

## **Main elements of the draft concept on 'content regulation'**

The direct regulation of media content constitutes the most potent instrument of restricting media freedom and the activities of editors and journalists. Hence the legislator must always tread carefully when choosing from among the regulatory instruments at its disposal, designing the substance of individual legal provisions and determining the sanctions that may be applied. In all such instances its decisions will result from the juxtaposition of the freedoms of expression and press on one side, and of other constitutional values that conflict with the aforementioned on the other side. The choices that the legislator ends up making will therefore also delineate the limits of the freedom of expression and the freedom of the press.

The regulation of media content is realised through the simultaneous application of numerous legal provisions and legal areas, the mutual interplay of which delimits the freedom of speech in the media. An important expectation vis-à-vis the relevant regulatory framework is that it provide clear and predictable guidelines for those who are subject to the regulation, i.e. journalists and editorial offices, and that it correspondingly rule out the possibility of arbitrary applications of the law. Furthermore, the sanctions proffered may not disproportionately encumber the operations of content providers.

This discussion paper addresses regulatory issues – such as human dignity, hate speech, balanced coverage, protection of children – whose significance does not necessarily stem from their own legal character, but which are interesting as a reflection of the underlying social phenomena. In none of these cases is the objective of the "regulation" to just erect barriers to the operations of the media. Moreover, the issues examined here are embedded in a complex system of legal instruments, and in these systems the media law provisions merely complement general civil and criminal law solutions.

As a result of technical developments, various types of media are increasingly indistinguishable from one another. While previously the legislator could easily justify enacting stricter content regulations for television, and maybe radio as well, today the power of such arguments is rapidly waning in light of changes in technology, economy and media consumption patterns. For us – as opposed to those who drew up the 2010 Hungarian media laws – it follows unequivocally that the legal burdens on currently strictly regulated media must be alleviated.

Partly as a result of technological changes, and partly stemming from the legal framework created by the European Union, content providers can easily circumvent individual national regulations. In the Hungarian television market this process is nearly complete, and correspondingly the regulations pertaining to television broadcasters affect only a few providers. As far online content providers are concerned, those whose operations most frequently result in infringements of the law also tend to be the ones that have found ways to remove themselves from the scope of Hungarian regulations.

The regulatory failures concerning these providers poignantly illuminate that the severity of the regulatory framework cannot change the fundamental features of the media system, even as serious restrictions on the freedom of expression encumber the activities of media service providers who otherwise operate lawfully.

Considering the above, the basic starting point of the present discussion paper is that the need for specialised media law regulations and the possibility of media law sanctions should arise only in situations when European community law unequivocally requires such legal solutions. The fundamental question concerning media law regulatory provisions is not whether the print and/or online press need to be regulated – in our view, the answer to that question no –, but instead the obvious issues that arises is whether it is necessary to regulate even television and radio contents with such provisions. Our position, also explained in the context of each individual subject matter discussed below, is that self-regulation is adequately capable of supplanting specialised media law regulations in all types of media. Since regulations respond to fundamental social values and problems, however, we would also find acceptable an approach involving a state supervision scheme whose goal would not be to apply sanctions but rather to track the presentation of the relevant social phenomena in the media, to ensure that they are part of the public discourse and remain on the public agenda. We argue that an ombudsman-type institution would be suitable for such purposes. The present discussion paper does not address organisational issues, nor self-regulation or the details of a potential media ombudsman institution. It also does not discuss media education, which in many cases would serve adequately for pre-empting the need for content regulation.

## **1. PROTECTING HUMAN DIGNITY**

### **Is the media law regulation of human dignity necessary?**

The protection of human dignity enshrined in the Hungarian constitution, the Fundamental Law, is asserted through numerous legal provisions, primarily the Civil Code and the Criminal Code, as well as data protection regulations. The regulatory provisions in the two Codes are complemented by media law instruments. While in civil or criminal law cases the injured party may initiate proceedings to protect his/her human dignity or personality rights, in cases involving a media law defence of human dignity state intervention occurs regardless of claims advanced by the injured party, in fact even if no individual rights were infringed. Media law protection is enforced by way of proceedings initiated by the media authority, which applies the relevant media law sanctions. Under both, the previous and the current legal regime, sanctions are based on the application of rather general provisions of a fundamental nature. In 2011 the

Constitutional Court held that the extension of this regulatory approach to print and internet-based press products is unconstitutional.

The media law protection of human dignity provides those applying the law with significant leeway in terms of establishing a threshold of intervention. The substance of the right to human dignity is furthermore also hugely influenced and continuously reshaped by the prevailing social understandings of the notion, which will also have the effect of rendering vague the threshold of intervention. The application of the law by the authorities, which seeks to adhere to the Constitutional Court's jurisprudence on the matter, has moved towards an approach wherein the possibility of enforcing the rights of individuals' have emerged as the primary reason for intervention. Nevertheless, we can assert that in the context of the media law, the protection of human dignity still has not been endowed with a content that would hold out the possibility of a consistent and clear application of the law that could be applied in each and every case. In its decisions, the authority has failed to draw up an appropriate set of criteria that would make it clear when a service provider can expect penalties, and which would delineate the boundaries of media freedom.

Though it is indisputable that the media laws approach the problem of human dignity from a specialised area and with specialised instruments of intervention, as a constitutional value human dignity already enjoys comprehensive protection even without those. Moreover, the answer to this problem is not fully independent of the underlying institutional and public authority framework which enforce the regulations. It is theoretically possible to design an institutional structure that gives the freedom of the press and the freedom of expression their due share when weighing this complicated balance, and which refuses to include political intentions among the criteria it considers in making its assessment. Based on the domestic experience, however, there is a substantial risk that such an institutional structure simply cannot be created.

Based on the above, Mertek's position is that there is no need for a generalised protection offered by the media law. A media law regulation of this issue would only be acceptable if it were to name specific elements of human dignity – just as the present media law expressly names the protection of those in a vulnerable position – and thereby render the possibilities of intervention predictable and consistent.

Identifying such elements in human dignity, drawing up specific provisions for their protection and subsequently enforcing them could be realised through a self-regulation framework, possibly with the inclusion of an independent media ombudsman whose office would be tied to the self-regulation scheme and who would not wield instruments of public authority.

## **Do the existing instruments for protecting personality rights constitute proportional restrictions on the freedom of the press?**

The civil and criminal law instruments of personal privacy and data protection regulations exert a more substantial impact on everyday journalistic and editorial practices than the media law's protection of human dignity. Related legislation adopted over the past few years, and especially the new Civil Code, have failed to redress the problems that have arisen in this area, and in fact they have further constrained journalists' editorial latitude and have burdened their work with even more uncertainty. The provisions of the new Civil Code regarding the personality rights of public figures deserve special attention in this context, for – in comparison with the previous, mostly unregulated state of affairs in this area – they mark a substantial regression in terms of the possibility to criticise public figures. Through the new provisions the regulations create tight limits on the freedom of expression and the freedom of the press; moreover, they establish entirely vague – such as for example "equitable public interests" – boundaries to free speech. Mertek's position is that this solution violates the freedoms of expression and press.

## **2. HATE SPEECH**

### **Do the regulatory instruments available constitute a sufficient protection against speech that incites to hatred?**

Extremist speech in the media which seeks to incite to hatred against certain social groups is a reflection of severe social problems. It is our conviction that the legal prohibition of hate speech is not the primary, and in fact not even an effective, remedy of these social problems. At the same time such instances of hate speech also deepen the social problems that gave rise to them in the first place, which is why they need to be met with some type of regulatory/media policy response broadly understood. Nevertheless, our view is that the fundamental objective of regulatory and media policy instruments is not to sanction but rather to identify and label hate speech as such, to keep the underlying social problems on the public agenda, and to promote the quest for adequate answers to these problems.

It is safe to assert today that neither criminal law nor media law regulations and practice are effective in bringing about a sober and reflective public opinion, or even in terms of helping the latter come into being. The threshold for criminal law intervention is unreasonably high – this also extends to the Constitutional Court's jurisprudence –, and the media authority's practice also fails to respond adequately to the phenomenon of hate speech and exclusionary speech becoming commonplace. The application of criminal law interprets the legal notion of incitement against a community even more stringently than the already restrictive standard endorsed by the Constitutional Court; it holds that incitement to hatred can only be made out if the impugned conduct involves a

call to violent action. Our view is that the effective criminal law framework already allows for a broader scope of intervention than has been made use of hitherto, and can therefore serve as an effective instrument against hate speech.

In the case of a legal violation involving speech that is gravely offensive or unduly hurtful in its expression towards any community, or any member thereof in connection with the individual's association with the given community, the new Civil Code allows any member of the affected community to turn to the courts, and he/she may even demand damages or compensation for the injury suffered. This provision is a serious and disproportionate restriction on the freedom of expression and the freedom of the press. The Constitutional Court has found a similar regulation adopted by Parliament in 2007 unconstitutional. The provisions adopted now also fail to satisfy the criteria laid down by the Constitutional Court.

### **Is it necessary to regulate hate speech in the media law?**

In terms of the necessity of media law regulations concerning hate speech, the fundamental underlying question is how such a regulation complements other legal instruments, and whether its contribution to scaling back hate speech is proportional to its restrictive impact on the freedom of the media. While the legal regulation of expressions that incite to hatred may legitimately pursue the objective that media outlets do not become mouthpieces of hate speech, and that they do not fuel the communication of expressions that offend equal human dignity and incite hatred against certain social groups, at least as important an expectation concerning any type of regulation is that it ought not inhibit the appearance of socially sensitive issues in public discourse.

When it comes to the media law assessment of hate speech, no consistent and reliable legal practice has emerged to this day. The Constitutional Court has examined both the previous and the existing media law regulations, and it has found that they constitute a constitutionally acceptable limitation on the freedom of the press. Yet the Court's decisions fail to provide clear guidance on the precise interpretation of the relevant media law provisions. Though the media authority's practice has given rise to some important decisions that help delineate what qualifies as hate speech, at the same time other rulings submitted in the same period evince a misunderstanding of the legislative goals concerning the regulation of hate speech. The application of the law has been marked to a great degree by a haphazard, case-by-case approach rather than the consistent application of principles; approaching the issues in this way does not allow for reining in incitement in the media.

The Constitutional Court has on two separate occasions (decision No. 1006/B/2001. AB; decision No. 165/2011. (XII. 20.) AB) adopted the position that the media law provision banning incitement to hatred is substantially, and in particular in terms of the pertinent

threshold of intervention, coterminous with the conduct defined as incitement against a community in the Criminal Code. At the same time the Constitutional Court also held in 2007 – with rather questionable reasoning – that media law consequences may also pertain in cases when a breach of criminal law regulations cannot be determined to apply. Pursuant to the Court's reasoning, media should not be allowed to act as "amplifiers" of hate speech. The Court's opinion emphasised the influential effect of television or motion pictures on audiences, as well as the milder character of media law sanctions as compared to criminal law penalties. We do not believe that the Court's reference to media influence to be well-founded in this case, however, and it must also be pointed out that the application of media law sanctions might ultimately result in silencing a given media outlet, and hence on the whole its allegedly milder character is rather doubtful. This reasoning was superseded by another ruling of the Constitutional Court in 2011, wherein the Court bound the effective media law regulations in all aspects to the criminal law standard. What follows is that there are at most two differences between the criminal law and the media law provisions on hate speech: for one, the targets of media law sanctions are media providers; second, since the media law sanctions themselves are designed to match the character of media services, they are consequently differ in substance from criminal law sanctions. On the other hand, it does not follow from the more recent Constitutional Court ruling that it would be disallowed to return to media law standards that are more lenient than those in criminal law, by adopting other regulations than those in the currently effective media laws.

In the course of its examination of the new media laws, the Constitutional Court has defined their scope of action against hate speech just as narrowly as the possibilities for criminal law action. In practice, the relevant provisions have been applied by the media authority – both in the framework of the previous regulations and the currently effective legal regime – as distinct instruments that allow for a broader basis of intervention than the pertinent criminal law norms: the authority has made out infringements of the law even in instances when criminal law accountability was not and could not have been found to apply. Generally, media law sanctions have been applied by the authority in response to speech that either failed to respect human dignity or contributed to the intensification of social prejudices against a given minority. At the same time, from the media authority's practice there does not emerge a consistent and reliable threshold of intervention which would constitute an adequate level of protection for social groups that suffer injury and simultaneously provide content providers with safeguards ensuring the proportionality of interventions.

Our position is therefore that both the interests of social groups and of press freedom would be better served by criminal law sanctions that adhere to the standards set by the Constitutional Court, and by a corresponding abolition of the relevant media law provisions.



Since numerous professional and ethical considerations play a role in assessing speech published in the media, and since we believe that the most important responsibility with regard to hate speech is that the phenomenon be brought to light and that its discussion remain on the public agenda, we also regard models involving self-regulation against hate speech as acceptable solutions in place of a media law regulatory framework.

### **3. THE REQUIREMENT OF BALANCED COVERAGE**

#### **Is it necessary to prescribe an obligation of balanced media coverage for all media services or, alternatively, at least for certain media services?**

The requirement of balanced coverage serves the purpose of ensuring that the members of the public can develop their own opinions based on impartial and diverse media information. To this end, the regulation significantly curtails editorial freedom by forcing the reporting of viewpoints that the editors and/or the media owner do not share.

This regulation was introduced into the media laws in the context of radio and television. It was enacted for a media system in which analogue terrestrial broadcasting played an exclusive or at least dominant role. There has never been a desire to regulate the print press by imposing a balanced coverage requirement. In instances when the freedom of the press can guarantee the publication of diverse viewpoints even if left to itself, this type of prompting by the state is deemed unnecessary.

In today's situation the assumption that excluding any opinion from any particular content provider would also result in restricting that particular opinion's access to publicity no longer obtains for any type of media. Still, balanced coverage makes it easier for the audience to become adequately informed. The assumption of a highly aware audience that proactively seeks out clashing viewpoints even by consulting various media if necessary would obviate the ineluctable necessity of a news source that presents diverse opinions. Unfortunately, such an attitude does not reflect the typical consumer behaviour. Considering this, when balanced coverage prevails within a broadcast stream that better provides for the possibility that the audience can obtain adequate information, which should in principle promote public discourse.

In 2007 the Constitutional Court construed the requirement of balanced coverage considerably more narrowly than the then effective media laws. It held that the legislator can extend this requirement to public service media providers and those commercial radio and television channels that "wield significant power over public opinion" (Decision No. 1/2007. (I. 18.) AB). The very purpose of public service media broadcasting, its role in shaping public discourse, inevitably calls for retaining the requirement of balanced coverage. The Constitutional Court's approach towards commercial radio and television could in principle be used to reconcile the erosion of

arguments that militate in favour of balanced coverage with the need for ways to disseminate information that take into account consumers' real behaviour when it comes to consuming news. In our view, the media providers that wield significant power of public opinion are those with the greatest reach – including larger portions of viewers/listeners who are less conscious about their news consumption –and hence also the ones that should be subject to the requirement of balanced coverage.

### **What does the requirement of balanced coverage entail?**

Legal practice has not resulted in a uniform interpretation of balanced coverage. In light of the low number of proceedings conducted on the basis of this requirement, even the previous regulatory framework revealed that this legal institution has not become socially entrenched. Complaints concerning lack of balance came from a rather narrow range of potential complainants. This trend continues to prevail under the new legal regime.

The applied practice of the balanced coverage requirement has shown that in the majority of cases this legal institution is used by an extremist political party or interest group to promote its own media presence. On the one hand, this highlights the severe flaws of the legal institution, ultimately even its dysfunctionality. At the same time it also illustrates that the editorial policy of excluding extremist political forces from presentation in the media, and shrouding them in silence instead, does not necessarily lead to the desired results. In the long run, presenting extremist views together with properly argued opposing arguments and debate might be a more efficient instrument to counter extremist groups, and it would also help avoid a scenario wherein the latter can portray themselves or be seen as the victims of insufficiently balanced coverage.

Even if we were to accept that retaining the requirement of balanced coverage is justified in the case of certain media services, however, that would still not imply that it takes detailed legal stipulations and interventions by public authorities to enforce such a requirement. Our view is that a more precise delineation of what balanced entails, and holding broadcasters to it, can be achieved with the involvement of those providers to whom it applies, in a self-regulation framework. It would be effective to establish separate internal regulatory and monitoring solutions within the framework of the public service media institutional system. As for the other services, the substance of the balanced coverage concept and the arrangements for handling complaints would be handled by some sort of "code of balance". This would transition the legal requirement of balanced coverage into a professional and ethical requirement, which could realise its objective of shaping public discourse with fewer restrictions on editorial freedom.



#### **4. CHILD PROTECTION**

##### **What instruments can the state use to help the protection of children from harmful content?**

The least controversial premise of the media regulations is that children deserve protection from harmful media content in order to safeguard their personality development. Still, the possibilities for the state and especially media law to successfully regulate this area are naturally limited as well. When it comes to harmful content, legal provisions can only play an auxiliary role that complements targeted educational programmes and parents who are aware and mindful of their children's media consumption. Furthermore, once again regulations need to consider the changing technological landscape and new media consumption patterns.

The role of media regulations in this area is dual: to provide readily intelligible information about the nature of a given show's contents and to limit children's access to certain designated contents. Though the existing legal framework essentially follows the logic of common European regulations, it requires several amendments. The age groups introduced in Hungary appear to have become accepted by now, but at the level of specific rules the system needs to be reviewed. Pre-eminent attention must also be directed at the technological environment, which is undergoing a transformation, and to designing requirements that are consistent with the value chain in the media market; regulations must not impose burdens that any of the media market actors cannot possibly meet, or any type of obligations that could only be met through a disproportionate restriction of media freedom.

In light of the selection of available digital media and the consumption patterns of the relevant age group, a horizontal approach towards child protection must be fostered. The state's engagement in this area must move away from a merely controlling presence that metes out punishments for violations of the law towards an active role in promoting media literacy and media awareness in all age groups. An additional benefit of such a new approach would be that it would be possible – and necessary – to provide for the assertion of child protection rules in co-regulation frameworks, which would apply across media types rather than distinguishing between different kinds of media. The context of adopting a new regulatory framework should go hand in hand with planning a complex child protection institutional scheme, which could assume the enforcement of specialised media rules from the media authority.

A crucial way of promoting media literacy would be the development of skills that help individuals become actively engaged in the creative uses of spaces of communication created by new technologies, in community co-operations and communal life in general. Media literacy is a sine qua non for the emergence of a personality that takes responsibility for him/herself and is capable of communal coexistence. The infusion of government resources is indispensable in this area; public funds must flow into

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widening the selection of available media, organised education and support for civil initiatives.