Reflections on the Country Memorandum compiled by Dunja Mijatović, Council of Europe Commissioner for Human Rights

by Hungary

Hereunder you will find the comments and reflections of the Cabinet of the Ministerial Commissioner of the Prime Minister's Office, the Ministry of Justice and the National Media and Infocommunications Authority regarding the allegations of the Council of Europe Commissioner for Human Rights. The paragraph numbers before each item correspond to those listed in the Memorandum.

General remarks

The general right of freedom of expression is safeguarded in Article IX of the Fundamental Law. Freedom of expression enjoys traditionally a high level of fundamental rights protection in Hungary: the case-law of the Constitutional Court attaches priority to freedom of expression in the system of fundamental rights, as the freedoms of expression, speech and press are basic preconditions for developing and upholding democratic public opinion. In this sense, the Hungarian authorities cooperated in a constructive way in the preparation of the current memorandum.

During times of insecurity and threat caused by the pandemic, it is even more important how institutions like the Council of Europe formulate and articulate their opinion on the media landscape and regulation in a given country. Therefore, it is more important than ever to ensure a clear and well-elaborated methodological framework that enables a correct and objective assessment of the legal framework in specific states. In this regard we highlight the following elements:

- The memorandum should be based on a transparent list of sources of different nature. Unfortunately, however, the document extensively relies on a handful, but well known government critical NGOs' analysis and online news portal articles, which raise doubts with regard to the objectivity of the memorandum. In certain cases the factual background of these sources is also questionable. For instance when discussing the alleged chilling effect on judges' freedom of expression (Para. 33.), the memorandum refers only to a single research conducted by Amnesty International. This research 'included desk research and a non-representative online questionnaire filled out by *18* Hungarian judges'. It seems to be legitimate to raise concerns whether the statements formed on the basis of a survey featuring the opinion of only 0,6 percent of all the judges in Hungary correctly reflect the opinion of the concerned community.
- In certain cases statements reflect a very personal opinion of the Commissioner, e.g. 'The Commissioner notes that there has been an extreme polarisation of the Hungarian, which has an overall adverse effect on the free exchange of information and opinions.' (Para. 31.). These unusual remarks unfortunately are not supported by any facts or evidence.
- Specific separate cases cannot lead to conclusions as regards general tendencies (not to mention systematic flaws). Therefore, reference to particular administrative

proceedings (e.g. in Paragraph 38 and footnote 88) should be excluded from the memorandum.

- The scope of assessment is also unclear. It raises issues that have been closed years ago or are connected to a legal framework, which was modified later (e.g. a Platform Alert from 2016, reports and articles on the media law from 2010 and 2011). Several statements referred to in the document go way beyond the scope of the memorandum, i.e. the question of freedom of expression and media freedom (e.g. reference to issues related to public procurement in footnote 28; the question of school segregation in footnote 76). Furthermore, certain issues fall definitely outside the competences of the Government or any public authority (e.g. the statement of a poet as referred to in footnote 46). These arbitrarily collected statements mean a significant step away from a focused, facts-based assessment.
- The language of the report also conveys an inherent bias at certain points. E.g. the memorandum presents one part of the media as 'pro-government' and the other part as 'independent', which is misleading, biased, and invalid. Therefore the Government strongly objects such an erroneous approach.

While maintaining our firm commitment to constitutional dialogue and to fostering freedom of expression, we also believe that objectivity as well as a fact-based and balanced investigation should be the guiding principles of an assessment on the implementation of particular human rights standards.

I. Hungary's media legislation and the right to freedom of expression

a) Independence of media regulation

Paragraph 5.

In consequence of earlier critics and recommendations formulated by the expertise of the Council of Europe in 2013 Hungarian Parliament amended the part of the Media Act concerning the appointment and dismissal of the President of and the members of the Media Council. The main amendments, changes were following:

- The President of the Authority is not appointed or dismissed by the Prime Minister, but by the President of the Republic on his proposal,
- The Prime Minister makes his own proposal to the President of the Republic, after considering the proposals it has requested by the Civil Service Board, as well as professional, advocacy and self-regulatory organizations of communications service providers, media content providers, broadcasters and journalists operating in the country for at least five years.
- The preconditions for the appointment and nomination of the President of the Media Council have changed.
- The amendment also states that the President and members of the Media Council may not be re-elected.

Through these changes the Hungarian media regulation fulfils the requirements written in the AVMSD at that regulatory subject.

Comparing AVMSD criteria to Hungarian Media Law

As regards the authority's independence, the Hungarian regulation guarantees the independence of the media authority (in accordance with the criteria laid down by Art. 30 of the AVMSD) with the following:

DIRECTIVE (EU) 2018/1808 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018	**Act CLXXXV of 2010 on Media Services and on the Mass Media (Media Act)**
Article 30 **1. Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.** **2. Member States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition. National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law.** **3. Member States shall ensure that the competences and powers of the national regulatory authorities or bodies, as well as the ways of making them accountable are clearly defined in law.**	Section 109 (1) The National Media and Infocommunications Authority (hereinafter referred to as "Authority") is **an autonomous regulatory agency subordinated solely to the law.** (2) The Authority contributes to implementing the Government's policy - as laid down by legislation - in the area of frequency management and communications. **Responsibilities may only be prescribed for the Authority by acts or by legislation enacted under authorization of an act.** (3) Bodies of the Authority vested with independent jurisdiction are the President of the Nemzeti Média- és Hírközlési Hatóság (hereinafter referred to as "President"), the Media Council of the Nemzeti Média- és Hírközlési Hatóság and the Office of the Nemzeti Média- és Hírközlési Hatóság. (4) The President of the Authority shall give account of the Authority's activities to Parliament on a yearly basis. (5) In relation to the communications industry, the **Authority shall be responsible - in observance of the objectives and basic principles laid down in the Act on Electronic Communications - to ensure that the communications market remains effective and efficient** for present and future considerations alike, to **protect the interests of providers of communications services and the end-users, to maintain fair and effective competition in the electronic communications sector, and to supervise the conduct of organizations and persons engaged in communications activities** for compliance with the relevant legislation. (6) **The Authority shall exercise its powers and jurisdiction independently, in accordance with the law.** (7) **The telecommunications regulatory powers of the Authority cannot be deprived.** Section 123 (1) **The Media Council is an independent body of the Authority reporting to Parliament, vested with legal personality.** The Media Council is the successor in title of the Országos Rádió és Televízió Testület (National Radio and Television Board).

	(2) **The Media Council and its members are subject only to Hungarian law, and cannot be instructed within their official capacity.**
4. Member States shall ensure that national regulatory authorities or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA. Member States shall ensure that national regulatory authorities or bodies are provided with their own annual budgets, which shall be made public.	Section 134 (1) The Authority operates in accordance with the regulations relating to the financial management of bodies governed by public law, and **shall be entitled - subject to the exceptions set out in this Act - to manage State property according to the statutory provisions on central budgetary agencies, and shall cover its expenses, related to the performance of its functions, from its own revenues and budgetary contributions.** The Authority's accounts are carried by the Treasury. Each year, the Authority may set aside funds from its own revenues defined under Subsection (4) - with the exception of fines - up to twenty-five percent of its actual revenue for the subject year. The reserves thus created may be used for covering operating expenses and for discharging its duties in the following years and for the purpose defined in Subsection (5a), and may not be drawn on for other purposes. (2) The Authority's consolidated budget shall be approved by Parliament in a separate act, in accordance with the provisions of this Act, relying on resources specified under Subsection (4) of this Section and Subsection (3) of Section 136. The President shall be entitled to restructure the resources between the approved allotment accounts of the integrated budget, with the proviso that the Media Council's authorization shall be required for re-allocations affecting its own budget or the annex described in Subsection (15) of Section 136. Within the Authority's integrated budget, **the Media Council enjoys financial independence** as described in Section 135. Section 135 (1) The Media Council shall operate in accordance with the regulations relating to the financial management of bodies governed by public law, whose accounts are maintained by the Treasury. (2) **Parliament shall approve the Media Council's budget as part of the Authority's integrated budget, in a separate chapter therein**, for financing the operating expenses of the Fund, and the resources defined in Subsection (3) of Section 136 of this Act for covering the Media Council's operating expenses pursuant to the Act governing the Authority's budget. The Media Council shall be entitled to restructure the resources between the approved allotment accounts.
5. Member States shall lay down in their national law the conditions and the procedures for the appointment and dismissal of the heads of national regulatory authorities and bodies or the members of the collegiate body fulfilling that function, including the	Section 124 (1) **The chairperson and the four members of the Media Council are elected by Parliament** - using the sequential procedure for voting by list - **for a term of nine years,** except if the mandate of the chairperson terminates for either of the reasons under Paragraphs b)-e) of Subsection (1) of Section

duration of the mandate. The procedures shall be transparent, non-discriminatory and guarantee the requisite degree of independence. The head of a national regulatory authority or body or the members of the collegiate body fulfilling that function within a national regulatory authority or body may be dismissed if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance at national level. A dismissal decision shall be duly justified, subject to prior notification and made available to the public.	113, or the mandate of the member terminates for either of the reasons under Paragraphs b)-f) of Subsection (1) of Section 129. In the latter case Parliament shall vote separately on the person nominated to chair or for a seat in the Council. Section 125 (1) The **Authority's President appointed by the President of the Republic shall automatically become nominated for the office of chairperson of the Media Council at the time of appointment**. (2) The chairperson and members of the Media Council shall take office at the time of their appointment, or if elected before the termination of his predecessor's term in office, at the time of termination of his predecessor's term in office. (5) **The chairperson and members of the Media Council may not be re-elected.** (6) The mandate of any new member shall be for the period remaining from the mandate of previously elected members of the Media Council. (7) The term of the chairperson of the Media Council shall correspond with the term of the President of the Authority, except where Subsection (8) of Section 216 applies. Section 129 (1) **Membership in the Media Council shall terminate**: a) upon expiry of the mandate of the Media Council; b) upon resignation; c) in connection with any conflict of interest; d) upon dismissal; e) by way of expulsion; f) upon death.
6. Member States shall ensure that effective appeal mechanisms exist at national level. The appeal body, which may be a court, shall be independent of the parties involved in the appeal. **Pending the outcome of the appeal, the decision of the national regulatory authority or body shall stand, unless interim measures are granted in accordance with nation**	Section 163 (1) The administrative **decision of the Media Council adopted within the framework of its regulatory authority of first instance may be challenged by means of administrative action** exclusively by the client or any other party to the proceeding concerning provisions expressly pertaining to him. Section 165 (1) The client shall have **the right to appeal at the Media Council against the official decision of the Office** passed under this Act, with the exception of decisions that cannot be appealed under the Administrative Procedure Act or under this Act.

The provisions of the Media Act ensure that the supervisory organs of the media services are appointed in a democratic and transparent manner as it is required in the Recommendation No.

R (00) 23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector.

Paragraph 7.

As a result of consultations with the Government on the comments of the Council of Europe, the amendment of the Media Act in March 2013 further strengthened the safeguards ensuring that the media authority discharges its responsibilities independently. In order to underline how independent an office the NMHH President is, the NMHH President is now appointed by the President of the Republic at the nomination of the Prime Minister. Another essential guarantee of independence is that the NMHH President and the President (and the members) of the Media Council may not be re-appointed and re-elected. To facilitate the selection of an appropriate candidate, the amended Act puts in place a procedure that allows for channelling the proposals of civil society organisations in the nomination procedure. As a prerequisite to the appointment (election), it sets out more demanding qualification and professional requirements with regard to the NMHH President, and the President and the members of the Media Council, thus strengthening the fundamentally professional nature of the selection.

We would like to highlight that members of the Hungarian Media Council are elected by Members of the Parliament (MPs), with a two-thirds majority, for 9 years, thereby their mandate extends well beyond a parliamentary term of 4 years. These provisions are meant to safeguard independence from any political attempts of interference.

By contrast, just to name a few

- The Chairman and the Vice-Chairman of the **Cyprus** Radio Television Authority are appointed by the Council of Ministers (Government), following a suggestion of the President of the Republic, and the other five Members are appointed by the Council of Ministers.[1] All officials are appointed for 6 years.
- In the **Czech Republic** the competent state administration in the field of radio and television broadcasting as well as audio-visual media services is the Council for Radio and Television Broadcasting. The Council consists of 13 members who are appointed and removed by the Prime Minister, based on the proposal made by the Chamber of Deputies – the lower chamber of the Czech legislative branch – for 6 years.[2]
- In **Denmark** the Radio and Television Board functions as media regulatory authority, which shall be set up by the Minister for Culture (!). The Board consists of eight members appointed by the Minister for Culture. The Minister nominates seven members, including the Chairman and Deputy Chairman, and the Cooperative Forum of Danish Listeners and Viewers Associations nominates one member. Each term of office shall be 4 years.[3]
- In the **United Kingdom** the competent media authority is the Office of Communications (Ofcom). Several members and the chairman of Ofcom are appointed by the Secretary of State for Culture (Cultural Minister), what's more, OFCOM shall consist of such number of members as the Secretary of State may determine.[4]

[1] Section 4(1) of the Radio and Television Broadcasters Laws of Cyprus
[2] Section 7(1) and (2) of the Act No. 231/2001 on Radio and Television Broadcasting and on Amendment to Other Acts of the Czech Republic
[3] Part 7 of Section 39 of the Radio and Television Broadcasting Act of Denmark
[4] Section 1(2) and (3) of Office of Communications Act 2002 of the UK.

- The **Irish** Broadcasting Authority has nine members, five of who are appointed directly by the Government on the nomination of the Minister for Communications, Energy and Natural Resources. The other four members are also appointed by the Government on the nomination of the Minister, however, with regard to these latter nominees the Minister shall discuss the experience and expertise of proposed candidates with the Joint Parliamentary Committee of both chambers of the Irish Parliament (Oireachtas) and shall take into consideration their advice and opinion.[5]

Paragraph 8.

The 6 members of the board of trustees (Board of Trustees) of the Public Service Foundation exercising ownership rights over the public media service provider (Duna Médiaszolgáltató Zrt.) are elected by the Parliament, half of whom is nominated by the governing factions, while the other half is nominated by the opposition factions. This in itself guarantees the plural composition of the body. The Board of Trustees must not intervene in the contents of the public media service in any way, and must not restrict editorial responsibility. Similarly to the Board of Trustees, the Media Council has no say in the content structure of the public media service providers.

The CEO of public media service providers is nominated by the Media Council, the Board of Trustees appoints the CEO from among these nominees. It is not uncommon in Europe for the media authority to exercise different powers over certain institutions of public service media without, however, impairing their independence. All of the executive officers at the helm of public media service providers are recognised professionals whose decade-long work in the media is a guarantee of independence. The CEO of a media service provider bears the editorial responsibility for the medium it manages, and must not accept instructions in this respect.

There is even a system in Europe, where the executive officers of the public media service providers are directly appointed by the political sphere (the government). Please note that the previous election rules resulted in a situation between 2009 and 2010 when the Hungarian National Television had no appointed executive officer for over 18 months.

The Media Services and Mass Communication Act established a separate body to ensure social control over public media, specifically for this purpose (Board of Public Services). To this end, the Board sufficiently represents Hungarian society (churches, public bodies, municipalities, bodies of national and ethnic minorities, other civil society organisations may nominate members to the Board of Public Services).

Paragraph 9.

Several provisions of the Media Act in effect are designed to facilitate consensus across political parties, and to help elect candidates above parties. Section 118 of the Media Services and Mass Communication Act expressly precludes representatives, officials and employees of political parties, and any persons engaged in party politics from becoming a member of the Media Council. In order to create a cross-party consensus, the Media Services and Mass

[5] Section 8(1) and (2) of the Broadcasting Act 2009 of Ireland

Communication Act obliges the nomination committee to come to an agreement by a unanimous decision.

The rules on the election of the President of the Authority presume that the Prime Minister and the MPs agree on the person of the president, which requires and forces a wide consensus.

Given also that the Media Services and Mass Communication Act provides for the possibility of seeking legal remedy in court, the nomination and election procedure cited cannot by any means be suitable for a party or several parties, the Government and the Parliament to exert decisive influence on the contents of media services and media products.

The long term of the mandate for different public offices and positions also helps them become more independent from the Government and the Parliament. The Media Council discharges functions significant for the functioning of the state and society. To keep 'their distance' from the Government and the Parliament, its president and members are appointed for a mandate the term of which is longer than a parliamentary cycle.

There are several ways of transparent and democratic elections. As explained in Section 13 of the Explanatory Memorandum to the recommendation Rec (2000) no. 23. "The recommendation states that the members of the regulatory authority in the media services sector must be appointed in a democratic and transparent manner. The term 'democratic' is meant in a wider sense here, including that the members of the regulatory authority are sometimes elected, appointed by public authorities (president, government, parliament) or non-governmental bodies.

Paragraph 7-10.

The legislation regarding the area of media in effect was formulated between 2011-2013 and was thoroughly consulted with the Secretary General of the Council of Europe. The Government duly considered the recommendations of the relevant international fora and the Hungarian legislator addressed all the remarks having relevance in legal terms. Secretary General Jagland at a press conference in 2013 said that the Council of Europe had "constructive dialogue" with the Government and that "significant progress has been made".

Paragraph 10.

The statement in the memorandum that the judicial review of Media Council decisions are restricted is fundamentally incorrect, and is based on misunderstanding and misinterpreting the law. It is possible to seek legal remedy in court against all Media Council decisions, and, resulting from the judicial control over public administration, guaranteed by the rule of law, courts have comprehensive review rights. This means that courts may examine the lawfulness of a Media Council decision from any aspect, i.e., contrary to the statement in the memorandum, in terms of the all the facts and all other legal issues of the infringement, the severity of the infringement, the type, extent, proportionality of the sanction imposed, etc.

Please note that the framework, scope and the rules of procedure of administrative cases are not set out in the Media Act, but in the administrative procedure code, so the above applies not only

to the Media Council, but also to any decision of any other public administration authority. Furthermore, these are fundamental requirements not only in Hungary, but also in every state of law, the questioning of which is completely unfounded, and demonstrates a lack of factual knowledge.

Regarding the absence of a suspensive effect of judicial review, we wish to emphasize that it generally applies to all final (legally binding) public administration decisions that they are enforceable, and implementation may only be suspended by a court at the request of the applicant. This fundamental rule is not unique to media regulation either, this is a requirement prescribed not by the Media Act, but by the administrative procedure code, included in the provisions applicable to administrative court actions. Please note that, if a final and legally binding decision were not enforceable, it would result in emptying the objectives of public interest vested in administrative decisions, considering that bringing an action against a decision of a public authority would result in being exempt from the legal consequences of the infringement committed.

The Commissioner alleges that judicial scrutiny over decisions taken by the Media Council remains limited. In this regard she refers to Section 163 of the Media Act[6] saying court proceedings have no regular suspensive effect if decisions are challenged before court.

- In this respect we would like to point to **Section 163(3), second expression of Media Act** which stipulates that an **interim relief may be submitted to court**.
- **Detailed provisions** on the interim relief may be found in Sections 50-55 of the Act I of 2017 on the Code of Administrative Court Procedure (hereinafter referred to as ACP Act). We wish to underline that an entire chapter is dedicated to the interim relief (Chapter IX) in the ACP Act. **Section 50(2) Points a) and c) of the ACP Act** clearly specify that in the context of interim relief it may be requested that **suspensory effect be ordered** or a **provisional measure be taken**.

b) Content regulation

Paragraph 11.

Hungarian media regulations provide for the fundamental rules of the freedom of the press and of media contents in separate acts, (Freedom of the Press Act) sets out fundamental rules governing all types of service and media content, while the Media Services and Mass Communication Act lays down detailed and differentiated rules applicable to media services based on the type of service.

The media regulation that entered into force in 2011 complies with EU law, follows the amendments thereof. It takes into consideration the provisions of the Fundamental Law, the Hungarian Criminal Code and Civil Code as amended, which also affects how the freedom of speech is interpreted in terms of media law.

In its every procedure and decision, the Media Council takes into consideration the relevant decisions by the Constitutional Court, the court decisions and guidelines issued in individual

[6] Act CLXXXV of 2010 on Media Services and the Mass Media of Hungary

cases, and the continuously expanding legal practice of the authority over the past decade, which makes its decisions foreseeable and predictable.

The Media Council may only act to perform its responsibilities and powers laid down in the Media Services and Mass Communication Act and the Freedom of the Press Act. Considering the continuous development of technology, the diversity of media contents, to the spreading of online contents in particular, the legal regulation cannot determine the complete and detailed content of the decisions by the authority, based on individual facts.

The Media Council is obliged to proceed in accordance with international EU and relevant national law in cases of infringement it is made aware of, with particular attention to the principle of the freedom of the press, and a pluralistic media.

Procedural and substantive laws have, however, provisions ensuring the right to discretion (the provisions of the Media Services and Mass Communication Act on imposing sanctions and measures) that enable the Media Council to deliver its decisions based on several alternatives, equally lawful in substance and form, and several lawful decision and interpretation options.

This right to discretion ensures that, for the purpose of the desired objective of the law, the Media Council issues the most suitable, most appropriate and most reasonable decision in any given (unique) case, whilst fully complying with the stringent legal requirements.

In the case cited as an example, the Hungarian regulation is consistent with the similar laws of the Member States.

The Hungarian regulation clearly states that presenters, newsreaders or correspondents may not add any opinion or evaluative explanation to the political news appearing in the programme aired by any media service provider. Any opinion or evaluative explanation added to the news provided in a programme shall be made in a form distinguishing it from the news themselves, indicating its nature as such and identifying its author.

The legal interpretation and decision of the Authority in individual cases was approved and confirmed by the Media Council, acting as the second instance of appeal, and also by Hungarian courts.

The media service provider subsequently turned to the European Court of Human Rights which made a decision opposite to the above.

As for content regulation, the Commissioner denounces the unpredictability of the ‘vaguely formulated content regulation provisions’ of the Media Act. In this regard she cites the opinion of the Venice Commission of 2015 on the Hungarian Media Legislation and the suggestions of the Commission relating to the requirement to elaborate policy guidelines on fines in order to make the decisions of the Media Council more predictable.

- **Section 185(2)** of the Media Act stipulates that ‘in applying the legal sanction, the **Media Council** and the Office, under the principle of equal treatment, **shall act in line with** the principles of **progressivity and proportionality**; shall **apply the legal sanction proportionately**, in line with the gravity and rate of re-occurrence of the infringement, taking into account all circumstances of the case and the purpose of the legal sanction.
- **Section 187(2)** of the Media Act **lists** several **aspects in applying legal sanctions** and refers to additional legislation.

- This additional legislation is the **Act CXXV of 2017 on the Sanctions of Administrative Infringements of Law** and Government Decree of 714/2020. (XII. 30.) on the Implementation of the Act CXXV of 2017. **Section 10(1) of this Act** contains **detailed provisions on the circumstances** and **aspects** the administrative **authority** in question **shall take into account** upon imposing regulatory penalties and fines. **Sections 3 and 4 of the Act CXXV of 2017** stipulate that administrative **authorities** applying legal sanctions, **with a view to ensure** the **progressivity** of administrative sanctions, **shall register detailed information into the Registry** of Administrative Sanctions. Detailed rules on the Registry of Administrative Sanctions are contained in Government Decree of 714/2020. (XII. 30.).

Paragraph 12.

In contrary to the observance of the memorandum, the judgment of the European Court of Human Rights in case *ATV ZRT v. Hungary* (Appl. no. 61178/14, judgment of 28 April 2020) does not impose any obligation in connection with the amendment of the Media Act.

The memorandum erroneously states that the Digital Freedom Committee was established in order to 'prepare a legislative proposal on the activities of social media platforms.' Instead, as it is apparent from the home page of the Committee, its aim is to make the operation of transnational technological companies transparent. Building on the experience of public bodies, the Committee examines the wide-ranging challenges and regulation of the online space by subject areas in order to attain the possibility of personal freedom in the digital space with the help of transparency. We appreciate that the Commissioner also considers it important to involve a wide range of stakeholders in the debate. That is why the Committee set up a website to be able to channel eventual contributions in the discussions despite the pandemic. The digital platform of the Committee serves several important purposes. Visitors of the website, including individuals and civil society organisations can share their experience and questions on the matter, and thus have an impact on the activity of the Committee. In addition, the Committee's thematic sessions can be followed through the website. To this end, we are publishing the minutes of the Committee meetings thus providing the opportunity to receive feedback from the public.

Hungary is also committed to take an active part in the drafting of an EU-wide legislation, including the Digital Services Act and the Digital Markets Act. Hence, there seems to be no difference of opinion with the Commissioner, as the Hungarian Government already expressed its willingness to support efforts at a European level in order to harmonise standards related to digital services and digital markets.

c) Legislative developments in times of crisis

Paragraph 13.

The Commissioner cites the *'Authorisation Act'* adopted on 30 March 2020, which introduced emergency rules in Hungary in response to the COVID-19 pandemic. The Commissioner also deplores the amendment of Section 337 of the Criminal Code that extended the applicability of fearmongering during state of emergency. Finally, the Commissioner deliberates that the high media coverage of the arrests in relation to the above criminal activity had an intimidating and chilling effect on freedom of expression.

First of all, we would like to call the attention of the Commissioner to the fact that the **precise title** of the legislation quoted in this section is **Act XII of 2020 on the containment of coronavirus**. We deem it advisable to avoid applying references which may point at legislations with negative historic connotations. The denotation *'Authorisation Act'* could be misleading and could raise the notion of any resemblance to suppressive and dictatorial political regimes from the past. The Hungarian Government finds it difficult to understand why the Commissioner refused to stick to the official title of the legislation and used a deceptive one instead.

The **Constitutional Court** found[7] that the **new criminal law rules on fearmongering** to be applied during a special legal order **were not unconstitutional**. This paragraph of the memorandum analyses section 337 of the Criminal Code as amended. According to the Memorandum, "*Section 337 of the Criminal Code was permanently amended to extend the sentence for "fearmongering "to up to five years' imprisonment if it is "capable of obstructing the efficiency of protection efforts" during a "state of danger*"."

The Constitutional Court **also established**, as a constitutional requirement, that the new criminal law provision threatens only the communication of a fact the **falsehood of which the perpetrator should have been aware of** at the time of the offence and which, at the time of the special legal order, actually **impedes** or is likely to impede the **defence efforts**.

The description of the criminal offence is formally correct, but the memorandum omits the most important characteristic of the amended offence: notably the fact that the amended provision separates the special legal order caused by epidemic from any (other) situation considered "public danger", and it provides for this particular situation only in section 337 (2) of the Criminal Code. This is not the equivalent, as suggested by the memorandum, of "extending" the sentence to 5 years of imprisonment, i.e. adding an aggravated case punishable by a higher penalty. In fact, section 337 (2) contains a number of limitations rather than extensions as compared to section 337 (1); this amendment excluded the possibility to punish any disturbing false news in the whole territory of Hungary. Offences that qualify under section 337 (2) do not meet the requirements under section 337 (1) of the Criminal Code. Therefore, the legislator did not extend the scope of criminal offence, but merely restructured it in this respect.

The memorandum assumes that the amendment is ambiguous. "*The Commissioner considers that the high number of investigations launched, including in cases that undoubtedly involved expressions of opinions, and the fact that the Constitutional Court found it necessary to clarify that the crime must be interpreted in line with freedom of expression safeguards*" – in her view – demonstrates this ambiguity. However, the memorandum does not identify the source of the statistical data, but highlights only a few examples in the footnote. According to the official criminal statistics, 11 investigations were ordered in 2020 of which 10 cases were terminated without indictment. In 2021, there have been no new cases. The number 134 might refer to all previous cases investigated or prosecuted under section 337 of the CC including *before* the amendment in 2020. In addition, footnote 17 refers to one arrest and then paragraph 13 generalizes arrests as follows: "the high media coverage of the arrests had an intimidating and chilling effect on freedom of expression." This finding is factually refutable, since no arrest was made in any case related to section 337 (2) of the Criminal Code. The case singled out in the

[7] Resolution of the Constitutional Court Nr. 15/2020. (VII. 8.)

footnote may refer to a measure conducted by the police against one individual which was neither an arrest nor a criminal sanction.

The Constitutional Court also declared that the **prohibition** only applies to knowingly untrue or distorted statements of fact, **not to critical opinions**. It should also be noted that "*cases undoubtedly involving expressions of opinions*" fall outside the scope of section 337 (2) of the Criminal Code. Noteworthy that criticism does not fall within the elements of the offence, and the crime can only be carried out in relation to facts. Since the overwhelming majority of cases (10 out of 11) failed to pass through the filter of the prosecutors and were not followed up by charges, the consistent application and the interpretation of the law is clear.
The memorandum notes that "*the Constitutional Court found it necessary to clarify that the crime must be interpreted in line with freedom of expression safeguards*". In this case, the Constitutional Court acted upon a constitutional complaint, which creates a procedural obligation to analyse the law. When invited, the Constitutional Court made it clear that Section 337 of the Criminal Code was in line with the Constitution and the safeguards of freedom of expression. In addition, the Constitutional Court did not impose any new requirement that would deviate from the uniform application of the principles of criminal law. As a constitutional requirement, the Constitutional Court prescribed that only such behaviour may be subject to criminal sanctions where the perpetrator is aware, at the time of the commission of the offence, that the information spread is false or where the perpetrator distorted the information. At the same time, such information has to be capable of obstructing or annihilating protective measures when the special legal order is declared. All these conditions must be fulfilled, thereby establishing the right balance between the requirement of protecting public health and safety and the freedom of expression.

Before the decision of the Constitutional Court, the same requirements had already appeared in criminal textbooks and commentaries which interpreted the offence of fearmongering. According to this,

"*The offence is committed by a person who either tells the facts that he has made up or distorted, or who transmits such allegations heard from someone else...*"

and in order to establish the crime*, "the perpetrator's knowledge must include that the fact stated or transmitted is false or distorted..."*

[Great Commentary to Act C of 2012 on the Criminal Code – Edited by: Krisztina Karsai, page 702] and:

"The perpetrator's knowledge must embrace the falsehood of the fact or the distortion of the fact."

[Hungarian Criminal Law, Commentary for Practice Third Edition, HVG Orac, page 1261]

The Constitutional Court stated in its previous decisions that the restriction on the freedom of expression in the context of disputes in public matters should involve only spreading knowingly false facts; the Constitutional Court also analyzed the relationship between the freedom of expression and public peace [see, for example, Decisions 13/2014.(IV.18.), No 7/2014.(III.7.) No 36/1994.(VI.24.), No 18/2000.(VI.6.)]. On this basis, it is clear that the Constitutional Court in its last decision did no more than confirm the established, earlier interpretation of the law. Therefore, there is no legal basis to conclude in the Memorandum that concerns about the clarity

of the amended Criminal Code may only be dispelled on the basis of the interpretation given by the Constitutional Court's decision.

The memorandum's recommendations include the need to "*take proactive steps to enable the free exchange of diverse information and opinions as these are the best means of addressing disinformation, and ensure that the relevant Criminal Law provisions are compliant with the requirements of legality, necessity and proportionality enshrined in Article 10 of the Convention*;"

The Constitutional Court analyzes, if necessary, compliance with the European Convention on Human Rights and the related jurisprudence of the European Court of Human Rights when taking its decisions. The Constitutional Court in its decision 15/2020. (VII. 8.) approved section 337 of the Criminal Code and also formulated its view that it was also in line with the Convention. Accordingly, the Constitutional Court's position is that there is no need to amend the Criminal Code.

Finally, contrary to the view of the Commissioner, we are of the opinion that media coverages of arrests or other law enforcement operations cannot qualify as scales to assess the extent of freedom of expression. **In a democratic society** based on rule of law, **it is** solely **up to courts of justice** and, considering the issue affecting a fundamental civil right, to the **Constitutional Court to decide** what behaviours and actions could have a **chilling effect** on freedom of expression.

Paragraph 15.

The Commissioner seems to suggest that the new regulation on the use of drones was a result of the extraordinary situation, the state of danger, caused by the pandemic. In fact, Act C of 2013 on the Criminal Code was modified by adding a new criminal offence called "Illicit Data Acquisition". This modification entered into force on 1 January 2021 as Section 422 / A, and reads as follows:

"(1) A person who without authorisation monitors another person's apartment, premises or a fenced site belonging to those and records what happened there, shall be punished by confinement for a misdemeanour, provided that no other criminal offence is committed.

(2) The person who makes the sound or image recorded during the surveillance provided for in paragraph (1) available to the general public, shall be punished by an imprisonment of up to one year, provided that no other offence is committed.

(3) The offences referred to in paragraphs (1) – (2) shall be punishable only on a private motion. "

Section 422/A of the Criminal Code thus sanctions a person who, by unauthorised use of an unmanned aerial vehicle, surveils or records in secret the home of another person or any other related premises or a fenced area of them. The crime of illegal acquisition of data shall be punished by confinement. The aggravated case is punishable with imprisonment of up to one year, in case the perpetrator makes the footage available to the general public (provided that no other crime is committed). Since this offence can be prosecuted only upon the private motion of the aggravated party, the police and the prosecution service cannot bring charges against any individual unless the aggravated party motions for it.

The introduction of the new offence was necessary because there could be mass violations of privacy rights, even with small drones freely available on the market. The new rule only complements cases of illicit data acquisition in view of the new technology and its significant threatening nature.

The new offence is not targeted on investigative journalism, but it aims to protect – the otherwise extensively advocated – privacy and to penalize unauthorised harassment by using a drone and the unauthorised disclosure of personal data. That is why Parliament defined it as a criminal offence which is to be prosecuted only upon a private motion. This new criminal offence also serves to increase the protection of the values protected by the GDPR.

It is also important to clarify that using a drone in itself is not criminalized in general. Act no. XCVII. of 1995. XCVII. as amended clearly sets out the framework for the lawful usage of drones. Among those activities that do not qualify as lawful usage, only the most serious breaches of law are punishable under criminal law.

III. Impact of legislative and other state measures on media pluralism and freedom of expression

a) Impact on the public service media and media belonging to KESMA

Paragraph 25.

Sections 14 (1) and (2) and Section 17 (1) and (2) of the Freedom of the Press Act phrase absolute prohibitions i.e. they represent the limitation of the freedom of the press (contents violating dignity, inciting hatred or of exclusive nature cannot be published, they can be excluded from democratic publicity).

The Media Council investigates the enforcement of these provisions based on citizen reporting.

It should be emphasised that the Media Council has **competence** to investigate the enforcement of Section 14 (2) and Section 17 (1) and (2) of the Freedom of the Press Act in all media contents (press products and media services), while it can check the fulfilment of **Section 14** (1) **of the Freedom of the Press Act** (as a result of the decision of the Constitutional Court) **in the case of media services only**.

According to interpretations by the Constitutional Court and the practice of the authorities developed based on these, the Media Council can only establish the violation of these provisions in strongly justified cases.

In the past six years the Media Council established the violation of the provisions on fundamental rights (human dignity, incitement of hatred, exclusion) **eleven times in respect of a total of nine media contents (television programmes or newspaper articles)**.

(The decisions will not be described comprehensively, only in relation to the note made in paragraph 25.)

In **2015** the Media Council established the violation of Section 14 (1) and (2) of the Freedom of the Press Act (human dignity) in one case.

In **2016** the Media Council established the violation of Section 17 (1) and/or (2) of the Freedom of the Press Act (incitement of hatred and/or exclusion) in two cases.

One of these decisions: thoughts in connection with the terrorist attacks in Paris published in the daily newspaper Magyar Hírlap and its online version ("Zsolt Bayer: 9066 Opinion" – issue of 16 November 2015).

- The author called Muslims above the age of 14 potential assassins and identified them with the emigrants (his comments were either about Muslims or emigrants).
- The Media Council established the violation of Section 17 (1) and (2) of the Freedom of the Press Act (incitement of hatred and exclusion).
- The Media Council banned the infringing behaviour and obliged the media content provider to pay a penalty and to publish an announcement about the infringement.

In **2017** the Media Council established the violation of Section 17 (1) and/or (2) of the Freedom of the Press Act (incitement of hatred and/or exclusion) in **five cases** along with the infringement of Section 14 (1) of the Freedom of the Press Act in **two cases** (human dignity).

Out of these decisions, **one was made because of a media content (a newspaper article published in print and online) suitable for the exclusion of the LGBTQI community**:

- In its printed and online version dated 10 July 2017, the article of Magyar Hírlap titled *"Up to this point and no more! It is time we set the limits"* wrote about the situation of the Hungarian homosexual minority on the occasion of the Budapest Pride parade.
  The author grouped his opinion on homosexual people and his ideas about how to limit their rights into eight points.

- The Media Council established that the article was exclusive against the homosexual community because it depicted them as a whole as a group that separates itself from the majority of society and which, due to its sexual orientation, is non-desirable and non-capable of fulfilling certain positions, while also worthy of being depraved of their fundamental rights as citizens. The media content was also suitable for generating stereotypical, exclusive thoughts against homosexual people or for confirming potentially existing views of such nature.

- The Media Council established that by publishing the article, the media content provider breached Section 17 (2) of the Freedom of the Press Act, therefore, the former obliged the latter to remove the infringing article from its website without delay and to inform its readers of the infringement in an announcement. A penalty was also levied.

In another decision, the Media Council established an infringement in respect of **an opinion** voiced in Echo TV (29 September 2017) **regarding civil organisations operating asylum programs**.

- The security policy expert interviewed on the program called the staff of civil organisations operating asylum programs as traitors and raised the idea of liquidating them. The program was suitable for inciting extreme emotions, even hatred against the staff and activists of these organisations, it violated Section 17 (1) of the Freedom of the Press Act.
- In addition to prohibiting the infringing behaviour due to the infringements committed in both the linear and the retrievable media services, the Media Council obliged the

media service provider to pay a penalty and to publish an announcement about the infringement.

The decision of the Media Council made regarding the **ostracising article** of Magyar Hírlap on **emigration** (10 August 2017):

- The author depicted the population of Africa (migrants arriving from Africa) as a community of people of lower rank, identified them as objects, who represent a danger for European civilisation. He argued with the isolation of the affected community and their strange nature, separation from other layers of society.
- The Media Council obliged the media content provider to pay a penalty due to the infringement of Section 17 (2) of the Freedom of the Press Act (exclusion) in its printed and online press products as well as to publish an announcement and to remove the article from its website.

In 2018 and 2019, the Media Council examined the enforcement of the provisions in several cases but it did not establish any infringements in light of the fact that expressing an opinion that is merely offensive and not acceptable equally for everybody, which may contain even extreme phrases, cannot be limited in itself, particularly in light of the freedom of the press.

In **2020** the Media Council established the violation of Section 17 (2) of the Freedom of the Press Act (exclusion) in one case due to the **media content featured in ATV's "News of the Day" programme (23 January 2020)**.

- One of the participants of the programme called a social group specified based on their skin colour, religion and sexual orientation i.e. white Christian heterosexual people as a "terrifying formation". He also said that white nationalists also come from them which was denunciatory and it was suitable for generating stereotypical, exclusive thoughts against the clearly identifiable community as a whole.
- Apart from the payment of a penalty, the Media Council also obliged the media service provider to inform its audience of the infringement in the next issue of the infringing programme, with the content specified in the resolution.

b) <u>Impact on the independent media and investigative journalists</u>

<u>Paragraph 29.</u>
First of all, in respect of the case of Klubrádió it should be emphasised that the ruling passed by the court in the litigation initiated based on the request of Klubrádió clearly confirmed that the Media Council reached a lawful decision in not extending Klubrádió's licence based on the facts.
Renewal without a tender is an exceptional procedure, a form of concession, and to benefit from this the media service provider requesting the renewal must always comply with legal regulations during its operations. The law stipulates a proportional requirement as the condition for such renewals, and only severe or repeated infringements count as reasons for exclusion, not all infringements. This is a proportional and fair criterion since the state-owned analogue frequencies are a finite resource, and providing them for media broadcasting purposes without

a new tender constitutes an exceptional right when compared to a right gained generally on a competition basis.
Everyone is familiar with the rules in the regulations, especially because these rules have not changed in Hungarian law for almost 25 years, and Klubrádió has been providing a media service for more than twenty years. The regulatory framework was thus well known to Klubrádió. Despite this, between 2014 and 2021 Klubrádió committed infringements in its operations 6 times, two of which were repeated infringements, thus within 365 days it failed to meet its statutory obligations twice.
The Commissioner's opinion included in the memorandum is also mistaken factually because the renewal of the media service licence of Klubrádió was not hindered by a former serious infringement but by former repeated infringements and the notion of "repeated" is clearly defined in Hungarian media laws. In extension procedures it is no longer possible to reconsider or re-evaluate previous infringements, but we think it is important to be emphasised that Klubrádió's repeated infringements – precluding the renewal – are not minor: Klubrádió failed to meet its data reporting obligations in a total of 18 months, which prevented the inspection of statutory obligations that is also mandatory under EU law.
Therefore, in such cases the current law precludes any extension of a licence without a tender, and the Media Council had no option to exercise discretion in reaching its decision on the renewal application of Klubrádió. In light of all this, it does not make sense in terms of both concept and content to refer to the case of Klubrádió as an example of the Media Council having an "exaggerated scope of authority for deliberation" since the Media Act defines former repeated infringement as a clear, objective reason for the exclusion of renewal, which does not allow deliberation. It needs to be stressed that these are clear and objective conditions, based on which, irrespective of any political issue or party affiliation, the Media Council can consistently and verifiably exclude those who do not meet these legal conditions from taking advantage of this opportunity. So the Media Council rejected the renewal of licences in the case of several other radios not only for Klubrádió when there was a lawful reason for exclusion.
At the request of Klubrádió, the court also examined the cases referred to in the Commissioner's memorandum and found that the decisions were completely different from the case of Klubrádió and they were made in a different legal environment so they cannot be compared to the case of Klubrádió. The court also stipulated that even if the practice of the Media Council would be different occasionally, Klubrádió could not demand to set aside the application of the mandatory legal regulation by referring to this i.e. it could not demand the renewal of its licence when a reason for exclusion prevails.

When reacting to the loss of Klubrádió and "independent" news, it is important to highlight that Klubrádió is not the only radio station in Hungary through which listeners can get access to a radio programme. Currently, in Hungary whose population is almost 10 million, the Authority offers 149 radio media services through terrestrial broadcasting apart from the 7 public service radio media services. At present, 15 media service providers provide media services with their places of business located in Budapest, and in addition to these media services, the programmes of public service and national commercial media service providers are also accessible for the citizens of Budapest.
As for their genre, the radio media services in Budapest are quite variable, they include several talk&news radios, music radios, church radios as well as radios focusing on cultural, economic issues or the protection of rights, or smaller communities.

So in light of the number of radios and genre variety, the radio market of Budapest offers the most variable opportunity for getting information or entertainment in the country. The programme of all of the radios of Budapest are available on the Internet, thus those interested can listen to them even outside their reception area.
In addition to the frequencies in use, currently bidding is in progress for an additional 5 district and 1 small community frequencies and if these are won, the radio media content supply of Budapest will become even more colourful. In light of all of this, therefore, it can be clearly established that the offer of the radio market of Budapest is diverse and is changing dynamically.

Paragraph 27-32.
The Commissioner analyses the impact of legislative and other state measures on the independent media and investigative journalists.

- As for the issue of investigative journalism **the Commissioner** so far, regrettably, **has failed to condemn** other phenomenon that may give rise to serious concerns regarding press freedom and freedom of expression. Just recently, **on 11th March 2021**, the **president** – and simultaneously prime minister candidate – **of an opposition party**, in his Facebook video recording, **announced** that **he would disqualify** certain group of **journalists** from exercising their profession.
- It is noteworthy that **the same person**, on the **18th May 2017**, entered the editorial office of an online news outlet without permission, **harassed** a certain **journalist** on his workplace and **took video recording of him without permission**, thereby **violating his rights** relating to personality and privacy.
- In paragraph 30 the Commissioner mentions the suspension of a journalist's accreditation to Parliament. The **code of conduct for the press** on the premises of the **National Assembly** is laid down in the **Order 9/2013 of the Speaker** of the National Assembly. Accordingly, journalists have access to a designated press area and the plenary hall, they can report on the activities of the parliament without restrictions, but **basic behavioural rules have to be respected** in order to ensure the dignity of the place. These rules are **similar to** the Code of conduct for the journalists on **European Commission premises**, according to which *'Journalists shall have due regard to the dignity, privacy and integrity of all individuals, Commissioners, Commission staff, visitors and any other individuals present on Commission premises as well as to the integrity of the Commission's property and equipment. Any violation may lead to the measures laid out in Commission Decision 2015/443.'*[8][9]
- The **Parliamentary Assembly of the Council of Europe has comparable rules** that form part of the Assembly's Rules of Procedure.[10] The second sentence of paragraph 26 of these Rules concludes that *'Journalists and representatives of the press and media are required to comply strictly with the instructions issued by the Directorate of Communication of the*

[8] Paragraph 5 (Respect for dignity, privacy and integrity of Commission staff and property): https://ec.europa.eu/info/sites/info/files/code-of-conduct-for-journalists-inside-ec-buildings_en_0.pdf
[9] Commission decision (EU, Euratom) 2015/443 of 13 March 2015 on Security in the Commission: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015D0443&qid=1616349919370&from=HU
[10] Rules on access to and movement and security within the Council of Europe during sessions of the Parliamentary Assembly and meetings of Assembly committees and sub-committees: http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp?id=EN_CEGEIFJD#Format-It

Council of Europe and the Assembly's Communication Division.' The third expression of Paragraph 27 specifies that *'media activities must not (...) compromise people's dignity and interfere with their privacy.'*

Paragraph 32.

The protection of journalists is ensured through the current legal regulations but their responsibility for the infringements they commit during their work is not unlimited, their exemption is conditional. As a rule of thumb, the Freedom of the Press Act[11] declares that the exercise of the freedom of the press may not constitute or encourage any acts of crime, violate public morals or the moral rights of others [Section 4 (3) of the Freedom of the Press Act].

However, according to the act, investigative journalists may not be held liable for any breach of law committed subject to a conjunctive set of conditions [Section 8 (1)-(2) of the Freedom of the Press Act]. The competent civil or criminal court shall in each case examine whether such conditions are fulfilled in light of the specificities and all the circumstances of the given case. The establishment of a general standard or demarcation line is not expected at the legislators' level. So the task of legal practice is to develop the interpretation of the above norms. Currently, the Constitutional Court has a case that may give an answer to this issue, namely, what the extent of the exemption of journalists is i.e. where the boundaries of investigative journalism are: when are journalists exempted in order to guarantee that they can perform their tasks of public interest and from when the step-up of the authorities (courts) can be verified constitutionally. [12]

c) Impact on judges and public officials

Paragraph 33.

The Commissioner expresses her concerns in that *'court decisions have repeatedly and publicly been criticised by government spokespersons.'*

- **Article C) Subsection (1) of the Fundamental Law** (Constitution) of Hungary stipulates that the functioning of the Hungarian State shall be based on the **principle of the division of powers**. **Article IX Subsection (1)** determines that everyone shall have the right to **freedom of expression**. The above principles are elaborated in various Constitutional Court decisions. **Article 10 of the Convention** for the Protection of Human Rights and Fundamental Freedoms declares **freedom of expression**. The precise wording of Article 10 articulates that *'Everyone has the right to freedom of expression.'*[13] What's more, **Article 14** of the said Convention establishes that *'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex,*

[11] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content

[12] On the constitutional complaint received by the Constitutional Court, the petition and the previous decisions of the case L.
http://public.mkab.hu/dev/dontesek.nsf/0/A2DAB2F87F46F1E5C125841E00467F8E?OpenDocument&fbclid=IwAR1m9owoJkOdW0sBiyNxRNk_5g29ZFTNOwI0gipcbSojsPH3zbEwpDI8dgM

[13] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765

race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'[14]

Also in paragraph 33 the Commissioner refers to the decision of the Court of Justice of the European Union (CJEU) in that the CJEU found the relevant Hungarian law that had imposed registration and publication obligations on civil society organisations, which receive support from abroad, breaches EU law.

- The **Hungarian Minister of Justice**, Judit Varga, **expressed** one month ago that the **Government of Hungary** (hereafter: the Government) not only **had indicated its readiness to repeal** the disputed regulation, but **also sent the legislative text** on the regulation's recast **to the** (European) **Commission**, indicating that as soon as the Commission informs the Government about the text's admissibility, the Government would **submit** it **to the Parliament** immediately, so the draft bill could be **negotiated during the spring session**.

d) Impact on civil society, human rights defenders and independent voices

Paragraph 36.

The Government will perform – as it consistently does – all necessary measures to comply with the Court of Justice of the European Union's (CJEU) judgement in case C-78/18. To that effect, there are currently ongoing negotiations between the European Commission and the Government based on the principle of sincere cooperation.

It should be noted in this regard that in its judgement the CJEU confirmed that certain civil society organisations may have a significant influence on public life and public debate having regard to the aims which they pursue and the means at their disposal. In addition, the CJEU judgement confirmed that the objective of transparency and, furthermore, traceability of movements of capital intended for organisations which participate in public life might be regarded as an overriding reason in the public interest. In the course of the dialogue with the European Commission, the Hungarian government aims to achieve this objective accordingly.

Paragraph 37.

Under **section 353/A**(1) of the Criminal Code, a person who engages in any organising activity aimed at

a) enabling a person to initiate an asylum procedure in Hungary even though he is not exposed to persecution in his home country, the country of his habitual residence or the country he transited through because of his race, nationality, membership in a particular social group, religion or political beliefs, or his fear of direct persecution is groundless, or

b) having a person obtain any title to residence even though he entered or resides in Hungary illegally,

is guilty of a misdemeanour and shall be punished by confinement, unless a criminal offence of greater gravity is established.

[14] See footnote Nr. 11 above.

The provisions of the criminal offence to sanction promotion and support of illegal immigration are not suitable for sanctioning legal or other assistance provided to asylum seekers at a later stage of the asylum procedure. This is clear from the criminal law provision, because according to Section 353/A of the Criminal Code, the conduct of the "organising activity" is separate from the concept of assistance. The organising activity cannot be associated with providing advice and information, because the act of organisation is much more complex, more comprehensive, a coordinated, targeted form of conduct with a particular aim. The organising activity assumes awareness (knowledge of illegality) and aims to deliberately promote illegal migration. The intention of ad hoc assistance does not fit this requirement and is therefore not punishable.

This offence may be committed only with a direct intent, aiming at a particular objective. Therefore, if the organizing activity does not aim to achieve one of the objectives set out in the Criminal Code, it cannot be regarded as meeting the conditions under the Criminal Code. The Constitutional Court interpreted this provision in its Decision of 3/2019. (III.7.). It explained that it would be against the obligation to assist the fallen and the poor as well as against common sense and the moral purpose of the common good to threaten by means of criminal law the altruistic organising activity fulfilling the duty to help the fallen and the poor. The Constitutional Court came to the conclusion that the text of the law under consideration does not allow for such an interpretation (ie. that *any* organizational activity would be criminalized), and the requirement of rational interpretation required by the Fundamental Law could not allow any court to reach such a conclusion. This interpretation of the Constitutional Court is binding upon the national courts. If the decision of the court seized is contrary to the decision or the interpretation of the Constitutional Court, a constitutional complaint may be filed. The explanatory memorandum to Article 353/A of the Criminal Code also supports the interpretation of the Constitutional Court.

e) Impact on specific groups and their access to rights

Paragraph 38.

The Commissioner asserts that the LGBTI community has been the target of homophobic and transphobic statements by governing officials, including the Prime Minister himself. In this statement the Commissioner, in the footnote of her memorandum, cites an interview with the Prime Minister on Kossuth radio from the 4th October 2020, equating LGBTI persons with a threat to Hungarian children.

- Contrary to the suggestion of the Commissioner, in the interview the **Prime Minister declared** multiple times that **Hungary is a patient and tolerant country** and Hungarians are very tolerant people. At the end of the interview the Prime Minister summarized his views on the topic as saying *'Leave our children alone.'* This wording and spirit mirrors a defensive standpoint rather than an offensive one and does not target any group in the society. Moreover, we would like to underline that **Act XXIX of 2009 on the Registered Partnership of Same-sex Couples** is **in effect** in Hungary **as of July 2009** meaning that same-sex couples have a **legal basis** determining basic legal conditions **for their cohabitation**.
- First, in this pargraph the Commissioner cites that a children's book with fairy tales featuring the stories of different individuals, including LGBTI persons and Roma, was publicly shredded by a Member of Parliament (MP). Regrettably, the **Commissioner failed**

to make it clear that **the MP** who acted that way **belongs to an opposition party** rather than to the ruling coalition parties.

- Second, **in his interview of 4th February 2021** with the German weekly magazine 'Der Stern' **Viktor Orbán,** responding to the question of the journalists, expressed that he **rejects the symbolism of destructing books** because such actions can take back people to the world of fascism or communism.[15]

Footnote 86 states that 'In May 2020, the Hungarian Parliament prohibited legal gender recognition in clear breach of international human rights norms and amid widespread condemnation. Multiple court cases have been brought against this ban and some Regional Courts have announced their intention to submit it for constitutional review. Constitutional amendments adopted in December 2020 introduced an obligation for children to be brought up in accordance "with the values based on our homeland's constitutional identity and Christian culture".' The Government draws attention to the fact that the text of the Fundamental Law of Hungary was incorrectly interpreted. The official translation of the Fundamental Law that can be found at https://njt.hu/ does not – contrary what the memorandum suggests – create a general obligation on parents or any other individual to raise their children in a specific way. Rather the Fundamental Law states that the state must ensure every means and measures to that end: „Hungary (…) shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country." This also flows from the reasoning of the Amendment.

Conclusions and recommendations

Paragraph 40 and 41.

The Commissioner states her opinion in her conclusions that 'by repeatedly disregarding the judgments of national and international courts, the Government has demonstrated that it has no intention of adhering to the rule of law (…)' (Para. 40.) and recommends to 'show unequivocal commitment towards the rule of law and implement with immediate effect all outstanding judgments of national courts, the Court of Justice of the European Union and the European Court of Human Rights'.

Hungary is firmly committed to the principle of rule of law in line with the Council of Europe standards and strongly rejects unfounded general statements such as in paragraph 40.

We believe that mutual respect and constructive dialogue shall define the relationship of Hungary and the organs of Council of Europe.

We reiterate our full commitment to the Convention system, also in the context of the implementation of the judgments of the European Court of Human Rights. The Hungarian Government has an ongoing cooperation with the Council of Europe as regards the implementation of the judgments of the Court.

[15] http://www.miniszterelnok.hu/interview-with-prime-minister-viktor-orban-in-der-stern-mr-orban-what-would-you-do-if-your-daughter-had-a-muslim-boyfriend/

Concerning the implementation of the judgments of the CJEU, the Hungarian Government, as in all previous cases without exception, will perform all necessary measures to comply with the CJEU's judgement.

Paragraph 41.

Both the Hungarian regulation and the Media Council's procedure comply in all respects with the rule of law principles guaranteed by EU and Hungarian legislation. As described above, the rules of administrative procedures generally ensure, including in respect of the administrative action and decision of all authorities (including the Media Council), the comprehensive right of review for courts and the possibility to suspend the enforcement of the authority's decision and to order several other measures for the immediate protection of rights.

The Hungarian government is disappointed that the memorandum is based on presumptions and allegations instead of facts, despite the fact that numerous government officials shared their views and insights with the Commissioner as well as provided her with adequate background information.