that ECtHR jurisprudence clearly establishes that Article 10 ECHR does not give protection to all kinds of offensive content (especially when it attacks someone's reputation and even certain important convictions), it is also true that such limits should be established and enforced in a very narrow and restrictive way. The general prohibition to "offend and exclude", even in an "implied manner" a wide and heterogeneous group of communities (surprisingly including "any majority") can only be judged as an extremely vague and subjective limitation, that may easily lead to arbitrary and disproportionate decisions of the public authorities vis-à-vis the dissemination of opinions and information.

Consequently, Article 16 and 17 (especially Article 17.2) of Act CIV restrictions are far too broad and may well cause a serious chilling effect on media content, for example, with relation to humour and satire.

Article 18 of Act CIV regarding content invasive of privacy does not provide the necessary elements to render the results of its application foreseeable, neither in connection with the requirements of Article 10 nor Article 8 of the European Convention on Human Rights. In this case, the proposed amendment to repeal such provision is welcome.

Article 19 of Act CIV goes beyond the provisions contained in the ECTT. It refers to the "intellectual, spiritual, moral or physical development of minors" whereas ECTT says "physical, mental or moral development". It is not clear how material could be said to damage intellectual or spiritual development. For its part, Article 9 (6) of Act CLXXXV does not refer to "intellectual" or "spiritual" development. The minor proposed amendment to be incorporated to the wording of Article 19 does not seem to solve this problems in any sense as it only refers, in the same terms, to the "representation of minors in media content" (which could be interpreted as already covered by the original version of this Article), and can thus be considered as redundant.

Article 20 of Act CIV refers to commercial communications and includes a prohibition on offending religious[15] or ideological convictions. It is not clear what this means, or how widely "ideological convictions" may be interpreted. Additionally, no

[15] See Venice Commission report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred (Adopted by the Venice Commission at its 76th Plenary Session, Venice, 17-18 October 2008). See also ECtHR *Aydin Tatlav v. Turkey,* n° 50692/99, judgment of 2 May 2006 §§ 28-30)

exceptions have been made for specialist media (e.g. an advertisement for a Christian product could offend Muslims).

Article 28.1(a) of Act CLXXXV prohibits sponsorship of news and "political information programmes". The ECTT refers to "current affairs programmes" which is a wider category than this. ***The wording of the ECTT should be used.***

Recommendation: the abovementioned provisions should be thoroughly revised, content requirements better clarified, and those that are redundant or ambiguous must be eliminated.

Certain of the concerns expressed above are amplified by the wording of Article 181 of Act CLXXXV. According to this Article, the administrative media regulatory authority has the general competence of handling all requests regarding possible infringements of the obligation of balanced information by any kind of media, and through specific administrative proceedings. Requests may come from any citizen and also from "the party subscribing to the unrepresented view". The authority cannot open those proceedings of its own motion.

Article 181 of Act CLXXXV also establishes a burdensome procedure that may end either with a declaration of infringement (that will have to be published) or with the imposition of the duty to provide the petitioner with an opportunity to present his/her own viewpoint. This procedure can be seen as inspired by the procedure that guarantees the right to reply or correction (see further comments under print media, below). However, in these latter cases, at stake is the need to correct a false statement that may cause a direct damage.

The establishment of an administrative procedure just to deal with cases in which a certain person or entity may feel "unrepresented" appears to be disproportionate and may negatively affect media interest in deploying information activities. Moreover, the law places in the hands of the media authority the responsibility to apply, in individual cases, a very vague principle which is normally interpreted and applied by media outlets according to journalistic professional principles and by internal governing or supervisory bodies in cases of public service media. Moreover, the fact that such an intrusive competence is given to an administrative authority (including in the case of print media) instead of a Court, is another reason for criticism and concern.

Recommendation: the provisions included in Article 181 of Act CLXXXV should be repealed.

Article 36(6) of Act CLXXXV requires public media to set aside two minutes per clock hour for public service announcements. This is contrary to Council of Europe Recommendation R(96)10 which restricts the obligation on such public announcements to "exceptional circumstances expressly laid down in laws or regulations."

Recommendation: the requirement set out in Article 36(6) to set aside two minutes per clock hour for public service announcements should be removed.

A final reference to a provision regarding media content regulation included in a different Hungarian law has to be made in this section. Section 5 of the Act CCXI of 2011 on the protection of families provides that "in support of the objectives enshrined in this Act and of child protection, media providers shall be obliged to provide their services by according respect to the institution of marriage and the value of the family and parenting (…). The legal consequences applicable to breaches of law committed by media providers shall be regulated by the relevant act of parliament". It has to be kept in mind that this Act provides a definition of family as based on the marriage of a man and a woman. It looks very difficult to justify, according to the above mentioned Council of Europe standards and the ECtHR jurisprudence, that editorial independence of media outlets should be limited in the sense that, for example, a positive or non-critical presentation of extra-marital relationships or gay marriage issues could be seen as illegal and thus sanctioned. Such approach would not only violate freedom of expression under article 10 ECHR but will also interfere with the right to freedom of conscience protected by article 9.

Recommendation: the requirement set out in Section 5 of the Act CCXI of 2011 regarding the need to respect the institution of marriage and the value of family and parenting should be removed.

Obligations on news coverage

Article 13 of Act CIV has already been referred to above; nonetheless, further reflection is needed about its requirement that linear media services (a notion that might include certain online information services) which provide news coverage shall do so in a way that is "comprehensive, factual, up-to-date, objective and balanced" in relation to any local, national, or European issue that may be of interest or is relevant to Hungarians. This should be compared to Article 7.3 ECTT which says, "broadcasters shall ensure news fairly presents facts and events and encourages the free formation of opinions".

Dr Zoltan Kovacs, on behalf of the Ministry of Public Administration and Justice, in his letter to Commissioner Hammarberg of 30 May 2011, explains that the obligation for 'balanced' coverage has been included in Hungarian law since 1996 and is well understood. While this explanation partially mitigates misgivings, there remain concerns as regards 'comprehensive'. This goes beyond providing that news coverage must be 'balanced' (which arguably equates to 'fair' in the ECTT), as it *obliges* linear media services to provide comprehensive coverage of all issues of interest or relevance to Hungarians. This interferes with editorial freedom to decide what to cover. Whereas it may be more appropriate for PSB, it is not for private broadcasters and the wider obligations – beyond 'balance' – should be limited only to the public broadcaster.

Recommendation: Article 13 of Act CIV should be reviewed so as to provide clarity and legal certainty; while news coverage by certain linear (broadcast) media may be expected to be "factual and balanced", other prescriptions for news coverage may fit non-binding guidance rather than law.

Article 38(1) and (2) of Act CLXXXV obliges any audiovisual media service provider with over 15% audience share to broadcast a minimum amount of news during weekday prime time on their most popular service. *Unless media service providers commit to providing news in the licence tendering process, news obligations placed on private broadcasters have to be examined carefully from an Article 10 ECHR perspective.*[16] Further, the limitation that no more than 20% of the news coverage can be from other media service providers means that each of the affected media service providers must have their own news service. Whilst this might not seem a large burden for local or even national news, it is not reasonable to expect every significant Hungarian media service provider to have their own international news service. Therefore, the net effect of this restriction may be to limit the amount of international news that can be reported. The Article also restricts the amount of news content or reports adapted from other media service providers, or news content that does "not provide information under the democratic principles for the participation of citizens," which is not defined.

Recommendation: Article 38(1) and (2) of Act CLXXXV represents a significant interference with editorial freedom with potential costs implications for the media concerned and should therefore be repealed; the media in question could be encouraged to include news provision in their tender applications (by including this as a specific factor to be taken into consideration in the tender notice).

Protection of sources

There is a lack of clarity in the interaction between Articles 6(2) and (3) of Act CIV. Whereas Article 6(3) states that sources can be ordered to be revealed in exceptional cases (to protect national security or uncover or prevent criminal acts), Article 6(2) stipulates that journalists may protect their sources only if the information supplied was in the public interest. This proviso is far too loose.[17]

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[16] See CoE Committee of Ministers Declaration on the allocation and management of the digital dividend and the public interest (20 February 2008) or Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, as well as the general aspiration as to quality content that stem from CoE recommendations on public service broadcasting and public service media and explanatory memoranda.

[17] See Committee of Ministers Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information and its Explanatory Memorandum, and also ECtHR *Goodwin v. the UK*, judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, § 39 (general principals); *Sanoma Uitgevers B.V. v. the Netherlands*, judgment of 14 September 2010, §§ 90-92 (ex-ante character of independent review).

PACE Recommendation 1950 (2011) on the protection of journalists' sources at Paragraph 4 said: "Referring to the new Press and Media Law of Hungary (Law CIV of 2010 on the freedom of the press and the fundamental rules on media content), the Assembly expresses its concern that limits to the exercise of media freedom fixed by Article 4.3 and the exceptions to the right of journalists not to disclose their sources stipulated in Article 6 of this law seem to be overly broad and thus may have a severe chilling effect on media freedom. This law sets forth neither the procedural conditions concerning disclosures nor guarantees for journalists requested to disclose their sources. The Assembly calls on the Government and Parliament of Hungary to amend this law, ensuring that its implementation cannot hinder the right recognised by Article 10 of the Convention."

The Hungarian Constitutional Court has stated that this provision relating to the public interest should be annulled and additional procedural safeguards introduced regarding the disclosure of sources only by court order. Implementation should ensure that the relevant provisions include a reasonable and proportionate balance between journalists' rights and the exceptional cases when revealing the identity of sources might be necessary and therefore imposed.

Amendments proposed in 2012 deal with this issue and provide a new wording of Article 6 which go a considerable way to addressing the concerns expressed above. Journalists are now able to protect sources except in the limited instance of criminal cases where "knowing the identity of the person providing the information is indispensable for the investigation of a wilful criminal act punishable by imprisonment of three or more years, and the evidence thus expected cannot be substituted by other evidence." Nonetheless, it is important that in such circumstances the Court has due regard to Council of Europe principles, namely that the legitimate interest in the disclosure must clearly outweigh the public interest in the non-disclosure, which particularly means that an overriding requirement of the need for disclosure must be proved, the circumstances are of a sufficiently vital and serious nature, and the necessity of the disclosure is identified as responding to a pressing social need. Many journalists expose potentially criminal behaviour through obtaining information from confidential sources; such exposure assists the democratic process and typically reveals corruption and fraud. Providing a blanket exclusion to protect sources in criminal investigations would deter this socially vital role of journalists.

Recommendation: Even in the limited circumstances where disclosure of sources can be ordered by the court in criminal proceedings, the law should make clear that disclosure of sources should only be sought or ordered if the need is clearly established and there is vital public or private interest which outweighs the interest in non-disclosure. Without this qualification there is a serious threat to investigative journalism.

There remains an additional problem which needs to be resolved. Under the proposed amendments, witnesses do not need to reveal the identity of sources if they are media content providers or are working for media content providers or in a legal relationship with media content providers, except in criminal proceedings as described above. This general exclusion should also include journalists who are freelance and who may have obtained information in an investigation prior to being in a legal relationship with a media content provider. The onus would be on the individual claiming the right to protect sources to prove they were engaged in activities intended for involvement with media content (i.e. journalistic activities) ***but nonetheless the law should be amended to provide protection for the sources of freelance journalists.***

PUBLIC SERVICE MEDIA

Preliminary remarks

Public-service broadcasting (PSB) is one of the central instruments for media pluralism in Council of Europe member states (and probably in most of the rest of the world as well). PSB is the best remedy for the so-called "market failure" of commercial broadcasting in order to satisfy citizens' needs regarding access to political information, education, culture and quality entertainment. PSB is also a key factor for the development of a solid and robust local/regional/national content industry and to compensate the tendency towards uniformity pushed by big global content industries. PSB is also a vital instrument to protect minority cultures and linguistic diversity, and to promote social cohesion as well.

According to Council of Europe standards, one of the core features of genuine PSB is its independence. Legal frameworks should guarantee adequate levels of editorial independence and institutional autonomy to public-service institutions. This means that adequate legal, political, financial and technical means (among others) should exist in order to guarantee such principles.

The public service remit should be adequately defined by law and other binding instruments, by clearly establishing the role, mission and responsibilities of public-service broadcasters in order to preserve editorial independence. This last principle requires the absence of interference or arbitrary controls or constraints on participants in the provision of the service, taking into account that those interferences are most likely to come from political or economic interests. Independence is reinforced through adequate funding as well: public-service institutions should receive appropriate resources, be they in the form of direct contributions from the state, license fees, income-generating activities or a combination of these sources. At the same time, funding of PSB should not affect competition to an extent which would be contrary to the common interest. Finally, PSB should be accountable to society at large. This can be demonstrated through regular publication of information, public consultations, submission of reports to parliament or supervision by media regulatory authorities.

Against this background, we consider that provisions in Act CLXXXV for the governance and management of public media services do not comply with Council of Europe guidelines as set out in the Committee of Ministers Recommendation R(96)10.

Act CLXXXV sets up a complex governance structure for public media which is both unnecessary and confusing. There are overlaps in responsibilities between the various boards and – worryingly – too much potential for board interference in the management of the individual media providers. The entire edifice is based on appointments to the various boards which are not at all based on competencies, but are predicated on political appointments. This undermines the basic tenet of public service media which is based on autonomy and independence.

Act CLXXXV provides for three tiered governance of public media. There is the Board of Trustees of the Public Service Foundation which has an overriding responsibility for the public media as well as a major role in the appointment and dismissal of the managers of each public media provider.

In turn the Board of Trustees appoints the Chairman and most of the members of the Supervisory Board of the public service broadcasters, which monitor how the broadcasters are managed. In fact, this Board could become a sub-committee of the Board of Trustees, if the Board of Trustees were constituted with appropriate expertise amongst its membership.

Alongside these Boards sits the Public Service Board, which assesses compliance with the public service remit. Its members are elected by various proposing organisations, identified in Schedule 1 to Act CLXXXV.

In no case are appointments made according to competency and skills, or relevant experience.

The CoE's Committee of Ministers' Guidelines state that members of supervisory boards should be "appointed in an open and pluralistic manner". Recommendation CM/Rec(2012)1 on public service media governance clearly states:

> "As public institutions, it is legitimate for the State to be involved in the appointment of the highest supervisory or decision-making authority within the public service media. To avoid doubt, this involvement should not normally extend to appointments at executive or editorial management level. Furthermore, any such appointment processes should be designed so that:
>
> - there are clear criteria for the appointments that are limited, and directly related, to the role and remit of the public service media;
>
> - the appointments cannot be used to exert political or other influence over the operation of the public service media;

- the appointments are made for a specified term that can only be shortened in limited and legally defined circumstances – which should not include differences over editorial positions or decisions;

- in line with Council of Europe standards, representation of men and women in decision-making bodies should be balanced".

Basic principles in the law

Article 82 of Act CLXXXV establishes a series of basic principles regarding the provision of public media services. However, as general principles many seem vague and insufficient. First of all, autonomy is proclaimed in paragraph 1, only at the professional level (for chief executives of public media service providers "and those involved in their operations") and "within the applicable legislative framework", whereas independence is broadly protected "before the State and economic operators". Funding is mentioned in order to guarantee "accountability and the existence of public control" but the legislator neither establishes funding sufficiency nor financial autonomy. In the same sense, Article 94 refers to the financial management of the public-service institutions and no references to financial autonomy are made. Indeed, the inclusion of the so-called "Fund" within the funding scheme of public media services poses a serious risk of undue interference in this area.

Article 82(d) of Act CLXXXV says public media services "cannot primarily be focused on profit-making". This is unclear: how is it to be judged? As public media services are permitted to carry advertising and they are not permitted to compete unfairly against private media, then they must be expected to carry advertising at commercial rates (to carry at non-commercial rates would amount to unfair competition). It is therefore difficult to envisage how this provision would be implemented.

Recommendation: the basic principles on public media services should be reformulated in order to establish clear and solid general PSB provisions and guidelines in line with Council of Europe standards; further, if it is not clarified, Article 82(d) of Act CLXXXV should be deleted.

Article 84(3) allows for the amendment of the Charter by a two-thirds majority of Parliament. Given that the current government holds that majority, this leaves it open to potential abuse. The purpose of imposing an obligation for a qualified majority is to ensure cross-party support for significant measures. The existing political reality in Hungary is such that a two-thirds parliamentary majority would not guarantee plural support**.**

Recommendation: a new voting mechanism should be introduced to ensure that any significant change to the Act carries true cross-party support. An example would be to change the definition of 'qualified majority' for the purpose of Act

CLXXXV as a vote supported by a majority of both government and opposition factions.

Objectives of public service media

Article 83 (c) of Act CLXXXV refers to "promoting and strengthening national cohesion and social integration".

Recommendation: this Article should include a specific reference also to promoting ethnic and local differences.

Article 83(d) of Act CLXXXV obliges public media services to "holding up … the fundamental values of the legal order and public policy within a democratic society". This suggests that public media cannot question public policy, which is a severe limitation on freedom of expression.

Recommendation: this provision should be deleted, especially as Article 83(n) encourages public media to debate public affairs.

The provision of accurate and balanced information is one of the fundamental elements of PSB. Article 83 of Act CLXXXV includes this specific responsibility in paragraph (m) within a very wide and complete range of PSB objectives and missions. However, the wording of that paragraph should be connected to what is established by Articles 84 and 101.

Article 84 of Act CLXXXV describes the myriad of institutions that compose the so-called Public Service Foundation as a big constellation for the provision of public media services in Hungary. Among these bodies is the National News Agency (NNA). According to Article 101, NNA is in charge of certain public-service responsibilities mostly in the area of providing access to news, reports, public announcements and other relevant information. Paragraph (4) of this Article particularly states that NNA "shall produce news programmes under exclusive right for other media service providers, and shall operate an integrated news hub for public media service providers".

In fact, Article 101(4) of Act CLXXXV sets up a single news provider for public services, while all major private broadcasters are expected to have their own news service. The obligation on public broadcasters to use the national news agency is unreasonable and an unfair restriction on the plurality of news provision. Public media services should be able to contract news provision from whatever source they choose (including private media services), as long as the content of the news meets their public service obligations.

Recommendation: the abovementioned Articles should be reviewed accordingly; in particular, the obligation under Article 101(4) for public media services to obtain their news from the NNA should be eliminated.

Public Service Foundation

Under Act CLXXXV, the Board of Trustees are appointed directly by Parliament without any open nominations process, any regard to plurality, or any consideration of whether the individual nominees have the necessary experience or competence to undertake the role. Given the duties of the Board of Trustees, they should be individuals with experience and understanding of public media, of management and of finance. The fact that nominations must be made within 8 days of the opening of the procedure does not provide sufficient time for appropriately qualified individuals to be sought out, interviewed, and selected. The only reasonable conclusion can be that the nominees are chosen for political, rather than competency, reasons. The appointment of the chair and most members of the Supervisory Board by the Board of Trustees compounds this weakness. A new competency-based appointments procedure should be introduced. There follows a more detailed analysis.

According to Articles 85-89 of Act CLXXXV, the Board of Trustees (BoT) is the management body of the Public Service Foundation. The BoT is meant to be the main body responsible for the planning, organisation and general supervision of the provision of the service. The BoT has controlling powers over the different institutions and media outlets that form the Foundation. As to its election process, Article 86 establishes that Parliament shall elect six of its members by voting for each member individually, subject to a two-thirds majority of the members of Parliament. Half of these members shall be nominated "by the governing faction" and the other half "by the opposition faction" and different factions should agree as to the persons nominated by each side. In the event of any faction's failure to make a successful nomination, or if not all nominees receive the necessary majority, the BoT comes into existence with the election of at least three members. The chairperson of the BoT and one other member are delegated by the media authority. All BoT members are elected for a term of nine years.

This complex regime raises several important concerns in terms of due independence of PSB management, according to Council of Europe standards[18]. First of all, after the 2010 elections a single political majority (the *Fidesz-KDNP* coalition) holds two-thirds of the seats in Parliament. This means in effect that the governing faction will be able to nominate the three members that are legally required for the BoT to function. It also means that the majority will have full discretion and power to veto those candidates proposed by opposition parties. Moreover, the idea itself that BoT members are nominated by "factions" and therefore according to political criteria is *per se* in contradiction with the most basic PSB idea of management and editorial independence.

[18] See the Committee of Ministers Declaration on the independence and functions of regulatory authorities for the broadcasting sector (adopted on 26 March 2008); and ECtHR *Manole and others v. Moldova*, No. 13936/02 judgment of 17 September 2009.

This concern is reinforced by the fact that Article 86 does not contain competency requirements on nominees, unlike for the Media Council (see Article 124). Nominations should be based on pre-determined competencies, for example individuals with relevant experience and expertise, such as graduates with a background at senior levels in content production, law, management, education, and finance. In addition, apart from some general provisions regarding the avoidance of possible conflicts of interest, no specific requirements of independent performance are established vis-à-vis BoT elected members. Furthermore, the fact that the chairperson of the BoT together with other members will be directly nominated by the body which is in charge of its supervision is clearly contradictory and significantly erodes the existence of a minimal degree of management independence.

Recommendation: the nomination process for all members of the BoT should be completely changed in order to guarantee the application of the principles of independence and professionalism; the objective should be to ensure that members are truly representative of the Hungarian population and can provide expertise and advice on the full range of public service content.

Article 86(2) and (6): Although the provisions ostensibly provide for a "hung" Board (50:50 government/opposition), the Chairman and one other trustee are appointed by the Media Council, and thereby have the deciding votes. As the Media Council itself is not independent (see further down), this *de facto* means the Board of Trustees is not independent and therefore does not comply with Council of Europe Recommendations.

Recommendation: the Media Council should not have the right to appoint the Chair and additional member of the Board of Trustees unless and until the means of appointment of the Media Council are amended to meet Council of Europe standards of independence.

Article 86(3): the short timetable for nomination and elections does not permit for individuals with relevant competencies to be identified and interviewed.

Recommendation: a new nominations procedure should be introduced to ensure that the best candidates are found and to remove the nominations process from undue political influence. For example, a Nominations Committee could be set up with, say, 6 members – half appointed by the governing and opposition factions. Such a Nominations Committee should consist of independent people with experience in senior recruitment. The Nominations Committee would then be tasked with finding and proposing nominees who meet the competencies required for the roles (this Nominations Committee could be used for every Board appointment proposed in Act CLXXXV). Finally, Parliament could select members (half chosen by government, half by the opposition) who were nominated by the Nominations Committee.

Article 86(10) A 9-year term, renewable without limit, goes contrary to every international standard of good corporate governance. Standard terms within Europe for similar appointments are generally 3-5 years, renewable once. Furthermore, the terms of the initial board should be staggered so that not all members retire at once. It is advisable to ensure a level of continuity and knowledge on the board at all times.

Recommendation: this provision should be revised.

Recommendation: the conflict of interest provisions in Article 88(1) of Act CLXXXV should be extended to husbands and wives.

Recommendation: Article 88 (6)(a) should be strengthened to include incapacity by reason of ill-health or mental illness.

Trustees' powers and responsibilities

Article 90 of Act CLXXXV establishes a series of powers and responsibilities of the BoT in order to guarantee adequate management of the Foundation. Among these powers, paragraph b) includes the capacity to initiate the proceedings of the media authority "when of the opinion that a media service provider is engaged in any conduct that seriously violates or threatens the attainment of public service objectives". The BoT has responsibility to guarantee that the public-service remit is adequately fulfilled and that PSB objectives and missions are effectively implemented. This responsibility may include the capacity to undertake internal procedures and to exercise those powers and competences that normally correspond to any management body. However, the fact that the BoT would be able to initiate proceedings normally reserved for the regulatory authority as an external, separate and independent supervisory body poses a clear threat to the independent and autonomous performance of the Foundation. In other words, the Act intertwines competences and responsibilities that should be attributed and exercised by separate and independent bodies. PSB institutions should be independent from their supervisor, precisely in order to guarantee a genuine, fair and effective external regulatory control.

Recommendation: Article 90 of Act CLXXXV should specify that the Board of Trustees can have no role in determining programming or exercise any editorial influence; paragraph b) of Article 90 should be fully eliminated.

Article 90(1)(a) of Act CLXXXV and Article 97.7 stipulate overlapping powers for, respectively, the Board of Trustees and the Public Service Board. How is this overlap to be reconciled?

Recommendation: a lead body should be identified.

Further, ***it is not appropriate for the Board of Trustees to have any role under Article 90(1) (e-g) in these appointments or terminations.***

Public Service Board

The Council of Europe Committee of Ministers' Guidelines state that the supervisory board should "represent collectively the interests of society in general". There is some attempt to reflect pluralism in the membership of the Public Service Board, but this falls short of what would be expected. Again, there are no competency requirements on the delegates (for example, why should a delegate from the Olympic Committee necessarily be competent to advise on the wide remit of public media?), there are no requirements to ensure that women are adequately represented, and – somewhat surprisingly – there is no requirement for the Board to contain educational experts or child psychologists. Further, there should be a limit on the number of 3-year terms members can sit on the board.

Recommendation: Article 97 of Act CLXXXV should specify that the Supervisory Board can have no role in determining programming or exercise any editorial influence.

The power to recommend the dismissal of executive directors in Article 97(10) is too broad and does not represent a proportionate means of supervising the public service remit. It would be better for the executive director to present an annual plan setting out how the remit is to be fulfilled, and then to be assessed at the end of the year according to that plan. Any failures in the plan might be addressed through targets for the future year, or through a request for increased funding. Dismissing the executive director is a nuclear option, opens too many opportunities for editorial interference, and is unlikely to produce the desired outcomes.

Recommendation: this should be revised substantially.

Articles 95, 98 and 136 of Act CLXXXV address the powers of the media authority vis-à-vis the Public Service Foundation. The Act grants several intrusive powers to the media authority, which may erode in different ways the editorial independence and institutional autonomy of public media service providers. Article 95 states that the Public Service Code shall include general provisions and specific rules regarding the proper operating principles to be adopted by public-service media providers within the framework of the Act. The Code is adopted by the media authority with the consent of the BoT and taking into consideration the opinion of the executive directors of public-service media providers. This preeminent role of the media authority regarding the approval of the Code creates a situation in which the supervisor interferes in internal institutional affairs and, moreover, it participates in the elaboration of criteria that may be used in the exercise of its regulatory functions. General PSB mission and objectives should be established by law. The rest of the operating principles may be established by parliament or left to the internal editorial independence and responsibility of PSB media outlets. The interference of the regulatory authority in this area is inappropriate and may impede a reasonable and adequate degree of independence in the management of public service institutions.

Article 98 of Act CLXXXV establishes that the media authority has "powers to review (…) on an annual basis the system of public media services, and may decide whether to maintain the media services provided by public media services previously or to make changes therein". Again, the definition of the scope of PSB should normally be performed by the legislative power, whereas PSB institutions may develop those provisions according to their own professional and editorial principles. Thus, the role of the media regulatory authority should not be to interfere in these processes but rather to supervise *ex post* to what extent the service has been properly and adequately provided.

Recommendation: the media authority should not have decision-making powers regarding the process of elaboration and approval of the Public Service Code and to define the scope of public media services.

Electing executive directors of public media service providers

Article 102 of Act CLXXXV needs substantial revision. The Media Council has overall regulatory responsibility for services and should play no part in setting the contract terms or the appointment of senior managers to the services it regulates because this would undermine the necessary independence between regulator and regulated. The Chairman of the Media Council should have no role in making nominations for the same reason. The Board of Trustees should select a candidate through a normal senior appointments process, or through the recommended Nominations Committee procedure as outlined in respect of Article 83 of Act CLXXXV above.

Recommendation: the executive director should be appointed by the Board of Trustees (subject to the recommended change in appointments process to that board) without any involvement whatsoever from the Media Council.

Supervisory Board of public media service providers

As regards Article 106 of Act CLXXXV, if the Board of Trustees is properly constituted with appropriate expertise, it will not be necessary to set up and fund a separate Supervisory Board. Instead, the Board of Trustees could create its own Finance and Audit Sub-Committee from its own membership. This would reduce bureaucracy and cost.

Recommendation: the Supervisory Board should be reconstituted as a sub-committee of the Board of Trustees.

Funding and Financial Management of Public Media Service Providers

With regard to Article 108(4) of Act CLXXXV, as public media services can carry advertising, additional funding must take existing revenue into account.

Recommendation: this provision should include a requirement for the Council to consider the revenue and expected revenue of the pubic media service providers, based on their audited accounts.

Act CLXXXV sets up a Media Fund (Article 136) to help fund community and public media services (amongst others). Although this is admirable, the constitution of the Fund Supervisory Board, and selection of senior staff by the Chairman of the Media Council is unacceptable. Given the influence the Fund will have on the services it chooses to fund – including having employer status over journalists for the public media - the ability of one person to select all the decision makers involved in the Fund's operations is detrimental to pluralism and independence. Dr Zoltan Kovacs, in his response letter to Commissioner Hammarberg, argues that as the appointment of the Chairman of the Media Council has to be by qualified parliamentary majority, this makes the process fair and independent. As explained elsewhere in these comments, the fact that the current government on its own holds a qualified majority undermines this argument.

Recommendation: the Board members should be selected by the Media Council as a whole (assuming they are appointed under a new procedure – see further down), and in turn select their own executive directors.

The Fund is "a trust and monetary fund appropriated to provide support for the structural transformation of public media services (…), community media services and public service media providers, the production and production support of public service programmes (…)" (paragraph (1)). The Fund is fully managed and controlled by the media authority. Also, under Article 100, the Fund exercises all ownership rights and obligations associated with public-service media assets. This is another case where an "external" entity unduly interferes within the daily execution of the PSB mission.

In short, an entity controlled by the media authority is put in charge of one of the most important elements of the financial system of the Public Service Foundation, apart from constituting one of its major content suppliers. In addition to that, Article 108 adds another structure within the complex funding system of the Foundation, namely the Public Service Fiscal Council, also externally controlled (according to paragraph (3). The Council is formed by the executive director of the Fund as chairperson, the executive directors of public media service providers, and two representatives of the State Audit Office).

Finally paragraph (13) of Article 108 adds that the media authority "is responsible for determining the detailed rules for the utilisation and management of the assets transferred, including the conditions of use of certain specific assets by public service media providers with a view to discharging their respective public service functions". In parallel, Article 106 stipulates yet another body called Supervisory Board of Public Service Providers. The chairperson and members of the Board shall be appointed by

the BoT. This Board (the only body that is really "internal") has only the competence "to inspect the books, current accounts, documents and cash holdings of the public media service providers at any time, or to have them inspected by an expert at the expense of the public media service providers."

Thus, Act CLXXXV creates a very confusing structure of intertwined councils and entities, most of them under the control of the media authority, and it leads to a situation in which the Public Service Foundation and the different institutions that constitute it do not have even a minimal degree of financial autonomy to manage and to take decisions about what services will be provided and how they will be funded.

Recommendation: the whole funding system of the Public Service Foundation should be amended, in particular regarding the composition and competences (or even the existence) of bodies and entities like the Fund or the Public Service Fiscal Council, in order to guarantee that the PSB system is managed according to genuine and effective principles of financial autonomy, without prejudice to necessary accountability in line with CoE standards.

REGULATORY BODIES

Preliminary remarks

States should not only refrain from interfering in the free exercise of speech, but they must also take proactive measures to promote media freedom, independence and pluralism. One of the key elements in this area, according to Council of Europe recommendations, is the need to guarantee that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public. Moreover, pluralism of information and diversity of media content will not be automatically guaranteed by the multiplication of the means of communication. So states have a particular responsibility to take necessary measures to effectively ensure that a sufficient variety of opinions, information and programmes is available to the public.

The procedures for granting licenses or authorisations play a central role in this area. Licensing procedures, especially when the number of future holders is limited, should be clear and competitive. They may also incorporate elements proactively to promote a pluralistic media landscape, as well as specific incentives to foster a wide and diverse range of information suppliers, their editorial independence and the effective access of citizens to a real multiplicity of points of view. In this sense, licensing should be regulated introducing all necessary safeguards in order to guarantee an effective and manifest separation between the exercise of political authority (and therefore the application of criteria of "political convenience") and the decision-making process which selects the actors participating in the media landscape. The basic conditions and criteria governing the granting and renewal of licenses should be clearly defined in the law. The regulations governing the licensing procedure should

be clear and precise and should be applied in an open, transparent and impartial manner.

The CoE recognises community media as a distinct media sector alongside public service and private commercial media. It serves many societal needs and performs unique functions. It is thus desirable that community media be allocated a sufficient number of frequencies.

Finally, from the point of view of citizens as "receivers" of media content, an adequate degree of transparency regarding media outlets is a fundamental requirement. CoE member states should ensure that the public has access to sufficient information on existing media outlets in order to guarantee an informed and critical formation of public opinion.

Audiovisual regulatory authorities constitute, according to the CoE, a fundamental guarantee for the exercise of the rights, duties and responsibilities which derive from Article 10 ECHR. Regulatory authorities have the power to adopt regulations, decisions and guidelines concerning broadcasting activities, including granting of licenses, monitoring broadcasters' compliance with their commitments and obligations and supervision of PSB organisations. Regulatory authorities should benefit from rules that strictly guarantee their independence against any interference, in particular by political forces or economic interests. Importantly, the rules should guarantee that the members of these authorities are appointed in a democratic and transparent manner, may not receive any mandate or instructions and cannot be dismissed as a means of political pressure. Regulatory authorities should also be transparent, effective and accountable and enjoy a funding scheme that allows them to carry out their functions fully and independently.

National Media and Infocommunications Authority

Articles 109 of Act CLXXXV and thereafter refer to the National Media and Infocommunications Authority (the Authority). This authority is formed by several bodies. Those vested with independent jurisdiction include the President, the Media Council and the Office, which operates as the administrative apparatus of the whole Authority. Although the Act creates a somewhat confusing constellation of bodies and offices within the administrative agency, the main regulatory body regarding media content is the Media Council (in principle, chaired by the President of the Authority), which holds most of the competences in this area. Mentions previously made in this analysis to the media authority as a general notion actually refer to the Media Council.

Importantly, the material competences of the Media Council cover not only audiovisual (linear and non-linear) media but certain aspects of print media as well. As stressed earlier, the subjection of print media to administrative control is a disproportionate regulatory scheme and it contradicts the best European practices and Council of Europe standards.

Article 111 of Act CLXXXV provides the framework for the appointment of the President of the Authority. The President is one of the main pillars of the Authority, vested with several powers. Most importantly, however, the President of the Authority *is legally designated* to be the chairperson of the Media Council as well. The President is directly and discretionary appointed by the Prime Minister for a term of nine years. The President is entitled to appoint two vice presidents for an indefinite term. This appointment is direct, with no prior formal selection procedure or public tender. The professional requisites for being appointed are somewhat general: "have a degree in higher education and at least three years of previous experience in broadcasting or media services, or in the field of economics, social sciences, legal services, engineering as well as in management in an executive level relating to supervisory control of the media or supervisory control of the communications sector".

The wording of the Act does not make it seem that this appointment (and the effective compliance with the general requisites of the candidate) could hypothetically be subject to any kind of revision by a judicial or legislative body. The President may be re-elected beyond the initial nine-year term. ***Recommendation: the President's appointment procedure should be changed in order to effectively guarantee the application of criteria of professionalism and to safeguard his independence.***

Media Council

Given the Media Council's considerable role in shaping media and potential impact on freedom of expression, it must be independent – and be seen to be independent – from all political influence. In this regard, there are aspects of the appointments procedure for the members and Chair of the Media Council which are not transparent and do not go far enough to preserve independence, as required by Council of Europe Recommendations.

According to Article 124 of Act CLXXXV, the chairperson and the four members of the Media Council are elected by Parliament by a two-thirds majority for a term of nine years. The minimal professional requirements for candidates are the same that apply to the President of the Authority. Members of the Media Council shall be nominated by unanimous vote by an *ad hoc* nominations committee comprised of one member from each Parliament group or block ("faction" according to the translation of Act CLXXXV used for this preliminary expertise – in the interest of common understanding and simplicity, the term faction will continue to be used herein). The voting powers of the members of the nominations committee shall be weighted according to the number of members of the Parliament faction on whose behalf they were elected.

This last provision is important to the extent that, if the nominations committee is unable to present four nominees, it is authorised to make nominations in the second round requiring just two-thirds of the weighted votes. The concerns expressed above

regarding the nomination of the members of the BoT of the Public Service Foundation also apply to this case. The purpose of imposing an obligation for a qualified majority is to ensure cross-party support for significant measures. However, in the current circumstances in Hungary, the provisions requiring a two-third majority vote for the election of the Chair and Members of the Council are not sufficient by themselves to ensure this objective and ensure pluralism**.** As the result, the Media Council will be under the control of the current political majority.

Finally, two other elements raise major concerns in terms of guarantees of independence: all members of the Media Council can be re-elected and their mandate can be terminated by way of expulsion, again, if they are "unable to fulfil (their) vested responsibilities for more than six consecutive months for reasons within (their) control" (Article 129 (6) of Act CLXXXV).

As already noted, the President of the National Media and Infocommunications Authority becomes automatically nominated for the office of chairperson of the Media Council. Moreover, even if the Parliament is not able to elect the President as chairperson, the former shall anyway have powers to convene the meetings of the Media Council, as well as to preside over them and participate in such meetings in an advisory capacity, without taking part in the decision-making process. In other words, according to the law the only possible candidate to chair the Media Council is the President of the Authority, as appointed by the Hungarian Prime Minister. If the Parliament is reluctant and refuses to confirm this nomination, the President will chair the Council anyway, though with reduced powers.

The above-mentioned provisions raise significant concerns regarding the guarantees of an adequate level of independence of members of the regulatory authority. Political dynamics will have a clear and immediate influence in the nomination and composition of the regulatory authority. Members of the Media Council are not sufficiently protected from political influences as required by Council of Europe recommendations[19].

Recommendation: the procedure for the election of the members of the Media Council and its chairperson should be changed in order to effectively guarantee that they will not be vulnerable to political influence. The objective should be to reinforce independence; to this end, the nominations committee itself should be

[19] See, for example, the Committee of Ministers declaration on the independence and functions of regulatory authorities for the broadcasting sector (adopted on 26 March 2008) which calls on member states to "provide the legal, political, financial, technical and other means necessary to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political or economic interference", underlines the importance of a 'culture of independence' which is vital for the adequate regulation of broadcasting and invites civil society to monitor closely the independence of regulatory authorities "bringing to the attention of the public good examples of independent broadcasting regulation as well as infringements on regulators' independence".

made up of persons who are not themselves part of the political process – and who have competence in senior level recruitment (see also comments on Article 86 of Act CLXXXV above).

Media and Communications Commissioner

Articles 139 to 142 of Act CLXXXV establish the institution of the Media and Communications Commissioner (MCC) and set up its competences and rules of procedure. Under proposed amendments to the original Act, theMCC has the general remit to "contribute to the promotion of the equitable interests of users, subscribers, viewers, listeners, consumers of electronics news services and/or media services, as well as the readers of press products in connection with electronic communications, media services and press products" (The original Act referred to the MCC promoting the "enforcement of rights" as well as equitable interests.). The MCC is appointed and recalled by the President of the Authority and reports to him and to the Media Council, even if the MCC may not be given instructions. In its Decision 1746/B/2010, the Constitutional Court annulled regulations in relation to the MCC holding they were an unnecessary limitation on press freedom saying, "it is not constitutionally justifiable for the Commissioner to act against media providers and the publishers of press products in case of violation of unspecified "equitable interests" or the threat thereof – even in ways affecting editorial freedom"[20] Although the amendments present two different sets of proceedings, one against electronic communication services providers, and another relating to media services and press products, there remains no definition of "equitable interests".

Nonetheless, the proposed amendments to Act CLXXXV go a considerable way to address the Court's concerns by limiting the role of the MCC to complaints that affect a significant part of viewers, listeners or readers and by removing the MCC's right to obtain information as well as its power to report uncooperative providers to the Authority.

However, given its reduction in powers, it is questionable why the MCC has been retained at all in relation to media services and press products. The fact that the MCC has direct communication and a close link with the President of the Authority and chairperson of the Media Council puts the MCC in a very powerful position within the Authority. It calls into question whether the activities of the MCC will affect the treatment by the regulators of media providers and press products who do not cooperate with the MCC.

Recommendation: There is no apparent justification for retaining the role of the MCC for media services and press products and this should be removed. If a role is to be retained, adequate legislative and actual "Chinese Walls" should be built to

[20] See translation in http://hunmedialaw.org/dokumentum/94/08_1652011_Abh_final.pdf

ensure that the work of the MCC does not influence or effect the assessment of media services or press products by the Authority or Media Council.

The MCC retains considerable investigative powers – with the power to issue sanctions for non-compliance – against electronic communication service providers.

For example, if a media services provider does not provide requested data within specified deadlines, an administrative fine of up to HUF 25 million can be levied, as well as a possible personal fine on the executive officer of the media company. This fine is not subject to appeal. [Note, this is an amendment from the original Act which provided for an appealable fine of up to HUF 50 million.] The Commissioner is required to submit a quarterly report to the President of the Authority on his/her investigations and recommendations which will provide the Authority with potentially damaging information about the conduct of electronic communication service providers.

For these providers, the MCC has the appearance of a non-binding conciliation instrument but as a matter of fact it can become an alternative, expeditious and less controlled regulatory power. The decisions of the MCC cannot apparently be challenged before the ordinary courts. All these elements could deprive electronic communication service providers from the rights and safeguards in terms of defence and fair treatment within specific proceedings (Article 6 ECHR).

Recommendation: the institution of the Media and Communications Commissioner should be eliminated from Act CLXXXV altogether. Consideration might be given to creating a statutory Ombudsman with fully appealable powers to deal with potential consumer complaints about electronic communication services.

Tenders

Article 48 of Act CLXXXV establishes a general rule that analogue linear media services using limited state-owned resources shall be provided under contract awarded upon a tender procedure published and conducted by the media authority. However, paragraph (4) within the same Article also provides that for a specific period of up to three years the media authority "shall be entitled to authorise, without a tender procedure, a business entity to provide media services with a view to carrying public functions". These public functions are broadly described in two paragraphs and include providing content in emergency situations and serving a wide range of different communities' needs.

This exception to the general regime of competitive tenders to provide certain linear services is difficult to understand. It provides the media authority with a wide and discretionary power to give "licenses" without any kind of competitive procedure, to those that will be chosen according to wide and subjective criteria. The specification that these privileged providers will have to carry out "public functions" does not seem

to be helpful or to provide a minimum justification at all, in particular if we bear in mind that Act CLXXXV establishes as well a complete and complex system of public service broadcasting (Articles 82 to 108) and a specific "licensing" procedure for community media (Article 66).

Recommendation: the exceptional regime that allows for providing linear media services without going through a competitive procedure should be eliminated (by deleting Article 48.4 of Act CLXXXV).

Article 52 of Act CLXXXV regulates the tender notice that should be published by the media authority. This is an important landmark within the tender procedure since the notice determines the conditions under which frequencies will be finally granted. This Article contains a somewhat long list of elements that will be used to evaluate different applications as well as the rules serving as the basis for the authority's final decision. Act CLXXXV, however, does not establish the possibility to submit this important element to a separate judicial review while the final decision of the authority can be challenged before the administrative court (Article 62), presumably on the basis of any argument regarding any of the phases of the administrative procedure.

The tender notice is a central element that should help avoid excessive administrative discretion and political bias. Therefore, in order to guarantee real competition and fairness, as well as an effective protection of applicants' rights (Article 6 ECHR), it would be appropriate to give applicants the possibility to submit the tender notice to judicial review before it is used as a basis for the evaluation.

Recommendation: applicants should have the right to request separate judicial review of the tender notice.

Article 53(1) of Act CLXXXV is open to abuse. ***It would be better to specify the basis on which revisions are envisaged, for example in the light of new information becoming available. Only minor amendments should be permitted.***

Article 56(e) of Act CLXXXV should make clear the amount of emphasis that the Council is to place on the offer for the media service licence fee.

Recommendation: the amount of fee should only be taken into consideration in cases of competitive tenders where every other factor is judged to be equal.

Recommendation: Article 60, on the evaluation of tenders, should include a specific consideration of plurality.[21]

[21] See ECtHR *Manole and others v. Moldova*, No. 13936/02 judgment of 17 September 2009; § 107; and *Informationsverein Lentia and others v. Austria*, Nos. 13914/88 15041/89; 15717/89; 15779/89; 17207/90 judgment of 24 November 1993, § 38. And also Committee of Ministers' Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content

Article 64 of Act CLXXXV gives the media authority the capacity to decide on applications by media service providers regarding networking, expansion of the area of transmission, contract amendments and change of media rights. This Article in fact makes it possible for the media authority to arbitrarily authorise very important changes to the conditions for the provision of the service as they were originally defined through the tender procedure on an open, plural and competitive basis. It therefore gives media service providers the chance to obtain privileges or to circumvent main obligations established in their contracts. Moreover, the leeway allowed to the media authority in order to adopt such resolutions is extremely generous and based (in the best-case scenario) on vague and discretionary criteria such as "media market and media policy considerations".

Recommendation: the powers of the media authority to freely decide on networking, expansion of the area of transmission and contract amendment should be eliminated and only admitted in objectively justified cases, clearly regulated by the law and in a proportionate manner.

Legal remedies and sanctions

The final decision of the media authority within a specific tender procedure can be challenged before the Budapest High Court of Appeals. However, according to paragraph (5) of Article 62 of Act CLXXXV, this revision must be requested within fifteen days of the time of delivery of the resolution. Taking into account the complexity of this kind of procedure and the important interests that are at stake (not only those protected by Article 10 but also by Article 6 ECHR), this delay looks short and may be seen as a disincentive for possible litigants.

Recommendation: the delay for requesting the judicial review of the media authority's resolution on the results of a tender should be prolonged.

Article 163 of Act CLXXXV establishes that resolutions of the Media Council may be challenged in Court as concerns infringement of the law. However, paragraph (3) stipulates that the submission of the claim "shall not have suspensory effect on the execution of the resolution; the court may be requested to suspend the execution of the challenged decision". To the extent that the resolutions of the Media Council may have direct restrictive effect on freedom of expression and information, this general regulatory statement (despite the filing of a court request) may have disproportionate effects and give the Media Council the power to immediately punish specific media outlets. Court decisions may take some time and it is important to adequately safeguard specific valuable interests during this lapse of time.

Recommendation: paragraph (3) of Article 163 of Act CLXXXV should be amended in order to introduce the possibility of suspending administrative orders and sanctions in cases of claims against the Media Council's resolutions.

According to Article 185 of Act CLXXXV and following, the Media Council and the Office of the Authority have powers to impose sanctions for any infringement of media regulations. According to CoE standards, regulatory authorities should not exercise a priori control over programming, but at the same time it is legitimate to provide them with the power to monitor providers' compliance with law or other conditions specified in their license and to impose sanctions in accordance to the law. It is also important that possible infractions and sanctions be clear, foreseeable and proportionate. Otherwise, a serious *chilling effect or incitement to self-censorship* would occur and will erode the effective and complete legal force of Article 10 ECHR.

The legal regime applicable to cases of infringement seriously lacks legal certainty. Although some of the sanctions are specified by the law (for example as regards due registration), it has been impossible to find a complete and detailed list of specific infractions that may lead to the imposition of the respective concrete sanctions. Act CLXXXV uses terms such as "insignificant infringement", "repeat offenders", "repeated grave infringement" or "insignificant offenses". Paragraph (3) of Article 187 includes some kind of *grading* criteria in order to impose sanctions, but most of them are only based on the kind of media, not the type of infringement.

Moreover, some sanctions established by the law are extremely severe and may lead to removing the media service from the register and to the imposition of fines up to HUF two hundred million (approximately 680 000 €). Thus, the sanction regime in Act CLXXXV raises serious concerns not only in terms of proportionality of sanctions but also because the legal provisions are not sufficiently clear and foreseeable and therefore provide the Media Council with a margin of discretion that is not acceptable in such a matter.

Recommendation: legal consequences applicable in cases of infringement should be amended in order to guarantee an effective level of certainty as well as adequate proportionality between the severity of the infringement and the amount and severity of the sanction to be imposed.

Article 187 (bc) – (bf) of Act CLXXXV refers to the maximum sanctions that can be applied to print and online service providers. The Constitutional Court has removed the role of the Media Council in regulating content on these services which might be subject to financial sanctions, and there are no other regulatory provisions which apply which could carry the level of sanction indicated.

Recommendation: these paragraphs should be deleted.

Finally, it is noted that some amendments have been proposed regarding Article 182, in order to protect the confidentiality of sources and information and the confidence between attorney and client within the framework of investigative activities of the Media Authority.

Co-regulation and self-regulation

PACE Resolution 1636 (2008) on indicators for media in a democracy includes the following principles:

> 8.25. there should be a system of media self-regulation including a right of reply and correction or voluntary apologies by journalists. Media should set up their own self-regulatory bodies, such as complaints commissions or ombudspersons, and decisions of such bodies should be implemented. These measures should be recognised legally by the courts;
>
> 8.26. journalists should set up their own professional codes of conduct and they should be applied. They should disclose to their viewers or readers any political and financial interests as well as any collaboration with state bodies such as embedded military journalism.

Act CLXXXV (Part VI: Articles 190-220) sets out provisions for the encouragement of co-regulation, leaving approved self-regulatory bodies to undertake the effective regulation of its members.

Recommendation: Hungary is urged to approve the Association of Hungarian Content Providers (MTE)[22](a self-regulating body which was founded in 2001 by Hungarian internet content providers which has a professional code and code of ethics for internet content providers) and the Editor-.in-Chiefs Forum (Főszerkesztők Fóruma)[23] (a cross-platform association of editors covering most major media outlets and launched January 2012).

Impediments to industry self-regulatory bodies may well raise issues under the ECHR. Unless a convincing case can be made that needed self-regulation has failed, co-regulation can amount to interference contrary to CoE standards. In this connection, Act CLXXXV sets out very stringent conditions whereby self-regulatory bodies act as effective sub-contractors of the Media Council, undertaking certain tasks of the Media Council under a detailed and constraining administrative agreement. The Media Council has the right to supervise and audit the operations of self-regulatory bodies in such a way as to deny them any independence or autonomy.

Recommendation: Act CLXXXV needs substantial amendment to enable self-regulatory bodies to be self-determining as to how they regulate their members in the public interest. Whilst the self-regulatory bodies should be accountable to the Media Council for their performance of functions specifically delegated to them by the Council, there should be no intrusive interference by the Council in the

[22] See www.mte.hu

[23] See Editorial Code of Conduct at http://foszerkesztokforuma.files.wordpress.com/2012/01/english_ethical-guidelines_-final.pdf

operations of self-regulatory bodies. Furthermore, the Act needs positively to reinforce the encouragement of self-regulation wherever possible.

There follow more detailed comments and recommendations on this subject.

Recommendation: Article 190 should be amended to require the Media Council to encourage self-regulation, and not merely to 'co-operate'.

Article 192 of Act CLXXXV reads like a sub-contractual arrangement, rather than an acknowledgement of the work and authority of the self-regulatory body. The provisions around the Code of Conduct remove any autonomy for the self-regulatory body.

Turning to Article 194(2) of Act CLXXXV, as the Media Council must approve the Code of Conduct before the administrative agreement becomes effective, this approval must be limited to matters which are clearly covered in relevant law.

Recommendation: the Media Council should have no right to approve matters beyond its own legal remit.

Recommendation: Articles 194(3) and (4) of Act CLXXXV should be deleted. They are far too detailed and intrusive into matters which should be the sole concern of the self-regulatory body. Again, the Act is framed as if the self-regulatory bodies are sub-contracted by the Media Council, rather than the Media Council acknowledging the expertise and authority of the self-regulatory bodies to regulate their members.

Recommendation: the words "in detail" in Article 195(1) of Act CLXXXV should be deleted; this is too interventionist.

Under Article 195(4) of Act CLXXXV, the Media Council should only have the right to ask for data which are on the registry, not "information in connection with the data".

Recommendation: these words should be deleted.

Article 196(1) (a) and (b) of Act CLXXXV are repetitive.

Recommendation: Article 196(1)(b) should be deleted.

Article 197(2) of Act CLXXXV gives the Media Council power to act in relation to members of the self-regulatory body "when it considers" the self-regulatory body did not act as it should have. This is too subjective a test. Leaving it so undefined and at the Council's discretion amounts to unacceptable double jeopardy.

Recommendation: this provision should be deleted as, if there is a breach of the administrative agreement, then it is annulled and the Media Council can intervene.

Recommendation: Article 197(4), last sentence, of Act CLXXXV should be deleted as the termination provisions are set out in s.196.

Article 198(3) of Act CLXXXV refers to "dues and fees paid". This suggests that petitioners must pay to have complaints considered. Complaints handling is a core regulatory process, whether done on a statutory or self-regulatory basis.

Recommendation: complaints should not be subject to a fee as this would deter complainants.

Turning to the activities of self-regulatory bodies, Article 201 of Act CLXXXV sets out the terms of oversight by the Media Council and reads like the terms of a sub-contractual arrangement, not those of an agreement that recognises and supports self-regulation. The intrusive rights of the Media Council would deter any self-regulatory body from seeking agreement with the Council, thus undermining the encouragement of self-regulation as propounded by the CoE.

Recommendation: this Article should be deleted. The Media Council should have no right to detailed oversight of processes and performance unless it has reason to believe the self-regulatory body is in breach of the agreement and wishes to investigate before deciding to terminate the agreement.

Market concentration

Managing market concentration is another regulatory activity. In this connection,

Recommendation: Article 67 of Act CLXXXV should refer to maintaining "plurality" rather than "diversity", as different owners do not necessarily affect diversity. This may be a matter of translation, but if not, then the Act should be amended.

Article 70(12) of Act CLXXXV defines "turnover" for the purposes of ss (1)-(11), yet turnover is not referred to elsewhere in Article 70.

Recommendation: if this is a general definition, it should be moved into an overall 'definitions' section.

SPECIFIC COMMENTS ON COMMUNITY MEDIA AND PRINT MEDIA

Community Media

Article 66 of Act CLXXXV establishes a separate procedure regarding contracts (authorisations) for the provision of community media services. This idea of separation between commercial and community media services seems reasonable and adequate. However, Article 66 is extremely vague regarding the criteria and parameters that shall be used by the media authority in order to authorise the provision of such services. It states that the media authority's decision will be taken "upon tender procedure or in the Media Council's procedure opened specifically for this purpose". Apart from this, Article 66 does not mention the possibility of judicial review of such decisions and, moreover it establishes that "when recognition as a community media service is refused or withdrawn by a way of a resolution, the media

service provider may not initiate the proceedings (…) within a half-year period following the delivery of such resolution".

Thus, Article 66 puts in the hands of the media authority, granted with extensive and fully discretionary powers, all decisions concerning the structure, extension and composition of the community media sector. Taking into account the importance of this sector in any democratic society and the need to guarantee its independence and an appropriate space to develop its activities, Act CLXXXV contains a regulation that is too vague and may lead to the adoption of arbitrary or politically biased decisions in this area.

This framework is very weak. There is an implication that proposals for community media services would compete directly with commercial proposals in any tender, giving commercial services an unfair advantage in any competition. The result might be that no community services would ever be licensed.

Recommendation: Article 66 of Act CLXXXV should be amended in order to introduce a clear, fair and transparent regulation of community media services, based on public interest requirements. Moreover, identified frequencies and capacity on digital distribution platforms should be set aside for use by community media service providers; this capacity should be offered on a competitive basis, with a less onerous tender procedure for applicants.

Article 66(4)(h) of Act CLXXXV obliges community music radio services to broadcast at least 50% "Hungarian works".

Recommendation: this should be amended, so it will not apply to services aimed at ethnic minority groups.

Print media

The Law seeks to place statutory obligations on print media (the "press"), contrary to best practice not only in Europe, but globally, where the press is encouraged to regulate itself. As mentioned earlier (under regulatory bodies, co-regulation and self-regulation), the starting point should be self-regulation.

Concerning the right to request corrections in the press under Article 12, it is highly unusual to have an unfettered right to demand the publication of a correction. This right of reply is normally limited to circumstances where the inaccuracy has been materially misleading or unfair. Here, it is unqualified and too broad.[24] It is also the

[24] See Committee of Ministers' Resolution (74) 26 on the right of reply - position of the individual in relation to the press, as well as Recommendation Rec(2004)16 on the right of reply in the new media environment, and ECtHR *Melnitchouk v. Ukraine*, decision of 5 July 2005, Reports of Judgments and Decisions 2005-IX..

case (see PACE Resolution 1636 (2008)) that the right of reply is normally a matter for self-regulation in the non-broadcast media.

Recommendation: provisions on the right of reply should be amended to enable self-regulatory bodies to set their own standards. The right should be limited to content which is materially misleading or unfair.