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ANALYSIS OF THE HUNGARIAN MEDIA LEGISLATION

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Introduction

The following is an analysis of Act CIV of 2010 on the freedom of the press and the fundamental rules on media content and Act CLXXXV of 2010 on media services and mass media (in the following generally referred to jointly as the “media laws“ or with their respective Act numbers).

The analysis is made in light of commitments on media pluralism and the free flow of information that Hungary has accepted as a participating State of the Organisation of Security and Cooperation in Europe (OSCE), and includes proposals on how to meet these commitments.

The primary aim of the analysis is to present a number of recommendations on how to ensure that the Hungarian legislation is in line with OSCE standards on media freedom and pluralism. Since June 2010, the OSCE Representative on Freedom of the Media has suggested on many occasions amendments during the drafting of the laws, and in September 2010 she has commissioned a detailed analysis of the media laws ¹. While some minor adjustments were made to the draft legislation following this analysis, a number of concerns remain. Many of the points made in the September 2010 analysis remain relevant.

The current analysis does not contain article-by-article comments or drafting suggestions, but highlights and explains the background to the recommendations made.

The legal reform in the media field in Hungary includes a number of laws, sometimes referred to as the media law package, including constitutional amendments, the mentioned laws and other laws and regulations. The various legal acts are closely related. The package has been under discussion since June of 2010, when the first of several legal amendments were introduced in parliament. The OSCE Representative on Freedom of the Media has

¹ Analysis and assessment of a package of Hungarian legislation and draft legislation on media and telecommunications, prepared by Dr Karol Jakubowicz, <http://www.osce.org/fom/71218>

earlier voiced criticism of the legislative process that the laws were not adequately discussed publicly and with interested parties before being brought for adoption to the Parliament and that the different legal acts are so closely related that they should be discussed together and not bit-by-bit.

Now that the media laws are undergoing modifications following the assessment of the European Commission, it remains a major concern that the new draft laws are also not being discussed with the civil society of Hungary, including all stakeholders.

OSCE commitments on media pluralism and the free flow of information

The OSCE Representative on Freedom of the Media has expressed the view on several occasions that the new Hungarian media laws violate OSCE media freedom standards and endanger editorial independence and media pluralism. In her comments following the adoption of the laws in November and December 2010, the Representative pointed out that the legislation was open to misuse in that it could be used to silence critical media and public debate in the country.

Certain provisions of the media laws have been the subject of a recent assessment by the Commission of the European Union (EU). The EU analysis focused on those issues that are within the competence of the European Union. The issues examined by the OSCE Representative on Freedom of the Media understandably focus on the OSCE commitments on media freedom, which on some issues overlap with the focus of the EU assessment, and on other issues the focus of the analysis differs.

Namely, OSCE participating States, among them Hungary, have repeatedly committed themselves to safeguard pluralistic media and the free flow of information, and have stressed throughout the years that media freedom is a basic condition for pluralistic and democratic societies. These commitments were repeatedly stressed at CSCE and OSCE summits and ministerial councils, such as the 1994 Budapest CSCE Summit, the 1997 establishment of the Office of the OSCE Representative on Freedom of the Media, the 1999 Istanbul OSCE

Summit, the 2001 Bucharest Ministerial Council, or the 2003 Maastricht Ministerial Council².

The below analysis will show that **several provisions of the current laws fail to safeguard media pluralism and the free flow of information.** The ongoing modification of the media laws of Hungary poses a unique opportunity for Hungary to examine the laws in light of these commitments, and create laws that protect these long standing OSCE values.

General comments

The stated aim of the legislative changes in Hungary is to strengthen guarantees of freedom of expression. However, the laws adopted do not meet this aim. Diversity is an explicit aim of the law (Article 4 of Act CLXXXV) but many actual provisions appear to counteract this aim. The article (Article 72 Act CLXXXV) entitled diversity deals with ownership restrictions only, although this is just one aspect of diversity. Other rules that discourage media establishment or impose restrictions on media counteract diversity.

As a general comment, the laws are long and detailed, and the system is not clear for those who fall under the scope of these laws. A number of general rules on administrative proceedings are repeated in the law (Article 144 onwards in Act CLXXXV). If these are general rules, they are presumably to be found in general legislation to which a reference and indication of any exceptions would suffice.

The media laws include a comprehensive overhaul of the media governance system. Partly the background to this is to be found in a need to adapt legislation to technical developments. However, in these media laws the justified intent to adapt to technical developments is lost in an overly complex and restrictive legal package.

One of the main recent issues to deal with in any communications regulatory systems is internet. The OSCE has stated that Member States should take action to ensure that internet remains open for freedom of opinion and expression and tasked the OSCE Representative on

² Freedom of expression, free flow of information, freedom of Media - CSCE/OSCE main provisions 1975-2007, <http://www.osce.org/fom/31232>

Freedom of the Media to play an active role in promoting both freedom of expression and access to the Internet and observe relevant developments in all the participating States³. In practice, due to its technical nature internet regulation is hard to implement even if in some instances the legal foundations may be there. Generally it is seen that the freedom of internet is of great value and compensates for some possible limits to its regulation. If any limitation is necessary, it should be done through self-regulating mechanisms, by the editors themselves, without interference from governments.

The September 2010 analysis points out weaknesses in terminology in the different laws. The terms used in the law are in many instances undefined. This may be a serious deficiency when such terms have an important role in the law like the expression "protection of public order", which may lead to a requirement for journalists to reveal their sources (Article 6 (3) Act CIV). Even if details of application and interpretation may be made also in other instruments such as guidelines issued by the regulator, key concepts must be clear enough for those concerned to be aware of what it is that is in violation of the law.

Protection of sources is an important principle of free journalism. The current article on this matter could be open to abuse with journalists required too easily to reveal sources. A strict interpretation by the court can set the proper limits, but the current unspecified reference not just to courts but also authorities is worrisome.

Programmatic statements on balance, on appropriate information and similar expectations about content quality can be made in for example a pre-ambule to the law or in policy documents. As legal requirements they are not suitable as it is unclear how they can be implemented, especially in such a manner as to be objective and respecting legal certainty.

Different types of media

³ Freedom of expression, free flow of information, freedom of Media - CSCE/OSCE main provisions 1975-2007, pages 34-35, <http://www.osce.org/fom/31232>

The Hungarian media laws regulate all types of media and media content, including broadcast, print and online media. Most countries with freedom of expression and free media have only minimal legislation regarding print and online media. Broadcast media requires more regulation due to its use of a limited natural resource, the frequency spectrum, as well as due to special issues like publicly funded public service broadcasting. **To apply identical principles to all media is against OSCE standards on free media and does not serve any legitimate purpose. Freedom of media should be the basic principle and main rule, with any restrictions motivated by an objective need for such restrictions. This objective need is not present in the case of print and online media.** The OSCE has adopted decisions stating that OSCE states should take action to ensure that the internet remains an open and public forum for freedom of opinion and expression.⁴

As pointed out in the September analysis, the lack of clear definitions in the law furthermore opens up a possibility that further future media services may be covered and restricted by these laws as the regulatory body, which already has large powers, can take decisions on interpretation that extend its reach even more.

The laws do not contain any direct provisions on digitalisation, although some rules may be applicable to the changed situation after the switch-over to digital broadcasting (like requirements to provide access, even if these are not clear). It is not necessary to have a separate law on digitalisation, but certain provisions are needed like for instance on access to transmission systems.

Balanced coverage

The Hungarian media laws include an obligation for all media providers to provide adequate or proper news coverage (authentic, rapid and accurate information on public affairs at local, national and EU level, as well as on any event bearing relevance to the citizens of the Republic of Hungary and the members of the Hungarian nation, Article 13 - Article 10 after the EC-Hungary agreement - of Act CIV, and Article 12 (1) and (2) of Act CLXXXV). This is too far-reaching and does not make suitable concession to the fact that there are and should

⁴ Permanent Council Decision No. 633 Promoting tolerance and media freedom on the Internet (Annex to Decision No. 12/04)

be many different kinds of media providers. The provisions are linked with a complaint system (Article 181 Act CLXXXV) and could thus easily have the effect that potential media sources cease to exist or never come into being for fear of not being able to meet the strict requirements.

The interpretation of balanced coverage is difficult and by necessity leaves room for different interpretations. Such subjective notions should not be linked to formal complaints procedures as a free and pluralistic media will by itself allow for different views to come forward without a process such as that suggested (in Article 181).

What is essential and what has been underlined many times by the OSCE is the right of the media **to collect, report and disseminate information, news and opinions**. Any restriction in the exercise of this right must be prescribed by law and in accordance with international standards. This is recognition of the fact that independent media is essential for a free and open society with an accountable system of government and of particular importance in safeguarding human rights and fundamental freedoms. **This is a *right* of media, which authorities should not limit. It should not be made into an obligation, punishable by fines. What is essential is that information should be available to citizens and media and accessible for media to use as they see fit.** The basic rule should be that all public information is accessible but with specific exceptions for state secrets, business secrets, personal information and some other categories – importantly, the exceptions and not the access being what needs to be motivated. The access requirement is reflected in Article 9 of Act CIV and Article 5 of Act CLXXXV but should also follow from general access to information legislation as well as duties for different authorities following from general and specific legislation for such authorities.

Following the recent assessment of the European Commission, the Hungarian authorities have reportedly⁵ agreed to reformulate the provision somewhat so that the requirement for authentic, rapid and accurate information lies with the media system as a whole. Although this removes the obligation for individual media providers, whether the new suggested provisions will also have a limiting effect depends on how they will be applied by the relevant authorities (namely the Media Authority and the Media Council

⁵ This information is based on press reports.

of Hungary). If applied as a basis for licensing and other regulatory decisions, it could play an illegitimate intrusion into freedom and pluralism of the media.

As there is concern about the political independence of these very authorities, there remains a concern about this requirement, as there is inevitably a subjective element in what is accurate and interesting enough to require coverage.

In general, **positive content obligations *ex ante* should be kept at a very minimum. It remains questionable why there is a need for such a requirement.**

Laws should not regulate what kind of content should be available apart from in certain exceptional cases. A legal obligation on what content media outlets should have is not in line with free media and freedom of expression with exception of well-known international standards on public service broadcasters and some limited rules on what type of programming broadcasters should have in exchange for the use of a frequency. It is the editorial decision of different media outlets to decide what content to carry. Especially as the Hungarian laws extend to the internet as well, the provisions as suggested lead to an excessive interference in the editorial freedom of media and of individuals using internet to disseminate information.

There can be certain programming requirements for broadcasters, such as the duty to have news coverage or children's programming, in order to obtain a frequency licence for a certain area or programme requirements for public service broadcasting; however, in general **asking for a balanced coverage and other content prescriptions by all linear media leads to a serious limitation of media freedom and runs against OSCE principles.**

This is especially so as **it would be up to the discretion of the media council (that in itself runs the risk of being politically influenced, as noted by the OSCE Representative on several occasions) to determine when the requirement of balanced coverage is achieved.** The September 2010 analysis discusses this point extensively.

The OSCE has in different contexts urged participating States to encourage radio and television organisations to report on different aspects of life in other participating States, to increase the number of telebridges between countries and in other ways make information

widely available. Such requirements as well as statements on the importance of local information may be suitable as programmatic statements on what information should be available to audiences in Hungary rather than written as legally enforceable provision which in practice probably will not be enforceable anyhow.

Other content issues

The media laws introduce a concept of linear media service providers of significant powers of influence (Article 38 Act CLXXXV). This appears similar to concepts used in competition law and also in utilities law, for example for telecommunications (significant market power). However, the use of significant power of influence is a vaguer concept than market power and the special nature of broadcasting means that such influence may be difficult to determine.

The legal case for making special programming requirements for such broadcasters is not at all as clear as the case for special requirements in competition law or utilities law for firms in a dominant position (competition law) or firms with significant market power (utilities law). This is not to say no requirements can even be made, as indeed one exception from the rule that positive content obligations are not made is that in exchange for the use of a frequency, broadcasters have special obligations for categories of programmes (never for exact content though). It is questionable whether the best way to do it is by setting this out in details in the law, rather than letting the regulator establish such licensing criteria if needed.

Excessive provisions on hate speech may have the effect that they have a negative effect on freedom of expression.

OSCE has stated how, while fully respecting freedom of expression, the OSCE will strive to combat hate crime which can be fuelled by racist, xenophobic and anti-Semitic propaganda on the internet.⁶ This shows that freedom of expression should not be limited in the fight against hate crimes, but any limitations should be firmly anchored in this freedom.

⁶ Mandate of the OSCE Representative on Freedom of the Media (Decision No. 193 of the Permanent Council of 5 November 1997).

Interdiction of hate speech is an example of the kind of rules that normally exist for statements made with as well without the use of media. Such provisions are to be found in criminal legislation, as it is not the statements but the potential effect of the statements is what is important. **It is quite common that there are special rules for broadcast media.** The motivation for this is that such media is given the right to use a limited natural resource, the frequency spectrum, and in exchange for this has to follow certain rules, which may include some (limited) positive content obligations as well as negative ones. In addition to the objective frequency issue, the impact of broadcasting has also been mentioned as a reason for stricter rules. **If there are such stricter rules these should not be extended to all media.**

The main rule should be that general criminal law is sufficient and only if there is an objective reason, additional rules may apply. In any case, hate speech rules should not be too limiting for any form of media. They should not be used to limit the free debate including negative utterances and criticism, including personal criticism especially of people in the public eye (as shown by European Court of Human Rights case law). Hate speech is prohibited because of its potential to lead to actual negative effects like physical attacks. It is only for this reason that it should be limited. The restriction on discrimination through media (Article 17(2) of Act CIV) could be misused if interpreted too widely.

As in so many contexts, **a properly independent and well respected regulatory body is the only guarantee against excessive interpretation of subjective restrictions on freedom of the media.** Replacing prohibitions with a warning may be a good idea, but too restrictive use of warnings because someone may find the content offensive can also be have a limiting effect (Article 14 of Act CLXXXV).

Guidelines and classifications of programmes for protection of minors is good, although the possibility to have the regulator pre-view programmes should be used with utmost care (Article 9 (9) Act CLXXXV) like any *ex ante* provisions on content. The responsibility remains with the content provider and the regulator assists through guidance.

Public Service Broadcasting

Properly independent public service broadcasting is an important element of a diverse media landscape. The media law does provide for this (Article 82 of Act CLXXXV) but the actual

provisions on the public service broadcaster do not guarantee the independence of the broadcaster. Some attempts are made to provide for a certain plurality but the complexity of the system means these provisions may be insufficient.

As for the regulatory system, also **the governing structure of the public service broadcaster could endanger the political independence of public service broadcasting. The role of the regulatory authority also related to the public service broadcasting is one such provision**, especially given the problems with possible political control of the authority, and its very wide area of competence (as also discussed below).

Proper and sustainable funding is very important for the independence of the public service broadcaster. Such funding is not provided by the media laws, with a complex system and lack of control for the broadcaster itself. Details about this and suggestions are found in the September 2010 analysis.

The Media Regulator

Several bodies are created by the Media Law – like the National Media and Infocommunications Authority with a President, a Media Council headed by the same President (which is the new licensing body supervising both private and public broadcasting) and the Bureau. In addition a National Council for Communication and Information Technology, a Media Service Promotion and Asset Management Fund, an Institute of Media Sciences at the Media Council as well as a Commissioner for Media and Communications are created, and there is a separate Public Administration Frequency Management Authority. The Competition Authority has competence over certain matters, in cooperation with the specialised organs.

A matter of concern is that **many of these regulatory organs are interrelated and the legislation thus gives very broad powers to the media authority. This is of concern as the organs are to regulate all media, while best international standards would not vest such organs with competence over print and online media.** The wide competence of the bodies leads to an excessive concentration of power.

There is an additional concern linked to the media authority and media council, namely that their political independence is in question. As pointed out by the OSCE in many public statements, **these bodies are led exclusively by members supported by the governing party. The laws should guarantee that regardless of whether there is a majority or minority government, a strong majority for one party in parliament or not, political plurality is guaranteed in the appointment process of communication regulatory organs.** In the media laws, the President of the Authority is to be appointed by the Prime Minister, and the law envisages Parliament electing the same person as President of the Council (Art 125 Act CLXXXV). Direct parliamentary nomination of members of the media licensing body, the public-service broadcasting board and the executives of individual public service outlets is foreseen by the media laws.

In the September 2010 review a number of concrete suggestions were made on changes to the proposed institutional structure. These also include **the shortening of the overly long (nine years and renewable) terms of office.** The aim of all such suggestions is **to avoid political control over the organs**, which must be able to act independently. **The close link between all regulatory organs including the management organs of the public service broadcasters lead to potential concentrations of power.** The actual structure of a regulator can look in many different ways and it is up to each country what structure to chose, as long as the regulator is in line with basic requirements of autonomy. Even if the final decision on structure is up to the Hungarian authorities, the **proposed system is in violation of best practices not least as it endangers independence.**

The law foresees self-regulatory bodies to complement the authorities (Article 8 and Article 190 onwards of the Act CLXXXV). The problem here is that **the proposed self-regulatory system is so regulated as well as supervised by the regulatory authority that it is not a real self-regulatory system in the sense of being created and lead by the sector itself.** The OSCE has stated that the essential role that free and independent media can play in democratic societies and the strong influence it can have in countering or exacerbating misperceptions and prejudices is recognised. For this reason the OSCE encourages the adoption of voluntary professional standards by journalists, media self-regulation and other appropriate mechanisms for ensuring increased professionalism, accuracy and adherence to

ethical standards among journalists.⁷ This role should be vested in a proper self-regulatory system that can act independently, without interference by the government or State authorities.

Registration requirements

The obligation that requires all media – broadcast, print and online – to be registered with the media authority is excessive. Reportedly a certain change has been agreed with the European Commission, namely to allow for registration within a certain period (60 days) instead of before operations can start. Such a requirement is more like a notification, which in itself may be legitimate. If a notification requirement is properly understood and applied, it does not have to lead to undue restrictions of media freedom as long as it is possible to start operating immediately and as long as it really is just a simple notification, for purposes of information. A registration is something else as it gives authorities discretion to say no, it is a burden for the media outlet and especially if it applies to all kinds of (vaguely defined) media content, it can have a serious chilling effect. However, **why any registration is needed at all still remains unclear. There may be general business registrations but a special registration for media (other than that which uses a limited natural resource like the frequency spectrum) appears to have no justification.**

Any registration is a certain restriction on free expression as well as on the freedom to conduct economic activities. Article 5 of Act CIV states that conditions set for registration may not restrict the freedom of the press, but in reality the very fact of mandatory registration may have a restrictive effect on free speech. In rule of law societies with freedom of expression the main rule should be that no registration for media is needed unless required for some special reason which is objectively justified and necessary for the rule of law. Frequency allocation is one such reason but for media that does not use a limited natural resource, there are no objectively justified reasons for requiring registration. **International practice also shows that registration is normally only required in societies where the media is not really free. Especially if the body that handles the registration is political or perceived to be, it may have a chilling effect on free expression and plurality. Here it is**

⁷ Permanent Council Decision 13/06 on Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding.

worth pointing out that even if the organ is in fact not biased, a perception of bias will anyway contribute to a chilling effect. Quite apart from this, it is against trends in international and European legislation to institute new registration requirements.

Certain basic information regarding businesses including media needs to be readily available to the authorities as well as the public and business entities. Normally this is achieved through business registration rules. The media law provisions may indicate a misguided attempt to use registration for purposes of transparency, but the result of the registration provisions could be harmful for media freedoms as well as restrictive from the viewpoint of business freedom.

Registration requirements may exist for specific reasons in specific legislation, like trade mark legislation. This serves a specific need and no extra requirements should be made. It is poor legal drafting to add a requirement in a special law, referring to for example, as in this case, to trademark legislation when that exists in separate laws.

Diversity

The media laws include provisions on diversity (like Article 4 and 72 of the Act CLXXXV) but few rules that actual safeguard this aim. As explored in the September 2010 analysis, a previous special provision in the Constitution requiring the adoption of legislation to preclude information monopolies has been changed and less specific language on diversity added.

The rules in the media laws (Articles 67-71 in Act CVXXXV) are extremely complicated and appear to offer various possibilities for the regulator to interpret what limiting rules to apply. This is not good from the viewpoint of legal certainty and transparency and it is questionable if it will be effective.

In fact, some ownership - but not content pluralism - rules are found under the heading diversity (Article 72 Act CLXXXV).

Conclusion and Recommendations

Freedom of the media means media really should be as free as possible: free to decide its own content, structure, means of delivery and other matters. In order to bring the Hungarian media legislation in line with OSCE commitments on media freedom, here are the main recommendations:

- The legal requirements on balanced coverage and other content prescriptions should be deleted.
- Content shall be decided by the media outlets themselves and indirectly by the market, the audience. Editorial independence, including selecting types of content, should be safeguarded.
- The State shall not interfere with positive content obligation other than in some exceptional cases for broadcast media. This has been stressed by the OSCE Representative of the Media at many occasions.
- The OSCE has also recognised that the right of the media to collect, report and disseminate information, news and opinions is a cornerstone of free and pluralistic media. Any restriction in the exercise of this right must be prescribed by law and in accordance with international standards.
- For media as well as persons, to access information is a right – there should not be an obligation on the media how to use and report the information.
- The registration requirement for all media is excessive and should be deleted. Any restrictions on media in law in fact hinder pluralism and diversity.
- Support pluralism and diversity by making it easy to establish media outlets.
- All different forms of media should not be covered by the same rules.
- Vagueness of some notions in the law and the lack of impartiality of the governing body go very much hand in hand. The independence and trustworthiness of the regulatory bodies is extremely important.
- Real objectivity and plurality should be introduced through the means of appointment of organs governing the media sector. Even the perception of independence is essential for the trustworthiness.

- The regulatory body should be independent and competent, it should not have jurisdiction over internet and press which should be mainly self-regulated.
- The structure of the regulatory system needs to be clearer, with fewer bodies and clearer tasks.
- Self-regulation should not be overregulated in law.
- New technologies have meant convergence in different ways. More than ever a clear institutional structure as well as a suitable division of competences are needed.

These considerations lead to the conclusion that **the Hungarian media laws should be changed in many respects so they can implement the commitments on media pluralism and the free flow of information that Hungary has accepted as a participating State of the OSCE.**