

Hungarian Ministry of Public Administration and Justice

Reply to the criticisms expressed by the international media against the Media Act

Monday, 3 January 2011

General remarks

The government of the Republic of Hungary firmly rejects all accusations aimed at it on account of its adoption of the new Media Act on Monday. A common trait of the opinions expressed by the media is that they apparently lack in-depth knowledge of the Act's text. Instead of formulating specific criticisms, they are a collection of unfounded, at times outright absurd accusations. The Hungarian government remains committed to freedom of the press, and in no way wishes to stifle the opposition's views.

The new Hungarian Media Act does not contain any element that has not been a well-established part of legislation in most European countries. The Act does not touch on, for instance, either censorship, preliminary restriction of the press, stifling of political opinion, or ex post retribution which may debilitate the operation of the press. Contrary to the accounts in the media, neither the media authority nor its president can issue decrees "at their whim" (unlike the British Ofcom, which has a set of guidelines imposing mandatory norms); the latter merely holds the power to set the level of various communications fees.

Furthermore, the new Act is not intended to regulate printed and online press, television and radio based on a unified set of principles. While the rules governing the latter two fully comply with relevant European Union standards, the former two have only a handful of obligations to observe which, incidentally, are commonly included in the legislation of most European countries. Who would dispute that human dignity, the protection of privacy, the prohibition of hate speeches or the protection of children are primary issues of public interest, based on which even the press can and should be restricted to a certain extent? These are legal categories which have gained a clear and precise definition in the judicature of Hungary over the past twenty years, and as such, they cannot be moulded to fit the needs of any ruling political party. For instance, the interpretation of the notion of "human dignity" was, for the most part, adopted from the practice of the German Federal Constitutional Court, and the Hungarian constitutional system has consistently and smoothly applied it ever since.

Political opinions will in no way be supervised, nor will any arbitrary "balanced information" be a requirement, as seen fit by the government. The regulation imposing balanced coverage for the electronic media only - which has been a part of Hungarian law for the past 15 years - is far more lenient than the British requirement of impartiality.

The rules against the defamation of public figures or the right to respond to the press remain in place unchanged, unaffected by the new Act. The adopted legislation does not allow democratic publicity to be stifled, even on a theoretical level in the event of a worst-case scenario. Moreover, the independent court has the power to review all media authority decisions, thereby excluding any opportunity for exerting political pressure.

Regulation of the press - including online press - by a state authority is not a new practice in Europe. The novelty of the Hungarian legislation is that media is supervised together with communications by a unified, convergent authority, which obviously allows for concentrated, efficient and cost-effective operation. The media authority is an independent body; it does not take orders from either the government or the National Assembly. The Hungarian government is

confident that the future legal practice of the media authority will dispel all doubts as to its respect of freedom of the press and public debate.

Replies to specific assertions

Accusation: "The [Media Act] clearly breaches the spirit and the letter of EU treaties. It is a direct danger to democracy. The state will control opinion." (Jean Asselborn, Foreign Minister of Luxembourg)

Accusation: "The new media law adopted by Hungarian parliament may endanger the independence of press and editorial independence, may force journalists to employ self-censorship and places too much power in the hands of the media authority, composed of members of the ruling political party. The new Hungarian media law, if misused, could silence critical media and public debate in the country." (Dunja Mijatovic, OSCE Representative on Freedom of the Media)

Accusation: The Media Act is a disgrace, as it allows the state to bully media outlets expressing a critical view. (Die Welt)

Reply: These are unfledged remarks on a piece of legislation that is yet to be announced or officially translated. The Hungarian government guarantees that the Act respects the spirit and the legislation of the European Union. The Hungarian state has neither the will, nor the way to control opinion; there is not a single passage in the Act that would allow it to be an obstacle to the expression of political opinion or to debilitate democratic public opinion. Only the following requirements apply to the press:

- prohibition of offending human dignity - the notion of human dignity was adopted from the practice of the German Federal Constitutional Court. Over the past 20 years, a precise and thorough practice has emerged in respect of the protection of human dignity (including in the area of media regulation). This is not a tool for offended politicians to enforce their claims; general civil and criminal law procedures remain to be available for such cases. If offence of human dignity is established, the media authority will not make a decision on the individual infringement of rights; instead, it will assess whether the specific media content fundamentally violates the basic values constituting the right of dignity, as construed by general social consensus, to such an extent that the violation stretches beyond the mere offence of the individual's interests and affects public interest as well.

- the obligation to respect the constitutional order - essentially a formal provision of declarative nature, found in most European countries, allowing action to be taken, for instance, if armed attacks are promoted against democratic institutions.

- prohibition of breaching privacy - proceedings in the domain of breach of privacy have become frequent in the practice of the European Court of Human Rights, primarily striving to curb the intrusive behaviour of tabloids (see, for example, the Von Hannover vs. Germany case, where the Strasbourg Court ruled against the largest German tabloids). The provision concerned elevates this common European legal development to the level of legislation.

- prohibition of hate speeches - the notion of hate speech in the interpretation of courts and the Constitutional Court in Hungary is only restricted insofar as criminal sanctions are warranted by the clear and present danger of physical harm. At the same time, the violation of certain social groups warrants action, especially if the incitement occurs in media outlets with strong social influence.

- protection of minors - the provisions of the EU directive on audiovisual media services were extended to the press; there is little room for doubt as to the social necessity and motives for this move.

- restrictions on certain advertising - similarly, major, common European standards are to be applied to the press (e.g. the requirement for a clear indication of advertising, prohibition of hidden advertising).

Accusation: Having the same rules applicable to any and all media content (television, radio, printed and online newspapers) is contrary to the prevalent intentions of the EU.

Indeed, prior to the new Media Act, the above provisions applied only to the television and the

radio. Is the general prohibition justified? The legislation is based on the notion that certain basic, strictly construed restrictions affecting all media content should be allowed. Such restrictions must prioritise public interest and must in no way hinder the expression of democratic public opinion. The six restrictive rules presented above and their established interpretation within the legal system fulfil this criteria.

The convergence of media content distribution and the convergence of media platforms also corroborate this process. Content that is broadcast on television is immediately available on the channel's website. Similarly, all print outlets are available online. These fundamental rules should be enforced uniformly for all outlets; otherwise loopholes could easily emerge in the regulation (currently television media broadcasters are allowed to freely broadcast online content that is prohibited in traditional media outlets, such as pornographic scenes from reality shows).

Accusation: the new Media Act is incompatible with the European Union's democratic principles (Czech Minister of Foreign Affairs Karel Schwarzenberg)

The European Commission will assess whether the new Hungarian Media Act complies with the criteria set forth in European Union legislation (European Commission spokesperson for external relations Alejandro Ulzurrun de Asanza y Munoz)

In her letter, European Commissioner Neelie Kroes inquired whether the Hungarian Media Act is in line with the EU requirement prohibiting member states from extending their regulation to the media outlets of other countries.

The Hungarian government welcomes the fact that the European Union will review the Media Act just as it does every piece of legislation affecting the operation of the common European legal system. We are confident that the regulation complies with the relevant European Union standards in all respects. The wording of the Act on the action to be taken against foreign media outlets is nearly identical with that of the EU directive on audiovisual media services and with the rules of the Treaty on the Functioning of the European Union.

Accusation: the Media Council can issue decrees and can impose substantial fines of up to 950,000 dollars if it deems coverage to be unbalanced or in breach of human dignity (Washington Post).

In truth, the Media Council cannot issue decrees; only the president of the National Media and Infocommunications Authority have such powers, and even they are limited to determining administrative communications fees (e.g. pertaining to frequency use). No fine can be imposed for the breach of the rule on balanced coverage - which is far more lenient than the British requirement of impartiality and applicable to media services only -; the competence of the authority is limited to issuing a condemnation.

Accusation: Until now, journalists could only be obliged to reveal their information sources using criminal law procedures; from now on, the Media Council and the authority have the power to do this. This may force investigative journalists to reveal their sources in order to ensure national security, public order or to reveal the perpetrators of criminal acts, which is contrary to normal democratic thinking.

As regards the protection of journalists' information sources, it is important to underline that the Media Council cannot take action against journalists and cannot demand that they reveal their sources under the adopted Act. By ensuring the protection of persons disclosing information to the media in Act CIV of 2010, the Hungarian legislation attempts to pay its long-overdue debt. Pursuant to the Act, media outlets and journalists "are entitled to keep the identity of persons supplying information to them confidential". This general right of confidentiality also extends to court and authority proceedings; in other words, it grants exemption from testimony obligation to the media (it should be noted that, based on the above, "authority proceedings" cannot be proceedings initiated by the Media Council). The Act establishes a right, but not an obligation for the media, while introducing a new opportunity to respect agreements concluded with sources by way of the exemption from testimony obligation.

The right of confidentiality, however, is not unlimited. For one, it does not include the protection of information sources supplying information in an unauthorised manner, and media outlets can be

obliged to disclose their sources in exceptionally justified cases in the context of court or authority proceedings "in order to ensure national security, public order or to reveal or prevent the perpetration of criminal acts". This will place substantial responsibility in the hands of the courts in future, as they will have to weigh opposing interests; they will certainly do so respecting the freedom of press.

The prevailing legislative environment is less favourable from the perspective of the media. Prior to Act CIV of 2010, journalists could be required to disclose their sources during criminal procedures. In this regard the new Act is certainly beneficial to journalists.

Accusation: The proposed levying of high fines may create the opportunity for the government to exert pressure on Hungarian media. The proposed legislation would allow sanctioning of the heads of the media outlet violating the law (head or editor-in-chief of the publisher) as well.

In the current market and economic environment, we must take into account that a broadcaster with annual revenue of several tens of billions or even hundreds of millions of forints will not be affected by a fine to the tune of a few hundred thousand forints, which will not prevent it from repeating its infringing conduct and will not set a dissuasive example for other broadcasters.

No minimum amount will be defined in advance, as the proposed legislation also takes into account actors with small budgets operating on the market besides those with high revenues, therefore fines as small as HUF 5-10,000 may also be imposed. The proposed legislation also lays down the fundamental principles of proportionality, progressiveness and equal treatment, applicable to the legal consequences imposed on the violating media entities.

The sanctioning of senior officers is not a novel legal institution in the domain of media administration and press regulation either under Hungarian or EU legislation. The sanctioning of persons in senior positions is based on elaborate legal science fundamentals, and its basic principles are that the scope of responsibility of the senior officer covers the supervision of compliance with the breached obligation and that the senior officer could have prevented the infringement or will, in future, have influence on the operation of the organisation and can ensure lawful conduct. The maximum imposable fine defined in the proposed legislation in the amount of HUF 2 million is not excessive in comparison to other sectors.

Accusation: A new registry will be created based on the new Media Act, but media entities and publishers could still be subject of comprehensive, continuous or individual data disclosure even after compulsory registration - the Media Authority may even have access to their trade secrets.

It is vital to mention above all else that media content services (television, radio, press) may be currently provided following registration only. Ensuring the operation of the media system and market, economic, social, public service and human rights correlations is a priority task for the state, for which adequate enforcement of the law is vital. On the other hand, state intervention in the media system and the disclosure of facts severely restricts the constitutional principle and guarantee of freedom of opinion.

Based on these constitutional fundamentals, the tools and methods used by the state to intervene in the operation of media is a central issue, continuously scrutinised by both the media market and society. It is normal practice for the state to disclose, assess and analyse certain facts in every administrative sector, but only the domain of media elicits such attention from the central bodies of the state. In order to avoid criticism of media intervention and censorship, the proposed Media Act refers to the provisions of the Code on administrative procedures, which represent a set of basic rules and instruments applicable for all sectors and are in line with the principles of fair procedure applicable to the administrative procedure of the European Community.

The legality of the registry and of ordering data disclosure, and the protection of trade secrets are ensured by the execution of the authority's procedures according to the rules on administrative procedures, in the context of which judicial review (legal remedy) is ensured in all cases.

Accusation: Appointed members of the Media Council were chosen among allies of the incumbent government.

The Media Council is elected by the National Assembly by way of a two-thirds majority vote.

Members of the National Assembly cannot be influenced in their decision. In performing their duties, members of the Media Council do not take orders from anyone; they cannot be recalled and they are independent in every respect. The elected members of the Media Council have no ties, either formal or informal, with the ruling political parties; they come from various fields of the media sector. Authorities with a much smaller degree of independence from government are not uncommon across Europe. See, for example:

- members of the convergent British authority OFCOM - including its chairperson - are appointed by the Secretary of State for Culture, Media and Sport;
- the Dutch ruler appoints the chairperson and other members of the Media Authority (Commissariaat voor de Media) based on the nomination of the Minister for Education, Culture and Science;
- in Sweden, the government appoints the Authority (Radio och TV Verket) and the Broadcasting Commission, as well as the members of the body overseeing communications - all three organisations are under government control;
- members of the Broadcasting Commission of Ireland - including its chairperson - are appointed by the government from among experts in the field of media services;
- members of the Danish media authority (Medie- og tilskudssekretariatet) - including its chairperson - are appointed by the Minister for Culture;
- the chairperson of the convergent Italian authority AGCOM is appointed, in conjunction with the Minister for Communication and the competent parliamentary committee, by the decree of the President of the Republic based on the Prime Minister's recommendation;
- members of the Belgian Conseil supérieur de l'audiovisuel (CSA), the broadcasting regulator of the French Community of Belgium are appointed by the government for a term of four years; members can be re-elected and recalled by the government. Members of the German-speaking community's media authority (Medienrat) are also appointed by the government;
- the five members of the Austrian media authority KommAustria are appointed by the head of state (Bundespräsident) upon the recommendation of the federal government for a term of six years; the main parliamentary committee has a consultation right regarding the decision;
- in Switzerland, the duties of the media authority are performed by a ministry (Ministry of Environment, Traffic, Energy and Communication).