



MINISTRY OF PUBLIC ADMINISTRATION
AND JUSTICE

ZOLTÁN KOVÁCS, PH.D.
Minister of State for Government Communication



Ref. Nr: XVII/84/8 (2011)

Mr. Thomas Hammarberg

Office of the Commissioner for Human Rights,
Council of Europe,
F-67075 Strasbourg Cedex,
FRANCE

30 May 2011, Budapest

Dear Commissioner Hammarberg,

Please find attached our annotations to your document evaluating in the light of the relevant Council of Europe standards the following legislation: the media-related provisions of the Constitution currently in force as amended in July 2010; Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content ('Press and Media Act'); and Act CLXXXV of 2010 on Media Services and Mass Media ('Mass Media Act').

In the interest of clear and constructive dialogue, in our annotations we have sought to provide further information, clarify any potential misunderstandings and confirm our interpretation of the norms in question.

As we have stated in the introduction, this analysis is not exhaustive, and should you require further information we are ready to provide it.

We reiterate our commitment – shared with you and our partners in Europe – to ensure that the freedoms of expression, opinion, religion and belief are defended and exercised to the fullest extent in a democracy under the rule of law.

Please accept the assurances of our highest consideration.

Yours sincerely,




Zoltán Kovács, Ph.D.

**Detailed annotations to the Opinion of the Commissioner for Human Rights on
Hungary’s media legislation in light of Council of Europe standards on freedom of the
media (CommDH(2011)10 dated on 25 February 2011**

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**Detailed annotations to the Opinion of the Commissioner for Human Rights on
Hungary's media legislation in light of Council of Europe standards on freedom of the
media (CommDH(2011)10 dated on 25 February 2011**

I. Introduction

The Commissioner for Human Rights ("Commissioner") of the Council of Europe ("CoE") has prepared a detailed opinion ("Opinion") on the recently adopted Hungarian media regulation. It evaluates

- the media-related provisions of the Constitution currently in force as amended in July 2010,
- Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content ("Press and Media Act") and
- Act CLXXXV of 2010 on Media Services and Mass Media ("Mass Media Act").

The Opinion includes a detailed description of the relevant CoE standards. Doing so, the Commissioner has clearly defined the basis on which he has formulated his observations.

The purpose of the present annotations is

- to provide further information to the Commissioner on the Hungarian media laws, including *inter alia* information on the amendment of these laws by Act XIX of 2011 made on 7th of March;
- to indicate some assessments of the Opinion related to the Hungarian law that are inaccurate in our view and
- to indicate where our understanding of the referred CoE norms differs from that of the Commissioner.

Please note that the analysis provided below is not exhaustive. Should the Commissioner need any further clarification for assessing the Hungarian laws we stand ready to provide additional information.

II. Annotations to the Opinion

In his Opinion the Commissioner has defined eight points of concern. Below we address these concerns one by one.

2.1. “Prescription on what information and coverage shall emanate from all media providers”

Relevant provisions

Article 13 of the Press and Media Act:

“Linear media services engaged in the provision of information shall provide comprehensive, factual, up-to-date, objective and balanced coverage on local, national and European issues that may be of interest for the general public and on any event bearing relevance to the citizens of the Republic of Hungary and the members of the Hungarian nation. The detailed rules of this obligation shall be set by act in accordance with the requirements of proportionality and a democratic public opinion.”

Article 1 of the Press and Media Act:

“1. Media service: Shall mean any business services as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, for which the media service provider bears editorial responsibility, the primary aim of which is the delivery of programmes to the general public for informational, entertainment or educational purposes through an electronic communications network.”

“5. Linear media services: Shall mean the media services provided by a media service provider that allow for the simultaneous watching or listening to programmes on the basis of a programme schedule.”

Article 17 of the Mass Media Act:

“(2) Subject to the nature of the programmes, the balanced nature of communication shall be ensured within the given programme or in the series of programmes that appear regularly.”

Article 181 of the Mass Media Act:

*“(1) In case of infringement of the obligation of balanced coverage defined in Article 13 (2) of the Press and Media Act and Article 12 (2) of this Act, **the holder of the viewpoint that was no expressed, or any viewer or listener** (hereinafter for the purposes of Paragraphs (2)–(6): applicant) **may initiate that a regulatory procedure is instituted.** The powers to assess a request concerning the media services rendered by media service providers with significant influence and public media service providers shall be with the Media Council, while in case of other media services with the Office. The Authority shall not have the right to institute*

proceedings ex officio in case of infringement of the obligation of balanced coverage.

*(2) **Prior to requesting regulatory procedure defined under Paragraph (1), the applicant shall resort to the media service provider with its objection.** The applicant, within 72 hours from the broadcast of the contested information or, in case of re-broadcast, from the date of the last broadcast, shall have the right to request in writing that the media service provider broadcast the viewpoint required for a balanced coverage, properly, under circumstances similar to the contested information. **The applicant may not exercise his/her right of challenge if another representative of the same viewpoint has already been given an opportunity to present the viewpoint not presented earlier, or if this opportunity has been given to the applicant but has failed to take advantage thereof.***

(3) The media service provider shall decide on the acceptance or refusal of the objection within forty-eight hours of the receipt thereof. The decision shall be communicated to the applicant in writing without delay. The applicant, within 48 hours of the decision being announced, shall have the right to initiate at the Authority that a regulatory procedure be instituted, or, when the decision is not communicated, within ten days of the broadcast of the challenged or objected communication, together with the exact name of the challenged programme and the particular media service provider. A procedure may also be initiated at the Authority if the media service provider fails to comply with the contents of the objection in spite of its statement of acceptance. In this case, the regulatory procedure must be initiated at the Authority within forty-eight hours of the expiry of the deadline undertaken for complying with the objection. The statutory period for of proceedings conducted by the Authority shall be fifteen days, which may be extended in justified cases on one occasion, by eight days at the most.

(4) At the request of the Authority, the media service provider shall furnish the Authority with the recording of the challenged programme without delay.

*(5) Should the Authority, in its decision, establish that the media service provider has infringed the obligation of balanced coverage, **the media service provider shall broadcast or publish the decision passed by the Authority or the notice defined in the decision, without any assessing comment thereon, as provided for in the decision of the Authority, in the manner and at the time specified by the Authority, or shall provide an opportunity for the applicant to present his/her viewpoint. In addition to the foregoing, no legal consequences as defined in Articles 186–187 may be applied against the breaching entity.***

(6) The procedure defined under Paragraphs (1)–(5) shall be exempt from dues and charges, and the applicant may not be obliged to pay administrative service fee either. As regards legal remedy against the decision passed in the proceedings, the provisions of Articles 163–165 shall be suitably applied, with the provision that the client or other participant in the proceedings may seek revision of the final decision of the Media Council by lodging a petition against the Media Council before the Budapest Court of Appeal, by claiming infringement of the law, within fifteen days. The Budapest Court of Appeal shall adjudge the petition in court proceedings, within thirty days.”

Comments

First it is to note that the rule of the Press and Media Act defining the obligation of balanced coverage has been subject of amendment by Act XIX of 2011. The amendment was a result of the talks between the Hungarian Government and the European Commission. **It is the common understanding of both parties that the provision as amended is in full compliance with *inter alia* Article 11 of the European Charter of Fundamental rights on freedom of expression.**

We also note that **prescribing such obligation is not uncommon in European media laws.** In this sense **recital 102 of the Directive 2010/13/EU** of the European Parliament and of the Council explicitly refers to the existing common practice of imposing the obligation on television broadcasters to present facts and events fairly.

As to the categorical qualification of the requirement as “subjective” by the Opinion¹ we note that balanced reporting is not a new concept of the Hungarian law. Act I. of 1996 on radio and television broadcasting (“Broadcasting Act”) also obliged radios and televisions to present news in a balanced timely and factual manner². In the framework established by the former Broadcasting Act it was the role of a special Complaints Committee attached to the former National Radio and Television Commission (ORTT) to deal with complaints raised in this regard. Parties concerned by the decision of the Complaints Committee had the possibility to submit an appeal to the ORTT if they were not pleased with its conclusion for any reason. The subsequent decision of the ORTT could also be challenged at the competent court.

In the past 15 years **the Complaints Committee, the ORTT and the Court has interpreted the substance of balanced presentation in a vast number of decisions. These define the notion in details.** Beyond this practice of one and a half decade the obligation of “balanced coverage” **was also subject of interpretation by a decision of the Constitutional Court³.** **As a consequence the meaning of “balanced coverage” is sufficiently elaborated in the Hungarian law in details and cannot be deemed “subjective”.**

The Opinion also states that the requirement would be applicable to “all forms of media”⁴. This is not correct. Within the conceptual framework of the Press and Media Act the term “*linear media service*” **refers exclusively to radio and television broadcasting.**

It is worth noting that prior to the recent amendment of the Press and Media Act on-demand media services were also subject of this obligation. However, the amendment of the Hungarian broadcasting acts by Act XIX of 2011 has deleted the reference to these services from the provision establishing the obligation of balanced presentation of news.

Thus it shall be seen clearly that

- **the obligation of balanced reporting of news solely relates to radio and television programme services;**
- **video-on-demand services are no longer subjects of this requirement following the amendment of the media acts by Act XIX of 2011;**
- **printed press and internet news sites and portals have never been subjects of such requirement in the Hungarian law.**

As to the remedies at disposal in case of infringements the special procedure laid down by Article 181 of the Mass Media Act has to be taken into account. When breaching Article 13 of the Press and Media Act this special procedure **allows the application of only the two kinds of remedies as specified by paragraph (5), cited above. In this regard no other sanction**

¹ Opinion 12.

² Act I. of 1996 on radio and television broadcasting 4. § (1)

³ Constitutional Court decision 1/2007. (I. 18.) AB

⁴ Opinion 12.

(such as a fine) can be imposed. Related decisions of the authority can be challenged at the competent court⁵.

When evaluating the system presented above we have to bear in mind that **the right of the public to receive information⁶ also implies the right to know when such information received is biased or incomplete.** Therefore the rights of the public call the state to act for preventing situations where certain media players may act as gatekeepers and filter or distort news thus jeopardizing free flow of information. Taken into account

- **its limited scope**
- **its defined content**
- **the specific remedies connected to it in an exclusive way and**
- **the unhindered possibility of judicial review**

the obligation of balanced coverage of news as enshrined by the Hungarian media regulation, in our view, ensures the proper balance between the right to freedom of expression by the media and the right to receive information by the public.

Finally, it is also to note that the way the media acts regulate the content of the obligation and the procedure related to balanced coverage is materially identical to the regulation the former Broadcasting Act of 1996 provided. **In the past 15 years no evidence or sign of any “chilling effect” have been experienced** in relation with this obligation, contrary to the presumption expressed in the Opinion at this point⁷.

2.2. “Imposition of sanctions on the media”

Relevant provisions

Article 185 (2) of the Mass Media Act:

“In applying the legal consequence, 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 consequence 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 consequence.”

Article 187 (2) of the Mass Media Act:

“The Media Council and the Office shall impose the legal consequence, depending on the nature of the infringement, taking into account the gravity of the infringement, whether it was committed on one or more occasions, or on an ad-hoc or continuous basis, its duration, the pecuniary benefits earned as a result of the infringement, the harm to interests caused by the infringement, the number of persons aggrieved or jeopardized by the harm to interests, the damage caused by the infringement and the impact of the infringement on the market, and other considerations that may be taken into account in the particular case.”

⁵ Mass Media Act 181. § (6)

⁶ Opinion 9.

⁷ Opinion 14.

Comments

Any evaluation of the system of sanctions established by the Mass Media Act is incomplete without paying due attention to the principles above. **The principle of proportionality forms an integral part of the system of sanctions. Disproportionate application of any sanction is explicitly not permitted by the law.**

We also note that at this point the Opinion largely builds on the assumption⁸ that sanctioning is based on subjective criteria. However, this assumption is not supported by arguments in the analysis. Although they are not referred to by the Opinion we are aware of the criticisms⁹ claiming that concepts such as “human dignity”¹⁰, “public morals”¹¹, or “qualified data”¹² would not be precise enough. As a response to these criticisms we have demonstrated at several instances that **these terms, just as in other legal systems, have their precise meaning in the Hungarian law being detailed by other laws, jurisprudence of the Courts and of the Constitutional Court and by binding and non-binding norms of the international law.** Consequently, their interpretation is not subjective.

We also note **the particular importance of judicial review** as a substantial guarantee. Related concerns of the Commissioner are addressed under chapter 2.8. of this analysis in details. Here we note that the Mass Media Act grants full judicial review in case of all the decisions of the media authority¹³ by providing the possibility to the courts to declare the contested decision null and void or to alter it if found unlawful. The principles and aspects referred to above orientate not just the media authority but also the courts charged with the task of supervising the authority’s decisions on sanctioning.

As to **the idea of repealing Article 187. of the Mass Media Act**, as expressed in the Opinion,¹⁴ we note that sanctions are generally recognized elements of media laws throughout the world and Europe. It would be highly unusual to introduce a system of media law that would consist **entirely of norms constituting not enforceable *lex imperfecta*.** Beyond the oddity such a system would be in contrary with EU law, as **all EU member states are expected to implement and safeguard the provisions of community law by proper means.** This would not be possible without establishing a system of adequate sanctions.

The Opinion also refers to the *Ürper et al. v. Turkey* case¹⁵ where the Turkish authorities ordered to suspend the publication of several newspapers for periods of up to one month based on an assumption that the applicants “*would re-commit the same kind of offences in the future*”. It is to note that **the Hungarian media laws refer to no such assumption.**

2.3. *“Pre-emptive restraints on press freedom in the form of registration requirements”*

Relevant provisions

⁸ Opinion 17-18.

⁹ See inter alia <http://www.osce.org/fom/74687>

¹⁰ Press and Media Act 14. §

¹¹ Press and Media Act 4. § (1)

¹² Press and Media Act 6. § (1)

¹³ Mass Media Act 163-165. §

¹⁴ Opinion 22.

¹⁵ Opinion 19.

Article 41 (2) of the Mass Media Act:

*“ On-demand and ancillary media services provided by media service providers established in the Republic of Hungary, as well as press product published by a publisher established in the Republic of Hungary under the scope of this Act shall be notified to the Authority for registration within 60 days following the commencement of the service or activity. **The registration is not a condition for taking up such a service or activity.** “*

Article 45 of the Mass Media Act:

(1) The registration of on-demand media services may be initiated by the media service provider thereof. The notification to the Authority of the on-demand media service shall include:

- a) particulars of the notifier:
 - aa) name,*
 - ab) address (domicile), designation of site (sites) that are directly involved in the media service provision,*
 - ac) contact information (telephone number and electronic mailing address),*
 - ad) name and contact information (telephone number, postal and electronic mailing address) of its executive officer, representative, and of the person appointed to liaise with the Authority,*
 - ae) company registration number or registration number.**
- b) basic particulars of the planned media service:
 - ba) kind (radio or audiovisual)*
 - bb) designation*
 - bc) type (general or thematic)**
- c) the planned date of launching the media service.*

(2) The following shall not be entitled to provide on-demand media services: the National Media and Infocommunications Authority's President, Vice-President, Director General, Deputy Director General, the Chairman of the Board of Trustees of the Public Foundation for Public Service Media and the Chairman or Member of the Public Service Council, the Director General of the Media Service Support and Asset Management Fund, the President, Deputy President or Member of the National Council for Telecommunications and Information Technology (NHIT), the Director General of the public media service provider, the Chairperson or Member of the Supervisory Board thereof, Members of the Media Council, and persons in the employment of any of the aforesaid organisations. The notifier shall make a statement that no conflict of interest under the Act exists or would arise vis-à-vis him/her/it subsequent to the registration of the media service.

(3) The Authority shall register the on-demand media service within thirty days.

(4) The Authority shall withdraw the registration if

- a) a conflict of interests exists vis-à-vis the notifier,*
- b) the designation of the notified media service is identical with – or is confusingly similar to – the designation of an on-demand media service registered earlier, with valid records at the time of notification, or*

(5) The Authority shall delete the on-demand media service from the register, if

- a) the withdrawal of registration could be applied under paragraph (4),*

b) the media service provider requested deletion from the register,
c) the media service provision is not commenced for one year after registration, or the commenced service provision is interrupted for over a year, or
d) a final decision by a court has ordered the cessation of trade mark infringement perpetrated through via the media service provider's name and barred the infringer from further violation of the law.

(6) The media service provider of on-demand media services shall notify any changes in registered data to the Authority within fifteen days.

(7) In the event of a change in the media service provider's person or the data of the media service set forth in Paragraph (1) (d), the media service provider originally making the notification shall initiate modification of the data on record. The provisions laid down in Paragraphs (1) to (4) shall be applied *mutatis mutandis* to this procedure.

(8) In the event the media service provider fails to comply with its obligations related to registration, the Authority may impose a fine up to one million forints, taking into consideration the principles set forth in Article 185(2).

Article 46 of the Mass Media Act:

“(1) Registration of a press product may be initiated by its publisher. In the event that the founder and publisher of a media product are different persons or undertakings, they shall incorporate their responsibilities and rights vis-à-vis the media product in an agreement.

(2) Notifications for the registration of press products shall contain the followings:

a) particulars of the notifier:

aa) name,

ab) address (domicile and site),

ac) contact information (telephone number and electronic mailing address),

ad) name and contact information (telephone number, postal and electronic mailing address) of its representative, and of the person designated to liaise with the Authority,

ae) company registration number, or registration number,

b) the title of the notified press product and the international identifier assigned to it by the National Library, or a certification that the media product does not need to be assigned such an identifier,

c) in the event that founder and publisher are different persons or undertakings, the particulars of both pursuant to point a).

(3) The following shall not be entitled to found and publish a press product: the National Media and Infocommunications Authority's President, Vice-President, Director General, Deputy Director General, the Chairperson of the Board of Trustees of the Public Foundation for Public Service Media and the Chairperson or Member of the Public Service Council, the Director General of the Media Service Support and Asset Management Fund, the Chairperson, Deputy Chairperson or Member of the National Council for Telecommunications and Information Technology (NHIT), herein not including the founding or publishing of media products aspiring to publish academic accomplishments or to disseminate scientific knowledge. The notifier shall make a statement that no statutory conflict of interests exist or would arise in the event of registration with respect to him/her/it.

(4) The Authority shall register the press product within fifteen days.

(5) The Authority shall withdraw the registration if

a) a conflict of interests exists vis-à-vis the notifier,

b) the name of the notified press product is identical with – or is confusingly similar to – the

name of a press product registered earlier with valid records at the time said application was submitted, or

(6) The press product shall be deleted from the register, if

a) the withdrawal of registration could be applied under paragraph (5),

b) the founder or – if founder and publisher are different undertakings, with the approval of the founder – the publisher requested deletion from the register,

c) publication of the press product is not commenced within two years from the date of registration, or ongoing publication is interrupted for over five years, or

d) a final decision by the court has decreed cessation of trade mark infringement perpetrated through the title of the press product and barred the infringer from further trade mark infringement.

(7) The publisher and founder of a press product shall notify the Authority about any changes in their data on record within fifteen days.

(8) In the event of a change in the publisher's person, the publisher on record shall initiate modification of the registered data. In the absence thereof, the founder may also initiate the modification. Paragraphs (1) to (5) shall be applied mutatis mutandis to such procedure.

(8a) In the event the publisher or founder of a press product fails to comply with its obligations related to registration, the Authority may impose a fine up to one million forints, taking into consideration the principles set forth in Article 185(2)."

Comments

It is necessary, not just for the media authority but also for members of the public, to have sufficient information on media service providers. **In the absence of such information copyright holders, enterprises or individuals are practically deprived from the possibility to seek effective remedies** if their rights (most often copyrights or their right to privacy) are violated. To put it in other words: **media itself shall also be transparent**. The system of registration based on the notification of data by the service providers as defined by the Media Act serves this purpose.

This system has been subject of amendments on by act XIX. of 2011. The amendments have been in force since 6th April 2011. These amendments have been extensively consulted with the European Commission. As a result of these consultations **it is the common understanding of the Hungarian Government and the European Commission that the finalized order of registration is in full accordance with the EU law, including Article 11 of the EU Charter of Fundamental Rights.**

The purpose of the recent amendments was to make it clear that in the case of non-linear services and press products **the obligation of the service provider consist exclusively of a simple notification of data that is not linked to the right to pursue such services in any way**. In line with this purpose the Mass Media Act unambiguously declares that *"The registration is not a condition for taking up such a service or activity"*¹⁶. Consequently, the obligation of service providers to notify certain data to the authority for registration **cannot be regarded as "licensing" in any way**.

It is to emphasise that the related provisions of the Mass Media Act **grant no margin of appreciation for the media authority** in its decisions related to keeping the registry of the

¹⁶ Article 41. (2) of the Mass Media Act

various media services. Decisions in this regard are made as results of automatism defined by the law in all their details. It is also to note that **the Media Act grants unconditional and full judicial review** of the decisions of the media authority made while keeping its registries if requested by any service provider concerned.

The Opinion refers to the *Gaweda v. Poland* case¹⁷ where the Polish authorities refused to register two periodicals on the grounds that the publications were “*inconsistent with the real state of affairs*”. On the basis of Article 45 (4) and (5) and Article 46. (5) and (6) it is clear that **the Hungarian media laws do not provide the possibility for the authority to bring any decision on such or any similar grounds.**

The Opinion also refers to the notion of “conflict of interest” in Article 46 (5) a)¹⁸. This term is also used in Article 45 (4) a). **Situations of such “conflicts of interest” are defined precisely by Article 46 (3) and Article 45 (2).** Thus the norm based on this term, in contrary with the analysis, is sufficiently foreseeable.

Furthermore, we note that Act II of 1986 on the press (repealed by the Media Act) **printed press had already been subject of the obligation to notify** prior to the entry into force of the media acts to the same extent. On the same legal basis a number of news websites have also made notification as press products and have already been registered as such (in the late 1990s - early 2000s). With regard to the online press we also add that similar obligations to notify exist in a number of other European countries.

2.4. “Exceptions to the protection of journalists’ sources”

Relevant provisions

Article 6 of the Press and Media Act:

“(1) *The media content provider and any person employed by or engaged in any other work-related legal relationship by the media content provider shall have the right to keep secret the identity of its informant (hereinafter referred to as: journalists’ source). The right to keep such data confidential shall not include the protection of journalists’ sources disclosing qualified data unlawfully.*

(2) *The media content provider and any person employed by or engaged in any other work-related legal relationship by the media content provider shall have the right to keep the identity of their journalists’ sources confidential even during court or other regulatory procedures, provided that the information thereby supplied to it were disclosed in the interest of the public.*

(3) *In exceptionally justified cases, courts or authorities may, in order to protect national security and public order or to uncover or prevent criminal acts, oblige the media service provider and any person employed by or engaged in any other work-related legal relationship by the media content provider to reveal the identity of the journalists’ sources.”*

Comments

¹⁷ Opinion 24.

¹⁸ Opinion 28.

The predecessor of the Press and Media Act, Act II of 1986 on the Press, has not provided any protection of journalistic sources in criminal procedures¹⁹. **The creation of this by the quoted rule of the Press and Media Act is definitely a positive measure** in this regard. This context has to be taken into consideration when evaluating the quoted provisions.

In paragraph (3) the Act sets up a double set of conditions:

- First, it is necessary for the disclosure to serve the purpose of protecting “*national security and public order*” or uncovering or preventing “*criminal acts*”. This has to be proved by the court or authority demanding the disclosure.
- Second, disclosure can be required only “*in exceptionally justified cases*”.

This double set of conditions, in our view, ensures that journalistic sources **are disclosed only in cases where interests of the public would disproportionately suffer in the absence of it**.

From the procedural aspect the disclosure of the source is **a testimony of the journalist**. Laws on **criminal procedure**²⁰ and on **administrative procedure**²¹ **provide proper procedural safeguards** to prevent cases when it would be undue to demand disclosure. This includes the judicial review of decisions ordering disclosure.

2.5. “Weakened Constitutional guarantees of pluralism”

Relevant provisions

Article 61 of the Constitution of Hungary prior to the amendment of 6th July 2010:

“(1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest.

(2) The Republic of Hungary recognizes and respects the freedom of the press.

(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the public access to information of public interest and the law on the freedom of the press.

*(4) A **majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the supervision of public radio, television and the public news agency, as well as the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector.***”

Article 61. of the Constitution of Hungary as amended on 6th July 2010:

“(1) In the Republic of Hungary everyone has the right to the freedom of speech and to freely express his opinion, and furthermore to access and disseminate information of public interest.

*(2) The Republic of Hungary **recognizes and protects the freedom and pluralism** of the press.*

(3) In a democracy, with a view to forming an educated opinion in matters of public interest, everyone has the right to be properly informed.

(4) In the Republic of Hungary, public service broadcasters shall participate in fostering and in the enhancement of national and European identity, in the advancement of the Hungarian

¹⁹ Act II of 1986 on the Press 11. § (1) b)

²⁰ Act XIX of 1998 on Criminal Procedure

²¹ Act CXL of 2004 on administrative procedures and services

language and cultural heritage, including the languages and the culture of minorities, in strengthening national allegiance, and in satisfying the needs of national, ethnic, familial and religious communities. Public media services shall be overseen by an autonomous administrative authority and independent ownership body, whose members are elected by Parliament, whereas oversight as to the implementation of its objectives shall be exercised by committees of citizens formed on the strength of law.

(5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the public access to information of public interest, the law on the freedom of the press, the law on media contents, and the law on the supervision of media services.”

Article IX of the fundamental law (Constitution) due to enter into force in 2012:

“(1) Every person shall have the right to express his or her opinion.

(2) Hungary shall **recognise and defend** the freedom and **diversity of the press**, and shall ensure the conditions for **free dissemination of information** necessary for the formation of democratic public opinion.

(3) The detailed rules for the freedom of the press and the organ supervising media services, press products and the infocommunications market shall be regulated by a cardinal Act.”

Comments

In the Hungarian constitutional system there are certain subjects requiring regulation with a higher degree of consensus in the Parliament. In these special issues, defined by the Constitution, adopting or amending an act requires a two-thirds (qualified) majority in contrast with other acts that can be adopted by a simple majority (i.e. with more than half of the votes)²². Beyond this **procedural requirement** there is no difference between acts adopted with a simple or a qualified majority whatsoever: they are placed at the same level of the Hungarian legal system and they are binding in an identical way.

Taken this context into consideration it is clear **that lifting the special procedural requirement of qualified majority does not give ground to the conclusion that the given issue ceases to be the subject of any legislation to be adopted by the Parliament**. This is also the case in relation with “*prevention of monopolies in the media sector*”. For this reason we disagree with the assessment expressed in the opinion that the “*Parliament’s duty to pass a law precluding information monopolies*” would have been “*eliminated*” by the amendment of the Constitution in the summer of 2010²³.

Moreover, Article 61. (2) as amended on 6th July 2010 explicitly provides that the state “*recognizes and protects the freedom and pluralism of the press*”. **This provision unambiguously provides that media pluralism is to be safeguarded by the state**. On this basis the Parliament has the definite duty to safeguard media pluralism by means of legislation.

It is also to add that **safeguarding pluralism implies a much wider scope of action than merely preventing monopolies** in the media sector. In a media sector where there are more than one player no monopoly can be identified irrespectively of the actual range and quality of

²² Constitution 24. § (3)

²³ Opinion 34.

the media services at the disposal of the citizens. Genuine pluralism therefore poses a much higher standard than the simple requirement of not to have a monopoly. As a consequence **the amended Constitution does not weaken, but explicitly strengthens guarantees of the plurality of the media.**

With regard to the constitutional right to be properly informed it is to note that freedom of information is widely acknowledged as both freedom of expressing and obtaining information²⁴. The term “proper”²⁵ in Article 61 (3) reflects this thinking. As to its interpretation Article 7. of the Constitution is also to be taken into account. This states that *“the legal system of the Republic of Hungary accepts the generally recognized rules of international law and grants the alignment of the internal law with the obligations stemming from international law.”* **Legal instruments of international law are therefore taken into account when interpreting the provisions of the Constitution** and the Hungarian Constitutional Court regularly refers to judgements of the ECtHR. International law, as demonstrated by the Opinion²⁶, clearly does not support any restrictive interpretation of the term “proper” in this context. **This is also imperative for the Hungarian Constitutional Court, the courts and the authorities.** For this reason it is not possible to attribute any restrictive meaning to this notion.

On 25th April the **new Fundamental Law of Hungary** was promulgated. This will enter into force in 2012. The Fundamental Law upholds the explicit obligation of the state to *“defend (...) diversity of the press”*. At the same time by abandoning the term *“proper”*, it provides for ensuring *“the conditions for free dissemination of information necessary for the formation of democratic public opinion”*. It also continues to refer to the norms of international law²⁷, thereby giving a clear indication that these provisions shall be interpreted consistently with the ECHR as interpreted by the ECtHR.

It is also to note that the Mass Media Act contains detailed rules on preventing media concentrations²⁸ and media pluralism²⁹. Thus **in reality there is an actual body of legal norms enacted by the Hungarian Parliament for preventing information monopolies and promoting pluralism in the media sector.** This fact makes speculative assessments of the constitutional rule analysed above of secondary importance in many aspects.

2.6. *“Lack of independence in media regulatory bodies”*

Relevant provisions

Article 123 of the Mass Media Act:

*“(1) The Media Council shall be a body of the Authority **with independent powers** under the supervision of the Parliament and having legal personality. The Media Council shall be the legal successor of the National Radio and Television Commission.*

²⁴ The idea is also referred to by the Opinion 9. In the practice of the Hungarian Constitutional Court this perception appears inter alia in judgement 37/1992. (VI. 10.) AB.

²⁵ „megfelelő”

²⁶ Opinion 33.

²⁷ Fundamental law Article Q)

²⁸ Mass Media Act 67. § - 71. §

²⁹ Mass Media Act 72. § - 81. §

(2) The Media Council and its members shall be subject solely to the laws of Hungary and may not be instructed with respect to their activities.”

Article 127 of the Mass Media Act:

“(1) The conflict of interest rules defined in Paragraph (1) of Article 118 with respect to the Chairman and members of the Media Council, the President and Vice-President of the Authority, and the Director General and deputy Director General, as well as the grounds for exclusion defined in Paragraph (3) of Article 118 shall be applied as appropriate.”

Article 118 of the Mass Media Act (applicable to the president and the members of the Media Council and to the senior officials of its office on the basis of Article 127 (1)):

“(1) The following persons shall not be eligible for the position of President, Vice-President, Director General and deputy Director General:

a) the President of the Republic of Hungary, the Prime Minister, members of the Government, State Secretaries, the State Secretary responsible for Public Administration, Deputy State Secretaries, the Mayor of Budapest, the Deputy Mayor of Budapest, Mayors, Deputy Mayors, chairmen of county-level general assemblies and their deputies, members of Parliament, members of the European Parliament,

b) the Chairman and Members of the Board of Trustees of the Public Foundation for Public Service Media; the Chairman and Members of the Public Service Board; the Director-General and Deputy Director General of the Fund; the Chairman, Deputy Chairman or Members of the National Council for Communication and Information Technology; the Chief Executive Officers of public service media providers and the Chairman and Members of the Supervisory Board thereof; Members of the Media Council; the Chairman of the Media Council with the exception of the President of the Authority; and persons engaged in any other work-related relationship with any of the foregoing organisations,

c) local or county-level municipal representatives, government officials, officials of the national or territorial units of political parties, and persons engaged in any work-related relationship with political parties,

d) executive officers, management board members, Supervisory Board members of communications and media service providers, media service distributors, advertising agencies, press publishing and newspaper distribution companies,

e) persons engaged in any form of employment or other work-related relationship with a communications or media service provider, media service distributor, programme distributor, advertising agency, press publishing and newspaper distribution company,

f) persons holding direct or indirect ownership stake in an undertaking providing communications or media services, or pursuing media service distribution, programme distribution, press publishing, advertising agency or newspaper distribution activities,

g) direct and indirect owners of companies – in case of public corporations, with an ownership stake of more than five percent –, and persons engaged in any work-related relationship with the such companies, which are affiliated with the organisations defined in item (d) under an agency of service agreement,

h) the direct relatives of persons subject to items (a) to (b) and (d).

(2) For the purposes of item (e) of Paragraph (1), other work arrangements entailing scientific work, the publication of scientific results and the dissemination of scientific information shall not be regarded as grounds for conflict of interest.

(3) The President, the Vice-President, the Director General and deputy Director General may not be engaged in party politics or make representations on behalf of political parties.”

Article 129 of the Mass Media Act:

On the protection of the president and the members of the media council against dismissal.

Comments

By referring to paragraphs 3-6 of Recommendation of the CoE Committee of Ministers Rec(2000)23 on *the Independence and Functions of Regulatory Authorities for the Broadcasting Sector* the Opinion concludes that the Media Council of the National Media and Telecommunications Authority lacks independence.

We disagree with this assessment as it does not take into account the provisions detailed above. With regard to this elaborated body of rules we note that

- Article 118 of the Mass Media Act as referred to by Article 123 provides **a detailed set of rules on incompatibilities** separating members of the Media Council and top officials of its office both from political actors and from market players **in consonance with paragraph 4 of the Recommendation.**
- As regards the standards laid down in paragraph 5 of the Recommendation we refer to Articles 118 (3) and 123 (2) of the Mass Media Act. These provisions ensure that members and top officials of the regulatory authority **neither receive any mandate nor take any instructions** from any person or body. They also grant that these persons **do not make any statement or undertake any action which may prejudice the independence of their functions** with almost identical rules with those of the Recommendation.
- With regard to the procedure of appointing it is to note that in our view **the mere fact that members of the regulatory authority are elected by the Parliament does not give ground to deny their independence.**
- Article 129. of the Mass Media Act provides **material guarantees against dismissal** in compatibility with paragraph 6 of the Recommendation.

Bearing these in mind we conclude that **the Hungarian media law uses almost all the tools a law can provide for ensuring the independence of the regulatory authority both from political actors and from market players** thus satisfying the requirement laid down by paragraph 3. of the Recommendation.

At this point we also have to note that the Opinion does not provide an analysis of the Hungarian law in this regard. Beyond quoting the rules governing the appointing procedure and specific paragraphs of the recommendation it merely states³⁰ that the Media Council lacks independence without formulating any corresponding argument.

³⁰ Opinion 39.

2.7. *“Lack of safeguards for the independence of public service broadcasting”*

Relevant provisions

Article 84 of the Mass Media Act:

On the structure and institutions of the Hungarian public service media.

Article 88 of the Mass Media Act:

On rules of incompatibilities relevant for members of the Board of Trustees of the Public Service Foundation and on rules protecting them against dismissal.

Article 90 of the Mass Media Act:

On the role and competences of the Board of Trustees of the Public Service Foundation.

Article 101 of the Mass Media Act:

On the role of the National News Agency as the producer of news programmes for the public media service providers.

Article 102 of the Mass Media Act:

On the procedure of electing the director generals for the public media service providers.

Article 104 of the Mass Media Act:

On the rules of incompatibility relevant for the director generals.

Article 105 of the Mass Media Act:

On the role and competences of the director generals.

Comments

When evaluating the recent changes to the system of public service media one has to **take into account the actual situation**. The two defining elements of this situation are as follows:

- In the past one and a half decade the Hungarian public service broadcasters **have lost a considerable part of their assets** due to poor economics of their operations.

- They have also **lost the definitive part of their audiences**. With the exception of the public service radio they marginalized in this regard thus constantly failed to provide an alternative of commercial media for viewers. The ratings of public service televisions seem exceptionally poor when compared to their European counterparts.

The Hungarian legislation was unable to address this crisis for almost 15 years due to the lack of political consensus required to legislate with qualified majority in the Parliament. In 2010 this situation has changed and the Parliament could pass related legislation by the new media laws.

The crisis of the Hungarian public service media has its roots in structural financial problems. Thus the legislator had **to elaborate solutions with particular regard to economics**. Parallel activities within the framework of the four public service entities have been identified as a major factor of poor efficiency. Based on this experience the Parliament aimed at providing a structure for public service media that **allows benefiting from economies of scale**. The role of the Fund referred to by the Opinion³¹ has been defined on the basis of these considerations.

We note that in the present crisis of public service media in Hungary consolidating its organisations into a single corporation would also have been a legitimate option to consider. However, the Parliament opted for preserving the currently existing public media service providers as separate and independent entities. **The independence of the Public Service Foundation supervising their activities is safeguarded by the detailed rules of Articles 84, 88 and 90 of the Mass Media Act as referred to above.**

When addressing the concerns expressed in the Opinion³² as to the independence of the director generals of the public service media companies we recall the followings:

- Under chapter 2.6. we have demonstrated that the Mass Media Act safeguards the independence of the Media Council and its members with an extensive set of legal solutions. **On this ground we disagree with the assumption that denies the independence of the president** of the council by solely referring to the procedure of appointment.
- We also note that it is incorrect to label the president of the council as an appointee of the Prime Minister. Although the Prime minister also has a role in this process **it is the Hungarian Parliament that elects the president of the Media Council by a qualified majority of votes.**
- The procedure of nominating and appointing **involves a number of actors** (the president of the Media Council, the Media Council itself and public foundation) **whose independence is guaranteed by detailed rules** of the Mass Media Act. Appointing the director generals is the result of their cooperation. The decision therefore cannot be attributed to the president of the Media Council.

As regards Recommendation of the CoE Committee of Ministers (96) 10 we recall that it provides detailed guidelines related to the management of public service organisations in its chapter II. In our view

³¹ Opinion 44.

³² Opinion 43.

- the **protection of general directors against dismissal** (Article 102 (4) – (6) of the Mass Media Act)
- the **strict rules of incompatibility** in their regard (Article 104 of the Mass Media Act), and
- their **set of competence** as defined in details (Article 105 of the Mass Media Act).

satisfy the requirements of these guidelines. These rules also have to be taken into account in any evaluation of the legal status and independence of public service media organisations.

As to the production of news it is to note that **it is the role of the National News Agency to produce news programmes for the system of public service media**. The employees of the Fund referred to by the Opinion³³ contribute to this on the basis of commission given by the National News Agency. **These arrangements became necessary for ensuring the efficient use of resources**. Beyond noting that the meaning of the term “indirect employer” lacks clarity for us we also recall that the president of the Media Council is not entitled to interfere with the work of any journalist either directly or indirectly.

2.8. *“Absence of an effective domestic remedy for media actors subject to decisions of the Media Council”*

Relevant provisions

Article 163 of the Mass Media Act:

*“(1) No appeal may be lodged against the regulatory decision of the Media Council passed in its first instance regulatory powers. **Revision of the regulatory decision of the Media Council** may be asked from only by the client, and as regards the provisions expressly applicable to him/her, the witness, the official witness, the expert, the interpreter, the holder of article of inspection, the representative of the client and the liaison officer, by claiming infringement of the law, **at the court proceeding in administrative cases**, within thirty days upon announcement of the regulatory decision, by lodging a petition against the Media Council.*

*(2) **The court proceedings instituted under a petition for the revision of the Media Council's decision shall be subject to the provisions of the Act on the Code of Civil Procedure on public administration lawsuits**, with due heed to the deviations herein contained.*

*(3) **The submission of the petition shall not have a suspensive effect on the execution of the decision; the court may be requested to suspend the execution of the regulatory decision challenged by the petition.***

*(4) **The Media Council shall forward the petition, together with the documents and representations of the case, to the court within fifteen days of receipt thereof.***

*(5) **The request for out-of-court proceedings against the orders of the Media Council which can be challenged by an independent legal remedy shall be submitted within fifteen days of the notification of the order.***

*(6) **No supervisory proceedings may be instituted on the regulatory decisions of the Media Council.**”*

Article 164 of the Mass Media Act:

³³ Opinion 44.

“(1) In proceedings specified under Article 163, courts of both first and second instance shall pass judgement within 30 days.

(2) Judicial review proceedings shall fall within the exclusive competence of the Metropolitan Court of Budapest.

*(3) **The court shall have the powers to alter the decision of the Media Council.**”*

Article 165 of the Mass Media Act:

*“(1) The client shall **have the right to appeal against the regulatory decision of the Authority** passed hereunder at the Media Council, with the exception of decisions against which no appeal may be lodged under the Act on the General Rules of Administrative Proceedings and Services or under this Act.*

(2) The decision of the Office may be challenged under an appeal only by the client who has participated in the proceedings of the first instance.

*(3) **Revision of the second instance decision of the Media Council** may be requested only by the client, and as regards the provisions expressly applicable to him/her, the witness, the official witness, the expert, the interpreter, the holder of article of inspection, the representative of the client and the liaison officer, by claiming infringement of the law, at the court proceeding in administrative cases, within thirty days upon announcement of the regulatory decision, by lodging a petition.*

*(4) The submission of the petition shall not have a suspensive effect on the execution of the decision, **the court may be requested to suspend the execution of the regulatory decision challenged by the petition.***

(5) The petition for out-of-court proceedings against the orders of the Office which can be challenged by independent legal remedy shall be submitted within fifteen days of the notification of the order.

*(6) **The judicial review proceedings** shall fall within the exclusive competence of the Metropolitan Court of Justice. “*

Comments

By the provisions above the Mass Media Act **grants the fullest possibility of judicial review available in the Hungarian law.** Article 163 of the Mass Media Act clearly state that **any alleged incompliance with the law gives ground to contest the decision of the media authority at the competent court.** This includes material and procedural breeches of the law equally.

In the course of the judicial review the court **has full access to any evidence** it may wish to consider.

International agreements ratified by Hungary are promulgated by law. As such **they become part of the Hungarian legal system.** As to the concrete example of the ECHR, as referred to by the Opinion we note that this convention was promulgated and incorporated into the Hungarian law by Act XXXI of 1993.

As to the outcome of the review we recall that beyond **declaring any eventual illegal decision by the media authority null and void, the court is also in the position to alter the**

decision if this is the proper solution in its view³⁴. Consequently, the **total activity of the media authority is subject of unhindered judicial review.**

Beyond addressing the merit of the concern raised by the Commissioner by this point, we also have to make some comments on the actual example he called to support his argument here, i.e. the judicial review of a hypothetical sanction applied for “unbalanced reporting³⁵. In this regard we have to note that

- as demonstrated under 2.1. of this analysis not all media outlets have to comply with the requirement of balanced (fair) presentation of news, only radios and televisions are subjects of such obligation;
- as also highlighted under 2.1, a breach of Article 13. of the Press and Media Act constituting this obligation cannot be sanctioned by fine, as Article 181 (5) of the Mass Media Act explicitly excludes this possibility;
- as highlighted above, would a sanctioned media outlet seek judicial review of any decision by the regulatory authority it can refer to the rules of the ECHR or any other international commitment of Hungary in the procedure.

³⁴ Media Act 164. § (3)

³⁵ Opinion 52.

