

MÉRTÉK MEDIA MONITOR

HUNGARIAN MEDIA LAW



MÉRTÉK BOOKLETS

Volume 1.



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Volume 1.

January 2015

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MÉRTÉK MEDIA MONITOR

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Published by

Mérték Médiaelemző Műhely
Közhasznú Nonprofit Kft.
[Mertek Media Monitor
Nonprofit Ltd.]
H-1042 Budapest, Árpád út 90-92.

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The adoption of the new media laws in 2010 not only laid the foundation for the complete overhaul of the Hungarian media system but at once represented one of the current administration's first measures to scale back constitutional democracy. Fitting in comfortably with the broader arsenal of media policy, the new regulation provides a clear-cut picture of the way the government conceives of democracy. First and foremost, the new regulation is aimed at a structural revamping of the media system in such a way as to cement for the long haul the dominance of the current ruling parties in the public domain, at the very least on the channels of telecommunication that reach the most people in the country. Enterprises and editorial boards forced into compromise; single-party supervisory agencies; media businesses with close ties to the parties in power gaining ground – these are some of the main consequences of the media policy enabled by the new regulatory framework.

At the same time, the adoption of the new media laws has directed the attention of Europe and the world at large to the ongoing marginalization of constitutional democracy in Hungary. From the OSCE to the UN and the European Council, virtually all organizations concerned with fundamental rights have voiced severe criticism over the regulation, and their objections have been seconded by journalist forums and other NGOs. The present study does not undertake to provide a synopsis of the criticisms articulated to date.¹ The most comprehensive among them is certainly the expert opinion of the European Council, which essentially recommends a revision of the media laws across the board. Instead of such a summary, then, our aim here is to describe certain idiosyncratic, even eccentric solutions, now aided by the benefit of experience with the application of the new provisions.

Following an analysis of the constitutional underpinnings of the media regulation, we will provide a brief introduction to the specific features of the Hungarian media system, which exert a profound influence of the operation of the new provisions. In our account, we focus on the two most prominent risks that follow from the language of the law, namely the chilling effect of excessive content restrictions and the structural revisions threatening the pluralism of media in Hungary.

¹ See generally: Mérték Media Monitor *Forced Maneuver: Proposals and Expectations toward the Amendment of the Media Act* (2012) mertek.eu/en/article/forced-maneuver-proposals-and-expectations-toward-the-amendment-of-the-media-act.

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1. CONSTITUTIONAL FRAMEWORK FOR MEDIA REGULATION

1.1. Freedom of expression and the freedom of the press in the Fundamental Law of Hungary

The Hungarian Constitution, which was effective until 2011, ensured the freedom of the press between 1989 and 2010 using an unrevised phrasing. It was stated even in the phrasing of the judgement by the Constitution that the ‘protection’ of the freedom of the press presupposes active cooperation on the part of the state as opposed to the passive provision of the freedom of thought.²

This constitutional judgement was modified by the legislator in 2012.³ The new phrasing is more extended than the original and it essentially includes certain elements of the practices of the Constitutional

² Article 61 (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.

³ Article 61 (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 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 free access to information proper.

(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 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.

Court in the text of the Constitution. It is not possible to predict its possible practical consequences for the freedom of the media simply because this particular version of the text was not included in the Fundamental Law of Hungary which entered into force on 1 January 2012.

In line with the Charter of Fundamental Rights and the practices of the Constitutional Court, the Fundamental Law of Hungary provides the freedom of expression and the press.⁴

Changes in the text of the constitution do not in themselves necessarily mean changes in the content of the freedom of expression and the media. The content of the already laconic laws and the framework of the constitutional regulation of the media are formed by the Constitutional Court of which revision is enabled but is certainly not enforced by the modification of the text.⁵

1.1. The most significant statements of the Constitutional Court regarding media regulation

The first decision on the freedom of the media was taken in 1992⁶ in which the Constitutional Court established the framework and objectives in line with European constitutional traditions. It set out the constitutional conditions of the operation and place of public broadcast and at the same time it opened up the possibility for the development of a liberalized media market as well. Practice concerning the freedom of the media became more established after the adoption of the first media law in the second half of the 1990s although on the whole there were no more than ten decisions relating to issues about media regulation.⁷ The Constitutional Court found decisive parts of the 1996 media law and practically the whole frequency tendering system unconstitutional in 2007⁸ and in 2008⁹ and it examined fundamental issues concerning the regulation of media content. It examined particular provisions of the new media laws in December 2011.¹⁰ In its decisions it annulled provisions relating to the regulation of media content and provisions concerning the scope and procedures of media authorities but it did not assess a number of submissions relating to media laws. It did not particularly pay attention to the composition and independence of the media authority and the concerns about the independence of public broadcasting. According to the new law concerning the operation of the Constitutional Court, the legislative body cannot deal with such submissions in the future and the limitation of the scope of the circle with the right to initiate abstract constitutional control makes it improbable that further submissions might cause these concerns.

Hereinafter we summarize the important and general principles of media regulation that can be deduced from the practice of the Constitutional Court.

4 Article IX (1) Everyone shall have the right to freedom of expression.

(2) Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for the freedom to receive and impart information as is necessary in a democratic society.

(3) The detailed rules relating to the freedom of the press and to the supervision of media services, press products and the communications market shall be laid down in an implementing act.

5 L Majtényi and G Polyák 'A szabadság hazai hagyományának megtagadása – új médiatörvények Magyarországon' (2011) 1 *Közjogi Szemle* 1-14.

6 37/1992. (VI. 10.) AB

7 The most important decisions: Constitutional Court Resolution No. 37/1992. (VI. 10.) AB; Constitutional Court Resolution No. 47/1994. (X. 21.) AB; Constitutional Court Resolution No. 61/1995. (X. 6.) AB; Constitutional Court Resolution No. 22/1999. (VI. 30.) AB; Constitutional Court Resolution No. 766/B/2002. AB; Constitutional Court Resolution No. 1006/B/2001. AB; Constitutional Court Resolution No. 1/2005. (II. 4.) AB; Constitutional Court Resolution No. 46/2007. (VI. 27.) AB; Constitutional Court Resolution No. 37/2008. (V. 8.) AB; Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

There is a significantly larger number of decisions dealing with the general issues of the freedom of expression, from hate speech to the protection of public figures and the regulation of election campaigning.

8 Constitutional Court Resolution No. 46/2007. (VI. 27.) AB

9 Constitutional Court Resolution No. 37/2008. (V. 8.) AB

10 Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

1.1.1. The development of pluralistic media system

The fundamental purpose of media regulation in the Hungarian constitutional practice – as well as in the practice of international and national authorities protecting fundamental rights – is the development of a pluralistic media system.

The media and publicity have been defined by the vision of the Hungarian Constitutional Court as 'democratic public opinion'. In practice, the constitutional court gives a laconic reference to the content of democratic public opinion and the conditions of its implementation. Based on the decisions of the Constitutional Court it can be concluded that public opinion is democratic if information is 'complete and impartial' or if it is based on 'complete, balanced and realistic' information.¹¹ Its significance is the fact that 'diverse views are essential in a pluralistic democratic society'. Diverse views facilitate the independent individual to have a choice and the variety of competing arguments contributes to the early solution of existing social problems.¹² Ultimately democratic public opinion facilitates the 'grounded participation of the individual in social and political procedures'.¹³

The constitutional role of the media is defined by the constitutional standard of the democratic public opinion. The freedom of the media 'serves the constitutional right of expression' by 'magnifying the effect of individual expression of opinion and supporting the information of the democratic public opinion about public affairs and the expression of opinion about public affairs'.¹⁴ In its latest decision analysing the freedom of the press the Constitutional Court states that 'by exercising the right to freedom of the press the individual retaining fundamental rights is an active former of democratic public opinion'. In this particular capacity, the press oversees the activity of institutions and players of the public sphere, the process of decision making and informs the political community and democratic public about it and its 'public watchdog role' facilitates 'the disclosure of statements vital for individual expression of opinion, complete public information and the prevention of the emergence of a 'correct official view' based on monopolistic public opinion'.¹⁵

In the light of the freedom of the press, democratic public opinion is none other than a performance expected to be delivered through the operation of the media system and at the same time it is the standard which defines the direction and extent of state intervention in the operation of the media system. Regarding media regulation it follows that in its interpretation of the freedom of expression the Constitutional Court states that 'the right of information essential for the expression of opinion is believed to be a limit to the freedom of the press but only to a necessarily small extent'.¹⁶

The interpretation of the 'necessary extent' is helped by the most significant but not necessarily validated constitutional statement regarding the freedom of expression according to which the freedom of expression 'protects free expression of opinion regardless of its value and truth content'.¹⁷ Consequently, democratic public opinion cannot merely be the summary of valuable or correct points of view. In public discourse 'there is a place for all kinds of points of view whether good or harmful, pleasant or offensive especially because the classification of opinions is in itself the product of this very process'.¹⁸

Consequently, democratic public opinion requires exclusively a kind of restriction which is necessary to disclose all the relevant information and points of view. Ultimately the Hungarian Constitutional Court formulated the obligation of the state to develop a pluralistic media system via the concept of democratic public opinion, which is widely known in foreign and international fundamental rights courts.¹⁹ Democratic public opinion does not in addition mean an expectation of quality compared to social publicity and if the legislature intends to exclude particular information from this publicity to protect certain fundamental rights or constitutional values then it has to find a different constitutional basis.

On the other hand, there is a contradictory interpretation concerning the decision 165/2011. (XII. 20.) of the Constitutional Court. The Constitutional Court imposes the following restriction 'by definition, any media content denying the institutional and basic values connected to the fundamental rights of democracy is excluded from the development and implementation of democratic public opinion'. Instead

11 Constitutional Court Resolution No. 37/1992 (VI. 10.) AB

12 Constitutional Court Resolution No. 18/2004. (V. 25.) AB

13 Constitutional Court Resolution No. 30/1992. (V. 26.) AB

14 Constitutional Court Resolution No. 37/1992 (VI. 10.) AB

15 Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

16 Constitutional Court Resolution No. 37/1992. (VI. 10.) AB

17 Constitutional Court Resolution No. 30/1992. (V. 26.) AB

18 Constitutional Court Resolution No. 30/1992. (V. 26.) AB

19 See generally: G Polyák 'Pluralizmus és médiaszabályozás' (2009) 5 *Jogtudományi Közlöny* 208-220.

of the former content-neutral approach this particular interpretation at least opens up the way to a democratic public opinion raising expectations for quality and precluding certain information based on their content. This interpretation would make restrictions imposed on the freedom of the press futile and it would serve as a basis of such interventions in the operation of the media which would not be justified either by the protection of individual or community interests or the demand for varied information.²⁰

1.1.2. The independence of media supervisory bodies

The implementation of the freedom of expression is significantly influenced by the decisions about entering the market, sanctions and the accountability for public service remedy. The independence of institutions accountable for these decisions such as, media authorities and media supervisory bodies is an essential condition for the freedom of the media. The independence of media authorities has appeared as a community legislation requirement in the committee proposal for the modification of community television directive²¹ ultimately however, the accepted directive refers to the politically sensitive requirement significantly affecting sovereignty in the preamble²², or it includes an indirect reference²³.

The Constitutional Court Resolution No. 37/1992. (VI. 20.) AB determined the concept and essence of independence according to which regulation 'must exclude the possibility that any state organization or social group could influence the content of programmes in a way that it compromises the integrity and presentation of existing opinions in the society, the balance of their proportions, their realistic expression and impartial information. The Constitution requires radio and television broadcasting to be independent from the state and certain social groups. They cannot be entitled to make broadcasting one-sided or exercise considerable influence upon its content. This restriction has an effect on indirect influence and the possibility of influence as well.

Regarding private and public service media supervisory bodies the Constitutional Court emphasized in its 1992 decision that 'it is foreign to a special representative body guaranteeing the freedom of expression to recurrently have an exclusive or decisive political representation of the society in them'. The consensus of political parties far less the consensus of parliamentary parties does not guarantee the integrity of the freedom of expression.

In its later practice the Constitutional Court found formal legislative guarantees for independence sufficient and it did not evaluate the possibility for informal influence. In its 46/2007. (VI. 27.) resolution the Constitutional Court considered the guarantee for independence primarily in the regulation on operation exclusively subordinate to the law, in the absence of instruction and repeal, in rules of incompatibility and in the mandate of bodies separate from parliamentary term and in the possibility for a court revision regarding the decisions of the media authority. Consequently, it stated that legislative provisions are, in theory, capable of ensuring the independence of the members of the National Radio and Television Commission and rule out the possibility for parliamentary parties to formally exert their influence.

The Constitutional Court has not explored the issue of a solution according to which there is a lower constitutional risk of one-sided influence than at present in other words, a more proportionate one. In its 22/1999. (VI. 30.) decision it emphasized that political representation cannot be decisive regarding the supervision of public service media while concerning the media authority it failed to examine the necessity of validating civil, professional, etc. interests.

Regarding the new media law, the Constitutional Court has not examined the issues about the independence of the new media authority and the public service institution system. The legislative body has not been concerned with the issues relating to institutions in its decision about media law even though it has received a number of submissions about it and it has been the most significant element of international criticism. The European Council, the OSCE and the UN expert on press freedom and several

20 See for this interpretation: A Koltay and G Polyák 'Az Alkotmánybíróság határozata a médiaszabályozás egyes kérdéseiről' (2012) 1 *Jogesetek Magyarázata* 11-49.

21 According to the proposed article 23b 'member states guarantee the independence of national regulatory authorities and ensure that these authorities operate within their scope in an impartial and transparent way'.

22 (65) preamble paragraph

23 Member states take measures to – especially through their independent competent regulatory authorities – provide the Committee with all the information necessary for this particular directive regarding in particular article 2, 2a and 3.' (Article 23b)

international non-governmental organizations objected to the politically one-sided composition and the considerably broad scope of the media authority.

1.1.3. Indispensable Public Service Broadcasting

The Constitutional Court has assigned particularly strong constitutional positions to public service. In its 22/1999. (VI. 30.) resolution the Constitutional Court stated that ‘providing fundamental constitutional rights to learn of public interest data makes it the constitutional obligation of the state to facilitate a smooth public service and news service operation’.²⁴ Thus from a constitutional point of view public service broadcasting is a vital element of the Hungarian media system. According to the practice of the Constitutional Court regarding the operation of public service institutions, full and proportionally balanced and realistic information must be guaranteed in accordance with the principles of internal pluralism.²⁵

The Constitutional Court has examined the financial and organizational conditions of independent public service media in several of its decisions. Concerning institutional independence it confirms that the law must exclude the possibility that either state institutions or certain groups of the society could exert a decisive influence on the content of programmes in public service radio and television or these institutions and groups cannot be licensed to make broadcasting offer one-sided.²⁶ In its later decisions it was satisfied with ‘the balance between the representatives of government and opposition groups’ which ‘could prevent representative groups from being predominant on either side of the Parliament’.²⁷ It was complemented by an expectation according to which ‘the number of presidency members elected by the Parliament cannot exceed the number of curators delegated by non-governmental organizations’.²⁸ Ultimately however, the Constitutional Court believes that ‘the establishment of the one-sided supervisory body of public service broadcasting poses a ‘less serious constitutional threat’ against the freedom of expression than non-functional public service media advisory boards in the absence of the presidency’.²⁹

Regarding financing there is no decision which specifically states that in order to perform public service tasks the state is obliged to provide suitable financial sources but it does not state that the sustenance of public service broadcasting is a state function in which the provision of the required fund (including the determination of taxes) as well as its division are public authority functions deriving from the Constitution and other legislations.³⁰ In addition, it states that every resolution which authorizes the government to perform tasks requiring funds beyond the fulfilment of public service duties compromises the financial independence of public service broadcasting.³¹

1.1.4. A stricter regulation of media content

It was a particular characteristic of the Hungarian media regulation even in the period of the 1996 media law, in fact it still prevails and has strengthened with the adoption of new media laws, that regarding media content it imposes stricter requirements than provisions in civil and criminal law, the privacy act, etc. The most significant but most of all disconcerting current feature of the new media law was the extension of legal restrictions on public communications, which affected every on demand printed and online medium. Examining the 1996 media law the Constitutional Court came to the conclusion that the stricter regulation of radio and television content does not compromise the freedom of expression. In the case of printed and online media it limited the effectiveness of imposing media law sanctions as a result

²⁴ This argument is not in line with the widely accepted interpretation of the accessibility of public interest data. According to the Constitutional Court, gaining information about public interest is ‘an open, transparent and controllable public authority task, as a rule before state bodies and executive power’ and as its guarantee it is an independent fundamental right which everyone is entitled to retain. The freedom of information is not the privilege of journalists and especially not of public service media.

²⁵ Constitutional Court Resolution No. 37/1992. (VI. 10.) AB

²⁶ Constitutional Court Resolution No. 37/1992. (VI. 10.) AB

²⁷ Constitutional Court Resolution No. 22/1999. (VI. 30.) AB

²⁸ Constitutional Court Resolution No. 22/1999. (VI. 30.) AB

²⁹ Constitutional Court Resolution No. 22/1999. (VI. 30.) AB

³⁰ Constitutional Court Resolution No. 1/2005. (II. 4.) AB

³¹ Constitutional Court Resolution No. 47/1994. (X. 21.) AB

of the examination of the new media law but relating to these media, it did not find media law sanctions and the possibility for using media authority sanctions inherently against the Constitution.

One of the examples of media law restrictions beyond general provisions of the legal system is the regulation of hate speech. Both the previous and the current media law facilitates the imposition of media law sanctions against media contents inciting hatred which the Constitutional Court considered an intervention even in the case of printed and online media. Examining the 1996 media law relating exclusively to radio and television content, the Constitutional Court found two reasons to support this point of view: media law sanctions are less severe than those of criminal law therefore they can be used even in cases when a criminal law restriction would qualify a disproportionate, furthermore, 'compared to other manifestations of the freedom of speech opinions voiced in the media have a cumulative effect and have a powerful influence over the people think and the formation of public opinion'.³² Regarding the effects of the media the Constitutional Court has underlined the power which radio and television and in its recent practice all audiovisual media services can exercise over opinion formation and the power of persuasion relating to motion pictures, sounds and live coverage.³³ Examining the new media law the Constitutional Court merely stated that 'in its practice so far it has considered crime committed even through printed media as a necessary limit therefore it only confined itself to confirming its previous point of view in the current decision'.³⁴

In 2007 the Constitutional Court approved the scope of the media authority according to which it is entitled to use a kind of abstract procedure relating to personality protection rights entirely unrelated to independent from encroachment on individual rights. According to the Constitutional Court the media authority 'does not make decisions about encroachments on particular legal entities' but it is entitled to 'decide whether the operation of the broadcaster respects human rights and whether the subject, style and point of view of its particular programmes harm fundamental values present in human rights'.³⁵ The extension of this particular scope of the media authority relating to printed and online media was considered unconstitutional by the legislative body in 2011. In its judgement, audiovisual services 'proceedings instituted by a public authority in the interest of the viewers and listeners qualifies as a necessary and proportionate procedure with regard to a particularly significant influence over the public', 'in the case of printed and online media, dissimilar in their effects, the possibility for such action (...) qualifies as a disproportionate restriction'.³⁶ Ultimately, it is the presumed effect of the media which determines the limits of the intervention in this case as well.

32 Constitutional Court Resolution No. 1006/B/2001. AB

33 This argument is debatable regarding each of its elements. Media law are suitable for removing the given medium either directly or indirectly through substantial fines. The freedom of expression can hardly be subject to tighter restriction than the removal of the 'speaker'. Arguments based on the effects of electronic and audiovisual media exerted on the public were, as a general truth, made unsupportable by widening variety of television and other audiovisual contents and the ever-changing media consumption habits. In the present media system nothing can be stated about the 'media' in general; at best it is the power of influence certain services exert that can be examined.

34 Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

35 Constitutional Court Resolution No. 1/2007. (I. 18.) AB

36 Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

2. FACTORS SHAPING THE HUNGARIAN MEDIA REGULATION

It is an obvious fact that the Hungarian media system is forced to operate in a small linguistically closed market which significantly reduces the economic scope of media companies. At the same time, the fact that the media became a politically rather sensitive issue as well as the subject of a continuous and heated debate following the regime change has an almost equally significant influence over the development of the media system. This is indicated by the fact that the first media law, within the framework of democratic rule of law was adopted only in 1996. In spite of the continuous media policy debates and media regulatory attempts, only the 1968 press act was modified in the early period after the political transition.³⁷ The authorisation of journals was replaced by the free establishment of periodicals in 1989. It was only the 1996 media law³⁸, however, which created the opportunity for the electronic media to enter the market.³⁹ In the period preceding the adoption of the media law, the so-called media war was waged for the domination of public service broadcasting enjoying monopoly at that time.⁴⁰ After the opening of the media market every national television and radio tender created scandal which, as a rule, was followed by court decisions about infringements by the media authority. Public service broadcasters were unable to remain independent from the current government parties even in an orderly legislative framework offering the formal guarantees of independence. The media regulation coming into force in 2010 is, in essence, the culmination of this process.

At the beginning of the 1990s the printed press, then in the second half of the 1990s the main operators of the electronic media were all in the hands of major foreign-owned media companies. Axel-Springer, Bertelsmann, WAZ, Daily Mail and Ringier, in the periodical press market, SBS and CLT-UFA, in the national television market and EMMIS and Mezzanine, in the national radio market. Owing to the significant foreign investments the domestic media supply did not lag behind that of the European and the media market was more or less effectively protected from the political interlinking which characterised other countries in the region. This process took a dramatic turn with the national radio tendering in 2009. The two winning domestic companies of the tender belonged to the interest of two main parties.

37 Act II. of 1986 on the Press.

38 Act I. of 1996 on Radio and Television Broadcasting.

39 Actually, the public broadcasters had enjoyed less than complete monopoly even before the First Media Act entered into force. Local cable providers had been transmitting Hungarian language channels since 1994, the year that also saw the launch of HBO in Hungary.

40 See in English: E Hankiss 'The Hungarian media's war of independence: a Stevenson Lecture' (1992) 2 *Media, Culture, and Society* 293-311.

One of the two radio stations supported by the socialist, currently opposition party, has become bankrupt mainly because of the unsupported tendering and the politically influenced advertising market. The media enterprise having ties with the current government party made an attempt after the change of government to acquire a holding in national commercial television companies. TV2's previous owners finally sold the broadcaster to private persons who had managed the channel until then. Public opinion suspects, however, that these individuals have received considerable political support for their bid to acquire TV2.⁴¹ On the other hand, companies having close ties with political parties have become more and more decisive in the media market over the past few years. While almost every major operator in the radio market in Budapest has close ties with right-wing political parties, the largest political daily newspaper was to pass into the exclusive ownership of the socialist party's foundation last year but the plan did not succeed. At the same time Népszabadság and the county-level daily newspapers were acquired in 2014 by an Austrian financial investor, Vienna Capital Partners, and this deal also appears to be driven by political interests.⁴² This year also saw the sale by the internationally active Finnish Sanoma corporation of its Hungarian interests, and it featured the sale of the weekly HVG. The last time such massive shifts occurred in the media market was in the transition period following communism. At that time, however, media investors were entering the Hungarian market en masse, now they are leaving in large numbers. Another piece that fits into this series is the re-nationalisation of Antenna Hungária Zrt., which enjoys a monopoly in the terrestrial transmitting market; this should promote efforts to achieve an even more pervasive rearrangement of the television market.

The characteristics of the Hungarian media system based on the models provided by Hallin and Mancini can now clearly be summarised as the so-called polarized pluralist model.⁴³ Printed political press has a considerably limited availability and it is not significantly changed by the fact that online political contents also belong to this category. In the periodical press market the role of regional journals is influential but they barely deal with national public affairs. The television channels with the greatest audience reach essentially dropped all public affairs⁴⁴ content from their broadcasts after the change in government in 2010. Up until the adoption of the advertising tax, there was very little change in this regard. Following the adoption of the advertising tax, the share of public affairs news in RTL Klub's news show rose significantly, however. Political press and journalism reveal a substantially high degree of political parallelism. This is clearly confirmed by the influence companies which have ties to parties gain, the concept of the journalist's role, the media content itself and the divided public. Journalist professionalization has a low standard. A large number of journalists are openly committed to a political wing and as a result they prefer opinion journalism to fact-finding. In many cases the collaborative role⁴⁵ of the journalist has prevented the establishment and consistent maintenance of unified professional and ethical standards. Regarding the operation of the media system, the role of the state is dominant. Beyond the dominance of public service broadcasting relating to financing and tight but in many cases only partially effective regulation it is reflected in the politically motivated management of the state expenditure of advertising resulting in the distortion of the entire advertising market.

Thus far, the regulatory environment has not been able to help to solve structural and cultural problems. It became more and more conspicuous in the second half of the 2000s that the 1996 law is unus-

41 For example Attila Bátorfy: Akkor ki veszi meg a Tv2-t? [Who will buy TV2 then?], Kreatív Online, 20 November 2013., http://www.kreativ.hu/televizio/cikk/akkor_ki_veszi_meg_a_tv2_t; Dániel Szalay: Simicska-Nyerges kézbe kerül a TV2? [Will TV2 be controlled by the Simicska-Nyerges duo?], Médiapiac.com, 17 May 2013, <http://www.mediapiac.com/media/televizio/Simicska-Nyerges-kezz/9518/>; Ferenc M. László: A Simicska-Nyerges-birodalom ékköve lehet a TV2 [TV2 could become the crown jewel in the Simicska-Nyerges media empire], HVG Online 17 May 2013, http://hvg.hu/gazdasag/20130517_Nyerges_TV2_Infoncenter_vasarlas; Gábor Csuday: Itt a kapcsolat a Fidesz és a TV2 eladása között [So that's the connection between Fidesz and the sale of TV2], VS.hu, 20 January 2014, <http://vs.hu/itt-kapcsolat-fidesz-es-tv2-eladasa-kozott-0120>

42 Yvette Szabó – Gábor Csuday: Óriási médiaüzlet Magyarországon - fideszes szálak a háttérben [Huge media deal in Hungary – Fidesz's influence suspected in the background], VS.hu, 23 January 2014, <http://vs.hu/oriasi-media-uzlet-0123>

43 Daniel C. Hallin and Paolo Mancini drafted three models of media systems on basis of four comparable factors. These factors are the structure of media market, the political parallelism, the professionalization of journalism, and the role of the state. The three media system models are the Mediterranean or polarized pluralist model, the North/Central Europe or democratic corporatist model, and the North Atlantic or liberal model. See: CH Daniel and M Paolo Comparing Media Systems: *Three Models of Media and Politics* (Cambridge, Cambridge University Press, 2004).

44 Szonja Navratil: A Mérték Médiaelemző Műhely sajtószabadság-indexe [Mertek Media Monitor's Press Freedom Index]. In: Gábor Polyák – Erik Uszkiewicz (eds.): Foglyul ejtett média. Médiapolitikai írások. [Captive media. Writings on media policy], Gondolat Kiadó, 2014, pp. 148-188.

45 About the concepts of the role of journalist see: GC Clifford and LG Theodore and M Denis and N Kaarle and AW Robert *Normative Theories of the Media* (Urbana and Chicago, University of Illinois Press, 2009).

tainable. The law fundamentally applies to a media system in which the decisive operators of the market are the small number of analogue terrestrial broadcasting services. The law permitted cable and satellite television broadcasting to enter the market – it merely stipulated that a notification must be given – however, the legislature did not consider the possibility that the number, coverage and market significance of these services would later match those of the national terrestrial broadcasting services. On the whole, the law created a considerably disadvantageous economic environment for media companies. It was characterised by an unparalleled imposition of high fees in the region, restrictions on media concentration disregarding economic rationality, the most narrowly interpreted regulations on advertising, strict and inconsistently applied media content regulations.

Following the accession to the European Union, as an answer to this regulatory environment in Hungary, market operators kept leaving the country and settling in other member states to continue their enterprise. Households can reach about 100 Hungarian-speaking television channels. However, the authority currently keeps on file a total 13 nationwide cable or satellite television services with reception not limited to foreign countries, that are non-public in nature and are actually featured in the selection offered by one broadcaster or another.⁴⁶ Of these, only one has made it to the top ten television stations in terms of ratings.⁴⁷ A favourable turn from the perspective of the national media market is that last year the Chello Central Europe Ltd⁴⁸ resumed its broadcasting services (pl. Minimax, Spektrum TV, Sport 1) in Hungary. At the same time, the two national commercial television channels have each launched entertainment channels (RTL II, Super TV2) which are based abroad. Legal opportunity was offered by the television directive, the audiovisual media service directive and country of origin principle.⁴⁹ The undermining of the television market leads to the total reduction of the scope of media regulation and media policy and the certain failure of any regulatory policy. To stop the process, the construction of a completely reconsidered media regulatory environment was required.

The fact the Hungarian Constitutional Court found rulings issued in 2007 and 2008 regarding the regulation of the media market unconstitutional, required the revision of the regulation. As a member of the European Union, Hungary was obliged to implement the provisions of the audiovisual media service directive.

With such precedents in this environment the new media laws were adopted in 2010. Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content (Smtv.) include all fundamental regulations on media content and provisions for the legal status of journalists. Act CLXXXV of 2010 on Media Services and on the Mass Media (Mttv.) fundamentally includes the regulation on the formation of the media system's structure.

In the following description we will present the particular provisions of the media laws relating to the risks threatening the freedom of expression and the freedom of the press.

46 www.mediatanacs.hu/nyilvantartasok/1319115477_linearis_muholdas_mediaszolgalatasok_2011_10_19.xls

47 adattar.nmhh.hu/agb/nezettseg

48 This company also saw its owners change in 2013, as Liberty Global was followed by AMC Networks.

49 G Polyák and GL Szőke 'The Country of Origin Principle and Regulatory Regimes for Media Competition in East Central Europe', (2009) 1 *Central European Journal of Communication* 83-99.

3. RISKS INVOLVED IN THE APPLICATION OF MEDIA REGULATION AND THE FREEDOM OF THE MEDIA

Two years after the adoption of the media laws it is often stated that criticism against the laws was unjustifiable; the Media Council did not search over editorial offices, did not impose a fine on journals and criticism against the government did not diminish. This, however, is nothing more than the minimum of the freedom of the press. The real risk of the adaptation of the laws was not the fact that the media authority might make the operation of the media impossible by imposing huge fines. Rather, it was the situation developed as the result of the new regulation in which the editorial offices might adapt and make compromises, thus avoiding conflicts relating to the regulation or the authority. On the other hand, media policy of which significant but not exclusive element was the adoption of media laws will strive to attract the entire public and to, above all, manipulate the politically less active and less conscious media consumer members of the public with one-sided information. The majority of these risks have been realised.

3.1. Restrictions on Media Content and the Chilling Effect

The most significant turn in the history of Hungarian media regulation was when the new media laws extended the supervisory and sanctioning scope of the media authority relating to the printed and online press. All these, including the uncertainty of the media law situation, the prospects of severe sanctions and a broad legal scope of the authority and last but not least the newly organised media authority can pose a serious threat against the freedom of information through the media. Since the adoption of the law the rules concerned have been modified according to the expectations of the European Commission and the Constitutional Court. It might be relating to the rapt international attention paid to the regulation but the practice of the media authority has proved to be moderate although in many cases inconsistent. On the other hand, it is important to mention that the laws passed in 2010 have not considerably changed relating to their concept and the regulatory pressure exerted on editorial offices.

3.1.1. The Necessity and Proportion of Media Law Regulation

The most significant result of the Resolution of the Constitutional Court No. 165/2011. (XII. 20.) AB was the reduction of the scope of media content regulations which are to be applied to the non-audiovisual media as well. The supervision of the media law regulation of printed and online media by the media authority was not, in general, considered to be unconstitutional by the Constitutional Court. The Constitutional Court 'did not categorically exclude the possibility of a regulation which is content based or might induce state action in the case of printed press media either' and it stated that 'a retrospective, systematic and ex officio control and the possibility of sanctioning means, without doubt, a restriction on the freedom of the press but the mere possibility – along with an efficient and substantive judiciary control as a guarantee – cannot be considered unconstitutional'.⁵⁰

In its decision regarding the proportion of media law instructions; however, it failed to consider that media law sanctioning relating to the protection of the particular rights and values is merely one of its instruments. All legal views about media law restricts behaviour which do not entail civil, criminal and other, for instance data protection, legal proceedings and consequences. The proportion of the restriction imposed on the information can hardly be judged without considering every legal consequence relating to the information. Parallel proceedings and sanctions that can be simultaneously imposed in particular proceedings mean a considerable restraint on the freedom of expression as well. In its 57/2001 (XII. 5.) decision the Constitutional Court referred to the disproportion of the combined effects of the particular restrictions in connection with the freedom of expression itself.

The Constitutional Court did not examine the possible extent and character of the media law sanctions either which determines the extent of the restrictions imposed on the freedom of the press as well. Sanctions that can be used against products of the press and the prospective fines are still factors capable of making the operation of the certain press product impossible. The most serious sanction against dailies and online press products is a fine in the amount of 25 million forints. Audiovisual service providers can be punished by the withdrawal of its licence; the highest amount of the fine against these providers is 200 million forints in the case of a broadcaster with significant powers of influence⁵¹, and 50 million forints in other cases.⁵²

The severity of the sanction is of course influenced by other conditions of the sanctioning. Relating to this issue, the law includes some weak guarantees, such as the principle of gradualism and proportion, but the detailed rules are, in several points, unfinished and unrefined. In the meantime the Media Council introduced a practice according to which it strictly applies the principle of gradualism and it imposes the mildest sanction against every media service provider the first time they infringe regulations regardless of other infringements committed under the previous law. The Council largely ignores other aspects of sanctioning especially the seriousness of the infringement. The Media Council's sanctions practice was initially characterised by warnings and minor fines, apart from a few instances when more substantial financial penalties were imposed - in response to violations of child protection rules. The reason for the mild punishments were basically the principle of gradualness, which was treated as a priority when applying sanctions, and the restrictive interpretation of the concept of a media outlet engaging in „repeated infringements” of the law. It emerged clearly from the Media Council's sanctions policy that starting in the summer of 2011 it opened a new chapter also in the context of media providers that have been operating in the Hungarian market for a long-time now, and had consequently likely received prior penalties. In assessing whether an infringement had occurred repeatedly, the Authority only referred to violations of the new law, even in cases when the rule in question had essentially remain unchanged as compared to the previously effective regulations. In determining its sanctions, the Media Council did not consider the penalties assessed by the previous media authority, that is the providers set out with a clean slate. By consistently following the principle of gradualness, the Authority has arrived at a point where fines - ranging in the amount of a few ten thousand forints all the way to 20 million - tend to predominate among the sanctions levied by the Authority. By the end of the period under investigation, two-thirds of the sanctions levied were fines. The Authority did not incorporate the new sanction instruments laid down in the media law into its practice, and it did not exercise its power of suspending providers' media service privileges.

The Constitutional Court did not examine whether the definition of the regulation's subject, the clarity and accuracy of the definition serving as the basis of the scope of application ensure that the re-

⁵⁰ Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

⁵¹ See: Chapter 3.1.3.

⁵² Mttv. Sections 185-187.

strictions imposed concern only the information on which, according to the Constitutional Court, the restriction should be placed. Although it stated that ‘private communication, web pages, blogs, community sites, etc., cannot be managed together with online journals and news portals serving to inform or entertain the public’ but it did not examine taking the aspects of the application of the law into consideration whether the effective provision complies with the condition laid down at the determination of the subject of the regulation. Relating to the subject of the press product the law defines neither the concept of periodicals nor that of online papers or news portals and in spite of the modifications having been carried out since the adoption of the law it does not clarify the extent of the scope of media regulation. This does not fulfil the requirements of the clarity of norms and at the same time it is suitable for placing restrictions too extensively and on a larger range of information than it is constitutionally reasonable.

Finally, it failed to examine whether the institutional framework responsible for the implementation guarantee that all operators of the media system are assessed according to the same aspects when their behaviour is appraised. The political and economic independence of the media authority responsible for the implementation is a fundamental guarantee for the imposition of the same media law requirements on the all operators of the media system and the infringement of regulations are followed by the same sanctions without discrimination. In its current decision the Constitutional Court did not deal with the submissions challenging the independence of the media authority therefore the predictability of the entire regulation and its suitability for ensuring equal opportunities could not have been the aspect of proportion either.

The combined chilling effect of the above mentioned factors can still lead to the disappearance of certain subjects or critical voices – self-censorship – even if the reasonableness of each and every proceeding can be justified. This chilling effect is entirely independent from whether the media authority will ever impose the media law sanctions or not. It poses a serious danger especially in a social environment where 36 per cent of the journalist believe that there is an enormous and 44 per cent believe there is a considerable political pressure on the media and where 22 per cent of the journalist have already withheld or distorted political or economic facts in order to avoid some disadvantageous consequences.⁵³

In this chapter, legal provisions with a fundamental law relevance will be emphasized.

3.1.2. Media Content Regulations Affecting Every Medium

Considering all the above, as a consequence of the Constitutional Court’s relevant decision the requirement to respect the constitutional order, the prohibition to present vulnerable groups in an injurious light and the ban on incitement to hatred and exclusion continue to remain on the books as media law restrictions that apply to all types of media. Taking all these into consideration, after the decision of the Constitutional Court the general view of the media law restricting every medium remains the respect of constitutional order and the prohibition of incitement to hatred and disassociation.

Constitutional order, according to the Constitutional Court, is disrupted by ‘press products circulating and identifying with notions which ignore democratic order, the enforcement of human rights and human dignity which forms the basis of constitutional order’.⁵⁴ A previous decision considered the application of the provision only under certain ‘special circumstances’ acceptable; ‘an example of which would be a case if a broadcaster operated continuously by advertising an ideology which ignores equal human dignity forming the basis of constitutional order.’⁵⁵ These pieces of information would not fail to have legal consequences and extreme cases outlined by the Constitutional Court would encounter criminal law barriers as well. The application of media law views by the media authority did not take place either in the previous or the effective regulatory environment.

As we have referred to it in point 1.2.4., the Constitutional Court did not find either the sanctioning of incitement to hatred by the media law or its extension to printed and online media unconstitutional. The effective text of the law prohibits the incitement to hatred against and the disassociation of any social – minority or majority – groups. The provision has previously been modified according to the expectations of the European Commission: the prohibition of the open or implied offence of social groups has been removed. After the decision of the Constitutional Court the text was specified by the legislature

53 Mérték Media Monitor *Press Freedom Index 2012. Summary in English* (2012) mertek.eu/en/reports/press-freedom-index-2012.

54 Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

55 Constitutional Court Resolution No. 46/2007. (VI. 27) AB

making it clear that apart from offences against any member of a group, it does not extend to offences given to individuals.

In its decision examining the law, the Constitutional Court has introduced a really significant restriction relating to the application of the prohibition of incitement to hatred by the media law. In a previous decision the application the extension of this prohibition to a wider range of communications was considered acceptable, like the prohibition of hate speech in criminal law. According to the new decision, however, the scope of the application of the prohibition by media law is exactly the same as that of criminal law regarding the incitement to hatred. On the one hand, this considerably restricts the application of the provision by media law⁵⁶ which, from the point of view of the freedom of the press, is, beyond doubt, a favourable interpretation. On the other hand, it raises the important question of two different rulings in the parallel proceedings of both the criminal court and the media authority regarding the assessment of the same behaviour; different results in the assessment of the same behaviour based on the same standards seriously undermines legal certainty. The Media Council has further exacerbated the problem of legal uncertainty by delineating, in its most recent practice, the media law boundaries of hateful speech differently from the criminal law boundaries of the term, which also ignores the Constitutional Court's approach to this issue. In the case of an op-ed in the daily newspaper *Magyar Hírlap*, the authority assessed that for a violation of the media law to occur, *"it is not a necessary element in the definition of the offence that the audience genuinely develop feelings of hatred, and correspondingly it is even less necessary for the impugned community to suffer – physical – injury or threats."*⁵⁷ This interpretation offers no clear guidelines for future interpretations of the law.

Since 2010 the Media Council has rendered fewer than 20 decisions in cases involving incitement to hatred or the ban on exclusion, and only five of these ended in a negative decision for the party investigated against. The majority of decisions pertained to television content, though in some cases there were proceedings concerning print and online press products.⁵⁸ Condemning decisions were issued in cases when the persons depicted in the coverage "were presented not through as persons but on the basis of their membership in an ethnic minority ("Gypsies"), and as a result the negative assessment of their persons was projected onto the entire minority group,"⁵⁹ or the group presented "was portrayed in its entirety as a criminal group bereft of humanity and defined by criminality."⁶⁰ In its decisions, the Media Council is especially focused on discussing the presumed impact of the communication in question rather than offering its assessment of the content itself. Hence condemning decisions were issued in cases when the "item in question was liable to negatively influence the audience's perception of Roma"⁶¹ and when their portrayal was a "key element in the emotional ,tuning" of the audience, which reinforces an „an automatic, unreflective and routine interpretation of the broadcasted information, or [impedes] the factual processing of the information provided."⁶² A similar reasoning was applied in the decision concerning Zsolt Bayer's column in *Magyar Hírlap*: „The Media Council's position is that the reference to a ,significant portion' of a given social group contains generalisations that are liable to exert an impact on the entire community in question."⁶³ The writing was therefore capable of „inciting hatred not only against a ,significant portion' of the Gypsy community, but in fact against the entire community" and was simul-

56 According to the consequent interpretation of the Constitutional Court, criminal law sanctions against the hate speech can be applied in the case of the 'clear and present danger'. In its 30/1992. (V. 26.) decision, the Constitutional Court stated: 'The disturbance of the social order and peace - or public peace, to use the Criminal Code terminology - also contains the danger of a large-scale violation of individual rights: emotions whipped-up against a group threaten the honour and dignity (and in more extreme cases, also the lives) of the individuals comprising the group, and by intimidation restrict them in the exercise of their other rights as well (including the right to the freedom of expression). (...) Although the actual outcome of the examination is the same, this reasoning considers not only the intensity of the disruption of public peace which - above and beyond a certain threshold (clear and present danger) - justifies the restriction of the right to the freedom of expression.' The Court made it in the 165/2011. (XII. 20.) decision unambiguous, that these standards are also applicable for media law.

57 Decision No. 802/2013. (V. 8.) of the Media Council.

58 Krisztina Nagy – Zsófia Lehóczki: A médiatartalomra vonatkozó előírások a Médiatanács gyakorlatában 2011–2013 [The application of provisions concerning media content in the Media Council's case-law], In: Gábor Polyák – Erik Uszkiewicz (eds.): Foglyul ejtett média. Médiapolitikai írások. [Captive media. Writings on media policy], Gondolat Kiadó, 2014, pp. 105–148.

59 Decision No. 828/2011. (VI. 22.) of the Media Council

60 Decision No. 1153/2011. (IX. 1.) of the Media Council.

61 Decision No. 1153/2011. (IX. 1.) of the Media Council.

62 Decision No. 828/2011. (VI. 22.) of the Media Council.

63 Decision No. 802/2013. (V. 8.) of the Media Council.

taneously also „liable to give rise to prejudice against all members of the minority,” which implies that it also constituted unlawful exclusion.

Surprisingly, counter to previous expectations critiques of the Authority’s practice tend to complain about a lack of interventions on its part. The Media Council did not find it reasonable to impose a sanction against a programme in a public service television featuring the gypsy community in a negative way which sparked off a heated debate. According to its assessment the programme ‘did not judge reprehensible phenomena on a racial basis and it did not consider them as the cultural orientation of the community’.⁶⁴ The Commissioner for Fundamental Rights examined the programme as well and stated that ‘the problem (Gipsy-Hungarian coexistence) can be found in the customs of a minority group having a conflict with the majority and it is taken out of its natural contexts in a way that the image presented is distorted and misleading’.⁶⁵ The Commissioner did not find the decision of the Media Council reasonable enough and called on the authority to act ‘with increased professional care’ in the future. Furthermore, a general criticism against the practice of the authority is the fact that it reacts exclusively to cases it becomes aware of through reporting and it does not use its scope to commence an extensive investigation into malignant and dissociative communications which get perceptibly louder.⁶⁶ The purpose of such an investigation would obviously not be the imposition of sanctions but the identification of the problem.

Among the media content restrictions, the regulation of the right to remedy, the protection of children and commercial communications are constitutionally less sensitive. The new regulation extended the right to remedy for false factual allegations to online media as well. At the same time it failed to validate the characteristics of online communications in connection with, for example, deadlines or way of publishing. The maintenance of the objective responsibility of the press according to the new regulation is an even more serious malpractice: it obliges the editorial offices to take their responsibility for the infringements committed by a person making a statement or accurately quoting a piece of information given at a public event.

Compared to the earlier regulatory environment there are some further recent child protection regulations restricting printed and online media products. According to the law any media content which might inflict harm on minors can only be made available if the service provider ensures by means of technical or other similar safeguards that minors will not be able to access them. If such safeguards are not available, the media content may be published only with a warning concerning the potential endangerment to minors. In practice, in the case of online media contents this warning should be a pop-up window or a pictogram indicating the warning about potentially harmful content. It poses the question whether the regulation is effective because according to the representatives of the companies concerned, web pages marked this way are always more visited.⁶⁷

The Media Council’s decisions in the area of child protection display an official attitude that is excessively bureaucratic, focuses on minute details in the regulations and unable or unwilling to track and react to the social phenomena underlying individual cases. The first months of the Media Council’s activities saw proportionally the same number of child protection decisions and reprimands involving the most important issue of age rating as the same period under its predecessor institution. In the following time period there were far fewer decisions concerning child protection, but almost all decisions concerning this issue were related to violations of some minute aspect of the regulations, condemning the failure to display age classifications in the television guide. The same attitude also prevails in other areas of monitoring media content.⁶⁸

3.1.3. Regulations Concerning Audiovisual Media Services

Extending the scope of media regulation to printed and online media products does not, of course, create an undifferentiated regulation. The legislature continues to impose the heaviest regulatory burden on

64 Constitutional Court decision No. 924/2012. (V. 23.)

65 A/B-3395/2012.

66 Mérték Media Monitor *Content regulation in the practice of the Media Council* (2012) mertek.eu/en/reports/content-regulation-in-the-practice-of-the-media-council

67 G Polyák ‘Médiaszabályozás és gazdasági mozgástér. Esetek és tapasztalatok a hazai médiapiacra’ (2010) 3 *Médiakutató* 79, 84.

68 Nagy Krisztina – Lehóczki Zsófia: op. cit.

linear media services, namely, radio and television content services. The Constitutional Court contributed to a further differentiation of the regulation.

The legislature intended to extend the protection of human dignity by the media law to all media content.⁶⁹ Naturally, the principle of human dignity and personal rights are given an expansive protection in civil and criminal law in the Hungarian legal system as well. The legislature supplemented these in the 1996 media law by giving the media authority the power to impose sanctions if a radio or television programme violates human dignity or human personality as an abstract value regardless of individual enforcement or indeed, individual grievance. According to the assessment of the Constitutional Court concerning radio, television and on-demand audiovisual contents, this regulation is constitutionally disproportionate, whereas the extension of the regulation to online media products is a disproportionate restriction on the freedom of the press. The arguments of the Constitutional Court are summarized in points 1, 2 and 4 it is merely note here that the legislature has failed to elaborate on the relationship between the right to self-determination and the control of the authority. The Constitutional Court considered the regulation of the protection of privacy by the media law – as a separate provision contained in the law – unconstitutional, only in the case of press products⁷⁰ however, the legislature repealed the entire provision. According to the effective regulation the privacy policy, taken out of the scope of the right to self-determination, includes the protection of human dignity and the prohibition of self-serving and offensive featuring of individuals in humiliating, vulnerable situations extending the latter prohibition to every medium.

There were fewer than ten cases thus far in which the Media Council has made a determination that the right to human dignity had been violated. All of the relevant decisions condemning media providers were issued in connection with tabloid contents or crime reporting. The Authority's practice appears consistent in refusing to initiate proceedings when the case in question only involves the violation of an individual's rights. In the cases examined *"there did not arise a need for the institutional civil rights protection offered by the Media Authority for broadcast audiences. ...A damage to the public interest as specified by Article 14 (1) of the Act on the fundamental rules of press freedom and media contents cannot be established"*.⁷¹ This interpretation is basically consistent with the Constitutional Court's relevant case-law. Nevertheless, the authority's practice of failing to explain in detail why public interest did not suffer damage in a given case remains objectionable.

However, concerning contents 'ignoring the culture of human dignity'⁷² where the grievance 'pursues public interest by threatening the democratic public'⁷³ the Council has not established a unified and transparent standard.⁷⁴ It has failed to observe infringement in a case having considerable international resonance⁷⁵ in which the journalists and editors of a public media service provider with an obviously intentional falsification for political purposes, ultimately entirely ignored the principle of human dignity which must be respected unconditionally during the course of the production. It is worth observing that the Media Council does not only treat public service media service providers generously on issues concerning human dignity. It rejects complaints about that in almost each case regardless of the character of the infringement.

Still, the heftiest fine until now was issued in a case involving the violation of the right to human dignity. The proceeding that resulted in a determination of an infringement of human dignity was launched ex officio concerning a sweepstakes - which was the subject of widespread public outrage - broadcast on the 7 November edition of TV2's morning show Mokka, as well as the morning edition of the channel's

69 Smtv. Section 14

70 Smtv. Section 18, repealed on 19 June, 2012

71 Decision No. 905/2012. (V. 16.) of the Media Council

72 Media Council Resolution No. 722/2012 (IV. 8.)

73 eg Media Council Resolution No. 1044/2011 (VII. 19.)

74 Mérték Media Monitor *Content regulation in the practice of the Media Council. Summary in English* (2012) mertek.eu/en/reports/content-regulation-in-the-practice-of-the-media-council, and Mérték Media Monitor *Report on the content regulation in the practice of the Media Council (Part 2)* (2012) mertek.eu/en/reports/report-on-the-content-regulation-in-the-practice-of-the-media-council-part-2

75 In one of these cases having European resonance, the newsreel of Hungarian Television reported on the press conference of Daniel Cohn-Bendit member of the European Green Party and critic of the Hungarian media regulation. In the coverage – grossly falsifying the facts – the politician was reported to have fled the premises when asked about his alleged paedophile past. The uncut footage having been disclosed revealed that the politician answered the questions and left the press conference half an hour later. Several petitions were submitted to the Media Council because of the coverage. Finally, the authority decided not to commence proceedings in the case because there was no community interest which required media law intervention. In the letter sent to the person reporting the case the authority had not revealed the reason for the lack of community interest.

news show Tények (Facts). In the telephone-based sweepstakes the audience were asked to vote on the potential motives underlying the killing of a child, and those participating were offered prizes such as tickets to exhibitions or wellness facilities. The Media Council assessed that by broadcasting these items „the Media Provider had disregarded certain fundamental norms, such as the right of minors to human dignity, the respect of which is one of the main tenets of social coexistence.” The Media Council made clear that „media contents that disregard privacy rights in the presentation of a tragedy involving a minor, in a context such as the segment under investigation or a similar situation (...), are liable to violate not only the privacy rights of the minor portrayed or his/her relatives, but are also in violation of the ‘institutional’ protection afforded to human dignity, as well as the public interest in safeguarding a culture of human dignity, and hence also Article 14 (1) of the [Media Law].” In total, the Media Council issued a fine of 23 million forints, which is a very serious fine based on the authority’s case-law thus far.⁷⁶

A frequently criticised element of the law is the obligation to provide balanced, unbiased information.⁷⁷ This obligation was originally extended also to on-demand media services by the legislature – not considering the difficulties of implementation – at the recommendation of the European Commission, however, its application was limited to radio and television media services. This obligation, in a similar form, was part of the previous media law as well. The extension of the regulation is still a cause for concern: The Constitutional Court stated in justification of a decision in 2007 that the balanced and unbiased information can exclusively be required from public service channels, radio and television companies of which ‘power of opinion formation becomes significant’.⁷⁸

According to the media laws linear media services engaged in the pursuit of information activities are required to ensure that the newscast and news programmes they provide is diverse, factual, timely, objective and balanced concerning programmes on local and national events of interest to the public as well as on European events and public debates which are of interest to the people of Hungary and to members of the Hungarian nation. The balance of the information must be ensured, depending on the nature of the particular programmes, within the given programmes or in the series of programmes shown regularly. The implementation of balanced service is a special procedure according to which the media service provider and the complainant confer with each other and as a result the authority obliges the service provider to publish specific information or the point of view of the complainant.

The Council of Europe’s expertise proposed to do away completely with the Media Council’s right to proceed.⁷⁹ As a result of an agreement between the Council of Europe and the government, the text of the law was amended, but this has no substantial impact on the application of the law. As a result of the amendment, the requirements of diversity, factuality, timelines and objectiveness were removed from the law, leaving only the balanced coverage requirement. The amendment was justified on the grounds that these characteristics impose vague requirements that television channels and radio stations would find difficult to meet. Given that in judicial case-law balanced coverage is construed as a comprehensive category that encompasses all these aforementioned requirements as well, in practice the amendment does not imply that the scope of the relevant provision becomes narrower.

According to the Media Council ‘the only standard of the balance in programmes is the proportion of opposing views in them, the way they are conveyed and based on all these, the quality of the information provided for the viewers and listeners’.⁸⁰ As opposed to previous official and judicial practices the Media Council does not apply the diversity, factuality, timeliness and objectivity of information as an independent requirement. This otherwise moderate interpretation, in many cases, resulted in a decision – for example in the already mentioned Cohn-Bendit case – which did not state the nature of infringement of the obviously false information. This interpretation formed the basis of the practice according to which complaints about public media service – meaning 80 per cent of complaints – never result in condemnation.

Furthermore, according to the consistent point of view of the authority the ‘law protects the various opinions in order to establish the democratic public and help debate public affairs instead of protecting

76 The sum was arrived at by adding three different sanctions: The Authority imposed a 10 million forint fine for a violation of child protection rules, since it assessed that the show should have received a different age rating. Another 12.5 million in fines were levied for violating human dignity and another 500,000 for the gratuitous and offensive presentation of vulnerable persons.

77 Smtv. Section 13; Mttv. Sections 12 and 18i

78 Constitutional Court Resolution No. 1/2007 (I. 18.) AB

79 Eve Salomon– Joan Barata: Expertise by Council of Europe. Experts on Hungarian Media Legislation: 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, 2012. 22.

80 eg Media Council Resolution No. 674/2011. (V. 18.)

the ‘formers’ of the particular opinions’.⁸¹ This interpretation, which the authority uses building on the requirement for balance, is a significant means of not allowing an extremist party, Jobbik – against which most complaints are made – too wide a scope.⁸² All this justifies that this legal institute has become ineffective and it is incapable of contributing to the establishment of the democratic public; it can, at best, open up the possibility for extremist voices to be heard in the media.

Among the rules concerning media content, regulations relating to service providers with the so-called significant powers of influence must be highlighted as good examples of establishing differentiated regulation and taking economic reality into consideration.⁸³ Having an annual fifteen per cent average viewer rating qualifies a media service provider as one with significant powers of influence provided that at least one of its media services reaches an annual three per cent viewer rating; in the domestic media market only national commercial television and radio broadcasters are the most likely to meet this criterion. The imposition of content obligations based on viewer ratings is, without doubt, a more proportionate and effective regulatory solution compared to obligations based on the area of transmission required by the previous law. The law stipulates three obligations concerning media service providers with significant powers of influence: they are required to broadcast news programmes, broadcast a specified proportion of cinematographic works in their original language with Hungarian subtitles and providing subtitles or sign language interpretation with the gradually increasing proportion of programmes. Compared to the previous regulation this places a significantly smaller and more realistic burden on commercial television broadcasters.

On the other hand, the imposition of the obligation to broadcast newscast poses serious legal interpretational problems. According to the law, news content or report on crime not serving to provide information for the public cannot be longer in duration on an annual average than twenty percent of the duration of the news programme. After the introduction of this restriction the proportion of crime reports in commercial television newscasts decreased but at the same time the proportion of reports on accidents increased. Revealing the failure of the regulation is the fact that in spite of the intention of limiting tabloid news – in line, however, with media policy endeavours to restructure the media system introduced in the following chapter – the proportion of public news has decreased in the newscasts of commercial televisions since the adoption of the laws.⁸⁴

The regulation of media content does not considerably differ from either previous or European solutions in any other points.

3.1.4. Co-regulation

The media law has established a specific co-regulation system as an alternative to official control. Excepting television and radio media services, the law made it possible for the operators of the media market to implement the regulations concerning media content within the framework of self-regulatory bodies with an exclusive legal power.⁸⁵ According to the law the Media Council shall have the authority to conclude an administrative agreement with the self-regulatory bodies. Based on the agreement the self-regulatory body performs specific tasks related to the scope of official authority, media administration and media policy. The official scope of the self-regulatory bodies extend to the assessment of complaints concerning the activities of the service providers, the settlement of debates between media enterprises and the supervision of the operation of the service providers. The procedure on the part of the self-regulatory

⁸¹ eg Media Council Resolution No. 1322/2012. (VII. 18.)

⁸² Mérték Media Monitor *Content regulation in the practice of the Media Council. Summary in English* (2012) mertek.eu/en/reports/content-regulation-in-the-practice-of-the-media-council, and Mérték Media Monitor *Report on the content regulation in the practice of the Media Council (Part 2)* mertek.eu/en/reports/report-on-the-content-regulation-in-the-practice-of-the-media-council-part-2.

⁸³ Mttv. Section 38

⁸⁴ Mérték Media Monitor *Public affairs in the media. Impact of the media policy. English summary* (2012) mertek.eu/en/reports/public-affairs-in-the-media-impact-of-the-media-policy.

⁸⁵ Mttv. Sections 190-202/A

body has priority over the administrative procedure of the Media Council. The law emphasises that the self-regulatory body does not have administrative authority.

Since the summer 2011 four organizations have been part of the established co-regulation system such as the Hungarian Publisher's Association, the Association of Hungarian Content Providers, the Association of Hungarian Electronic Broadcasters and the Advertising Self Regulatory Board.⁸⁶

Part of the administrative agreement is a professional code of conduct devised by the self-regulatory body the adoption of which requires the approval of the Media Council. It would have been the most significant result of the co-regulation system if the codes had elaborated on legal facts in a more detailed and clear way making them easier to interpret during the course of editorial work. In essence, media law views and facts have been adopted by the codes without modification and with some minor supplements. Thus the law has an ambiguous content; its directly restrictive provisions for the freedom of expression are being interpreted by lay dispute settlement forums. Real self-regulation is not realised in the system it can much more be interpreted as the outsourcing of official administrative tasks.

Issues concerning the regulation of procedures including impossible sanctions and their execution are entrusted on the self-regulatory bodies by the law without defining the guarantee framework. This is worrying because in practice the codes regard the rights of the complainant according to the law; in fact they even restrict those who were excluded from the establishment and the implementation of the codes. The complainant is obliged to contact the media service provider within a specified period of time and confer with them. After an unsuccessful attempt at conferring with the service provider a written petition must be submitted paying attention to strict content conditions and paying the fee of the procedure; this the law itself does not imply. The most significant advantage of co-regulation for the providers is the absence of fees within its framework. The most substantial fee that can be imposed according to the codes is exclusion from the co-regulation system for a specific period of time. Further sanctions serve to ascertain, stop and publicise norm violation and to provide moral reparation. On the other hand the codes do not include provisions for the implementation of decisions made within the framework of the co-regulation system at all.

According to the law the Media Council is obliged to review all the decisions of the self-regulatory body. The authority also acts as a forum for legal remedies: if any of the parties requests the revision of the decision, the Media Council is obliged to review such decision within thirty days. If the Media Council finds that the decision of the self-regulatory body does not comply with the administrative agreement concluded with the self-regulatory body in particular the provisions of the Code of Conduct, or it violates the provisions of the relevant legislation or if the self-regulatory body is unable to enforce its decision, the Media Council establishes a procedure concerning the subject of the petition. This opens up the possibility for a judicial review as well. On the other hand, because of the ambiguous content of media law facts and the possibility of their wide range of interpretation the Media Council has a rather wide scope of revisionary authority. Furthermore, the Media Council has the authority to oversee all activities performed by the self-regulatory body under the administrative agreement, to supervise procedures and decisions extensively and as a last resort, terminate the administrative agreement.

The co-regulation system established in the media law is not in line with certain important European expectations regarding co-regulation systems.⁸⁷ One of the most significant concern relating to the independence from financing is that the Media Council – not in accordance with the principles and aspects established and considered in the media law, on the other hand, publishing it in the administrative agreement – provided the co-regulatory bodies with financial support. Independence from market operators is threatened by the fact that experts acting in the course of complaints procedures are exclusively delegated by the enterprises concerned and in the majority of the cases they have a permanent legal relationship with the particular establishment. Although this does not endanger the impartiality of the particular procedures since there are appropriate rules for the avoidance of conflicts of interests concerning the acting committees but it is clearly dominated by the views and interests of the service providers.

There have been only a few complaints procedures so far, probably partly because of the procedural difficulties although it is more likely to be caused by the low level of awareness of the co-regulation system. The co-regulation system undoubtedly places a less severe restriction on the freedom of the press than the control of the authorities. In its present form, however, it ignores all voluntary initiatives and it is not more than an alternative sanctioning system which service providers apply to themselves. Joining the co-regulation system is, in itself, a difficult compromise on the part of the editorial offices. By joining the co-regulation system, they accept and conform to the strict rules concerning media content so as not be

86 See summarised: mediajogfigyelo.hu/index.php?do=a&id=1575.

87 See especially: European Commission *European governance - A white paper* COM (2001) 428 final (2001/C 287/01).

forced to expect substantial fees stipulated by the law. This is how co-regulation becomes a spectacular expression of self-censorship. Furthermore, not every service in question participates in co-regulation and the current low number of complaints does not guarantee that they will not increase.

3.2. The structural transformation of the media system

The most severe and longest-lasting damage to democratic publicity are caused by those structural interventions that follow from the letter of the law only in part, many of them implemented through informal measures of media policy. The latter type of intervention has led to the dramatic market expansion of media businesses nurturing close ties with the main ruling party Fidesz, including their attempts – so far frustrated by the market itself on two separate occasions – to take over part or all of the nationwide commercial television stations, as well as the successful buyout of the free daily with the largest circulation in the country.

Among the various regulatory tools serving to restructure the media system and threatening the pluralism of media selection on offer, we will single out the transformation of the institutional system supervising the media, along with the means of regulating the media market and recent experiences with their application.

3.2.1. Institutional threats to pluralism

3.2.1.1. The independence of the Media Council

The independence of the media authority is a cardinal point of Hungarian media regulation. A politically lopsided media authority – such as the one ushered in by the new provisions – presents a serious jeopardy to the pluralism of the media system, notwithstanding any other safeguards as may be set forth by law. Considering that ‘pluralism’ is not something that can be precisely defined and enshrined as a liability in the abstract to which entities could be held accountable, it is inevitably predicated on the condition that the institutions supervising commercial and public service media themselves be sufficiently pluralistic and autonomous in making their decisions.⁸⁸

Hungary’s Media Act fails to instate adequate safeguards for a pluralistic and autonomous oversight of either commercial or public service media. The rules governing the election of the president and members to the Media Council, an authority vested with broad regulatory powers, are incapable of barring one-sided political influence from decisions concerning media market management and control over media content. In fact, these rules locked in the majority of ruling-party delegates to the media authority. Direct instruction is not the only form of this unilateral influence, which can be exercised, as the Constitutional Court has suggested, ‘by any means at will’.⁸⁹ For instance, indirect influence can be accomplished if the mechanism for nominating and electing members fails to guarantee participation in the Media Council by social groups and political forces other than the ruling parties.

Though the Media Council is part of the National Media and Infocommunications Authority (Nemzeti Média és Hírközlési Hatóság, NMHH), it has a distinct scope of authority to render decisions and also has a partly distinct apparatus at its disposal. The NMHH is a so-called integrated/convergent authority, which handles oversight of the telecommunications and media markets within a single body.

3.2.1.2. The election of the Media Council’s president

The president of the NMHH is the president of the Media Council at once. According to the original rules of the media act, the NMHH’s president, who was appointed by the Prime Minister, became automatical-

88 KH Ladeur ‘Einspeisung digitaler Fernsehprogramme – Zur Rechtsstellung von Kabelnetzbetreiber und Programmveranstalter. Zugleich ein Beitrag Verhältnis von Medien- und Telekommunikationsrecht unter Multimediabedingungen’ (2001) 10 *Kommunikation und Recht* 496-506.

89 37/1992 (VI. 10.) AB határozat (Constitutional Court of Hungary).

ly nominated for the office of chairperson of the Media Council at the time of appointment.⁹⁰ In 2013 the parliament modified the rules of the election. The objective of the amendment was to enshrine into law the terms of the agreement between the Council of Europe and the Hungarian government. Said agreement aimed to bring some critical aspects of the Hungarian media laws in line with the expectations put forth by the Council of Europe. According to the amendment the president of the NMHH is appointed by the State President, the Prime Minister maintains the right of nomination. A crucial element of the agreement and the resulting March amendment was the adoption of more rigorous professional selection criteria vis-à-vis potential candidates for the NMHH presidency. The amendment, which had been drafted in consultation with the Council of Europe, formulated strict criteria regarding the Authority's president. In addition to a higher education degree in either law, economics or the social sciences, a candidate must also have at least five years of experience "connected to the public oversight of media services or press products or the public oversight of infocommunications", or, alternatively, must have a scientific degree related to media or infocommunications and at least ten years of experience in higher education.

The law had to be applied earlier than was previously anticipated. After a serious illness, the NMHH's president, Annamária Szalai, who had been appointed for a nine-year term in 2010, passed away in April 2013. Thus commenced the search for a new NMHH president, who has to meet the recently narrowed professional requirements set out in the law and needs to be appointed by the president of the republic pursuant to a corresponding proposal by the prime minister. The Council of Europe also looked to the government to provide for the involvement of civil and professional organisations in the selection process. The law does indeed contain corresponding provisions, though pursuant to its text, the prime minister merely needs to "consider" the suggestions of these organisations, and is not in any shape or form bound by them. A serious deficiency of the effective regulations is that they fail to specify a final deadline for the nomination process. This deficiency gave rise to the very possibility of the currently prevailing scenario, wherein several organisations thusly authorised by the law have suggested candidates who meet the professional criteria required by the pertinent legislation, while the prime minister has to this day failed to satisfy his obligation of nominating a candidate.

Measures taken in the past weeks reinforce the perception that a reason for the prime minister's failure to choose one of the proposed professionally qualified candidates is that he has decided that none of them would be politically suitable. In May, the minister of public administration and justice turned to the Constitutional Court and asked the Court for its interpretation of certain aspects of the media law's March amendment. In his inquiry, the minister expressed his doubts as to whether Parliament had any authority at all to adopt professional requirements concerning the president of the NMHH, which is designated as a so-called autonomous regulatory body in the Fundamental Law. The minister also requested the Court to opine on the scope of the legislator's margin of appreciation regarding the regulation of selection criteria. Finally, he asked the Court to interpret the substance of the professional selection criteria prescribed by the law, asking specifically whether previous experience as a lawyer or a judge working on media issues may be considered public oversight activity, and whether membership in the Parliament's media affairs committee may qualify as such. The Court found that the latter issues fell outside its competence of constitutional review; with regard to Parliament's margin of appreciation, it found that detailed professional criteria for the NMHH presidency may be set out in law, and that the constitutional review of specific selection criteria, with a view towards the principle of press freedom, may be performed in response to a corresponding petition.

Subsequently, Parliament adopted a law that transfers the NMHH president's regulatory authority to enact decrees to the body's vice-president in situations wherein the president had failed to do so prior to the termination of his/her appointment. The president's authority to enact decrees pertains exclusively to the area of infocommunications and does not extend to the media sector. As far as infocommunications is concerned, however, the law on electronic infocommunications currently features a list of 30 items that circumscribe the scope of the president's authority to enact decrees. Presumably, the transfer of the authority to enact decrees to the Authority's vice-president was meant to provide for the longer term viability of the situation in which the NMHH operates without a president. The president of the republic, however, did not sign the amendment, but sent it back to Parliament for reconsideration. In his assessment, the amendment violated the Fundamental Law's provision that in terms of his/her authority to enact decrees, the head of an autonomous regulatory body – such as the NMHH – may not be "substituted

⁹⁰ Mttv, para 125 (1). Because the two posts are indeed filled by one and the same person, for the sake of simplicity hereafter we will refer to both as 'president', whether the president of the media authority or the chairperson of the Media Council is meant.

by a deputy whom he/she had previously nominated by decree”, and hence there is no way for transferring the authority to enact decrees by other means, for instance by law.

It was hereafter that Parliament adopted the amendment of the media law that overrode the previous agreement with the Council of Europe and softened the professional criteria applicable to the selection of the NMHH’s president. For one, in the future any type of higher education degree will suffice to meet the legally specified criteria, and the amendment also extended the range of relevant experience in public oversight to include the positions of the current and previous media and infocommunications authority’s leaders and professional staff, to related judicial and other legal activities, as well as to membership in current or previous media oversight boards. This has significantly expanded the range of potential candidates.

3.2.1.3. The election of the Media Council’s members

The four members of the Media Council are nominated by an ad hoc parliamentary committee⁹¹, this composed of members with a voting power commensurable with the number of members in the respective parliamentary faction that elected them in turn. In the first round, members are nominated to the Media Council by a unanimous vote of the nominations committee. If a unanimous decision is unavailable, candidates are nominated by a two –third majority of the weighted votes in the second round.

This goes to show that, whenever the ruling parties hold a two-third majority in Parliament – which is the case as we speak —, the nomination and election of members to the Media Council can be accomplished without any contribution by the political opposition or any other social group. A two-third majority in Parliament is obviously an exception to the general rule, but it is an exception that happened to obtain at the time these provisions were adopted. This circumstance must not be disregarded in assessing the new regulation, if only because the Media Act was passed by the same parliamentary majority that became the beneficiary of its application.⁹² In the specific case at hand, there was very little chance that the five parliamentary parties would be able to agree on four nominations by a unanimous vote. As expected, the ruling party went on to exclusively support its own nominees in the second round, who were then duly voted into office by the same two-third majority. Another example of abusing the two-third majority is the provision that, whenever Parliament fails to elect a new president to the helm of the Media Council, automatically extends the mandate of the incumbent president until such time as a new president is elected.⁹³

Yet even if Parliament succeeded in agreeing on nominees by a unanimous vote, the fact should be borne in mind that the Media Council always remains free to make its own discretionary decisions by a simple majority.⁹⁴ For all intents and purposes, no nomination procedure is conceivable today without the ruling parties nominating at least two out of the four members. Along with the president of the Media Council, who is nominated by the Prime Minister, ruling-party delegates are guaranteed to hold a majority. This represents a major setback compared to the former regulations which ensured the right of each parliamentary faction to independently nominate a member, while the votes by the members of the authority were always distributed evenly among ruling-party and opposition nominees, regardless of the number of the members. The president of the predecessor authority would be nominated jointly by the Prime Minister and the President of the Republic, which arrangement alone meant a more solid protection of autonomy, not to mention the fact that the president did not use to have a voting right in the most important matters pertaining to market entry.

Another reason why the nomination of the president of the Media Council by the Prime Minister is cause for concern has to do with the rather broad scope of powers with which the president is vested. Being single-handedly in charge of appointing and relieving of duty, without explanation, the organization of the Media Council and the executive director of the Media Support and Asset Management Fund

91 Mttv. Section 124.

92 The European Council has more than once pointed out that the stipulation of the two-third majority vote in itself is insufficient to ensure that the freedom of the media will be upheld, either in the enactment of media laws or in the process of electing members to the relevant bodies. Instead, the European Council recommends that Hungary develop solutions that presuppose a genuine cooperation and consensus between the ruling parties and the opposition.

93 Mttv. Section 216 (8)

94 Mttv. Section 144 (4)

(MTVA), the president holds direct sway over the entire process of preparing for decisions. In effect, the actual decision after that comes down to a choice among alternatives presented by the organization.⁹⁵

Equally problematic from the point of view of media freedom is the nine-year term for which members of the media supervisory agencies are appointed. The constitutional mission of these agencies is to represent social diversity in their decisions pertaining to the media. Social diversity, however, is not a static fact but a dynamic attribute in constant flux. The excessively long term of appointment increases the risk of perpetuating in media-related decisions a momentary stratification of society that will not reflect actual conditions of diversity in the more distant future. Unlike with such public law institutions as the Constitutional Court or the State Audit Office, the term of appointment to institutions overseeing commercial and public media should be defined in such a way as to ensure independence from the prevailing government majority as well as respect for the criteria of representing actual diversity. Moreover, the term of the appointment will fail to guarantee even a semblance of independence when incumbent officials can be reelected, as both the members and the president of the Media Council certainly can pursuant to the Media Act.⁹⁶

All these practical concerns could hardly be dispelled by formal safeguards, for instance by having the law provide that the Media Council and its members are not subordinated to any authority except that of the law, and shall not be instructed within their official capacity.⁹⁷ Even if the Constitutional Court's pertinent opinion as quoted in point 1.2.2. cannot be controverted academically, it can be said with certainty that a solution must exist for nominating and electing council members in such a way as to remove them further out of reach of any political party affiliation. For example, extending the right of nomination to more organizations could be instrumental in reducing the direct influence of the National Assembly and the Government on media content.⁹⁸

In March 2013, the Parliament modified the rules on nominating the NMHH's president. The objective of the March amendment was to enshrine into law the terms of the agreement between the Council of Europe and the Hungarian government. Said agreement aimed to bring some critical aspects of the Hungarian media laws in line with the expectations put forth by the Council of Europe. A crucial element of the agreement and the resulting March amendment was the adoption of more rigorous professional selection criteria vis-à-vis potential candidates for the NMHH presidency. The amendment, which had been drafted in consultation with the Council of Europe, formulated strict criteria regarding the Authority's president. In addition to a higher education degree in either law, economics or the social sciences, a candidate must also have at least five years of experience "connected to the public oversight of media services or press products or the public oversight of infocommunications", or, alternatively, must have a scientific degree related to media or infocommunications and at least ten years of experience in higher education.

In July 2013, the Hungarian Parliament adopted again an amendment of the rules for nominating and appointing the president of the NMHH. The amendment softened the professional criteria applicable to the selection of the NMHH's president. This has significantly expanded the range of potential candidates.

3.2.1.4. **Public service media**

One of the most obvious fiascos of recent media regulation in Hungary has been the transformation of the public service system. Despite massive increases in funding, public service media are losing audiences rapidly, and routinely feature in reports on news doctoring, severely prejudiced journalistic practices, employees let go en masse based on non-transparent criteria, internal power strife, and on attempts to thwart demonstrations protesting abuses in the public service media. In this study, we will confine ourselves to identifying some of the structural and institutional problems that have directly contributed to the dysfunctionality of public service media in Hungary.

The ambition behind the overhaul of the institutional system of public service media has been to create a powerfully centralized organizational system. On the one hand, this is an understandable response

95 Mttv. Section 115

96 Mttv. Section 125

97 Mttv. Section 123

98 As proposed by the expertise of the European Council. E Salomon and J Barata *Expertise by Council of Europe. Experts on Hungarian Media Legislation: 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* (2012) www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=oCDQQFjAA&url=http%3A%2F%2Fhub.coe.int%2F%2Fdocument_library%2Fget_file%3Fuuid%3Dfbc88585-eb71-4545-bc5d-b727e35f59ae%26groupId%3D10227&ei=CPUHUfziEae64ATr2oD4Aw&usg=AFQjCNftF-T4JknwN_jbZj2oN8eFR2JelQ&sig2=09yzGajYDGUJPOvkZnyFxQ&bvm=bv.41524429,d.bGE&cad=rja

to the former fragmentation of the system, particularly as regards the inefficient mechanism of supervision, and the restructuring is obviously aimed at encouraging better efficiency in the use of available resources. On the other hand, the move has produced an institutional system that is opaque and vulnerable to political influence, in which the lines separating responsibilities have been blurred.

The law assigned the task of providing public media services originally to four private limited companies – Magyar Televízió Zrt. (Hungarian Television), Duna Televízió Zrt. (Duna Television), Magyar Televízió Zrt. (Hungarian Radio), and the Magyar Távirati Iroda Zrt. (Hungarian News Agency) – all four owned exclusively by the Public Service Foundation and supervised by its Board of Trustees (hereinafter: ‘Board’). An amendment to the law was adopted by the Hungarian National Assembly in December 2014, primarily aimed at the transformation of the institutional framework of public media services. As a result of this amendment, Duna Médiaszolgáltató Részvénytársaság (Duna Media Service Company Limited by Shares) was established as the legal successor of Magyar Televízió (Hungarian Television), Duna Televízió (Duna TV), Magyar Rádió (Hungarian Radio) and Magyar Távirati Iroda (Hungarian News Agency), which used to operate as independent shareholding companies. Duna Médiaszolgáltató Részvénytársaság will thus become the provider of all public service television, radio and online content services, as well as public service news agent’s activities with effect from January 1, 2015.

The Board is the only body within the system of media supervision that has one member delegated by the opposition. Also elected for a term of nine years under the law, half of the members are delegated by the ruling parties, and half by factions of the opposition. They are elected by a two-third majority vote of Parliament.⁹⁹ However, even in this body, majority is guaranteed for the ruling parties, since another two members and the chair are delegated by the Media Council.

The Board is vested with general regulatory powers in connection with public service provision and management, most notably including the appointment of executive directors to the public media service providers.¹⁰⁰ Here we have another procedure that is left wide open to political influence. The executive directors and the terms of their future employment contracts are proposed by the president of the Media Council for approval by the Media Council. The provision of the selection process makes no mention of tendering, professional qualifications, or the presentation of a professional concept. In the next step, the Board decides between the candidates by a two-third majority vote in the first round and, in the event of an unsuccessful first round, by a simple majority in a second round – which is to say, relying on the votes of members delegated by the ruling party and the Media Council.

The key entity in the entire system of public service institutions is the Media Service Support and Asset Management Fund (hereinafter: ‘Fund’). Pursuant to the Media Act, the Fund exercises all ownership rights and obligations associated with public service media assets, including the production and support of public service programs.¹⁰¹ What this means in practice is that all the assets and the majority of the employees of public media service providers have been transferred to the Fund. With no independent capacities of their own, the providers are essentially confined to placing orders with the Fund for certain programs. The Fund is headed by an executive director appointed and relieved from office without explanation by the president of the Media Council. The executive director does not report to the Board or to any other external body.¹⁰² Even the members of the Fund’s Supervisory Board are appointed by the president of the Media Council.

According to the amendment from 2014, MTVA itself distributes the state funds available for the fulfillment of public service responsibilities between the different types of public service tasks.¹⁰³ The state provides the amount that is quantitatively defined for the long-term purposes of the public media services in the Media Act. Earlier, it was the so-called Public Service Budget Committee that decided on the division of this amount between the individual shareholding companies, the members of which committee were the CEO’s of the public service shareholding companies and the Fund, respectively, as well as two delegates from the State Audit Office. In the future, this Committee, whose members in the new institutional framework include the CEO’s of Duna Médiaszolgáltató Rt and the Fund, as well as one

99 Mttv. Section 86

100 Mttv. Section 102

101 Mttv. Sections 100 and 136

102 Mttv. Section 136

103 Mttv. Section 108

delegate from the State Audit Office, will only receive a right of comment with regard to the proposals developed and adopted by the Fund.

The Media Council's already massive influence on public service is aggravated by the fact that it is solely authorized to adopt the so-called Public Service Code,¹⁰⁴ which sets forth the basic principles of public service media provision and fine-tunes the public service objectives established by the Media Act. In practice, however, this document serves as a sort of ethical code rather than providing an in-depth definition of the law's generic public service objectives in the form of specific tasks to which providers could be held accountable. The Code is revised and compliance therewith monitored by the Public Service Board ('PSB'), which comprises members delegated by organizations defined by the Media Act.¹⁰⁵ Even though the PSB is supposed to implement broad-based social control, journalists' and human rights organizations are absent from the list of entities delegating members to it. The Media Act authorizes the body to propose that the executive director be removed from office if it refuses to accept his annual report. The law fails to articulate the criteria for making such a proposal, and PSB does not possess the professional competence to make such a judgment.

The Media Council's sway is further bolstered by its power to revise the system of public media services annually, deciding at will whether to sustain or change the prevailing public service scheme. In this way, the media authority plays a decisive role in all matters of staffing, organization, and content, in addition to being liable to monitor the legitimacy of public service media provision.

The Hungarian Media Act is supplemented by the amendment from 2014 through a chapter entitled "Strategic Plan of the Public Service Media and the Measurement of Public Service Value".¹⁰⁶ According to the amendment, a strategy is developed by the public service media provider each year - I can already see as one of the jobless CEO's is appointed deputy CEO on strategy -, which "creates a basis for the operation of the public service media, as well as for the cooperation between the public service media provider and the Fund". However, the strategy does not affect the amount of state subsidy specified in the law and it has no impact either on whether or not the public service media should launch a new content service. The situation is that this decision will continue to be made by the Media Council, which, independently from the strategy, "may supervise the system of public media services on an annual basis and may decide on whether to maintain its media services that it has provided for the public media provider to date, or to change the system thereof". Strategy will play a role in one single case: when the Public Service Budget Committee comments on the budget prepared by the Fund, it will take this strategy into account, among others.

The introduction of the procedures aimed at "measuring public service value" is primarily encouraged by the European Commission because by relying on these, it can be guaranteed that a new public media service does not disproportionately limit or distort the operation of the online and digital content provider market. However, it is the assessment of already existing services that would be required by the Hungarian regulation and no consequences are attached to the outcome of such appraisal. The detailed rules of the procedure are defined by the internal regulations of the public service media provider.

According to the amendment, the development of the strategy and the assessment are both done by the public service media provider itself, there is no mention of any public consultation or objective external assessor in the regulation at all.

The system of public service institutions set up as the result of the new regulation is centrally managed, stripped of all professional independence, exempt from any meaningful external control, and inscrutable in its finances. The intricate organizational structure casts a glaze of ambiguity over individual responsibilities, frustrating the work of journalists and attempts to hold individuals and entities accountable for the performance of specific tasks, while the interleaving with the Media Council precludes unbiased regulatory oversight. That these threats and limitations are very real has been borne out by experience in the field to date, as we have suggested in the context of content regulation. Finally, the vague definition of public service tasks further hamper accountability.

¹⁰⁴ Mttv. Section 95

¹⁰⁵ Mttv. Section 97

¹⁰⁶ Mttv. Section 100/A-100/B

3.2.2. The transformation of the media market

One of the major legislative objectives was to satisfy the economic needs of the major actors in the media industry, particularly including the largest television stations, as an indispensable condition for halting the migration out of Hungary's media market. Accordingly, the Media Act permits the broadest possible manoeuvring space in the acquisition of funds, for instance by relaxing the ceiling on airtime devoted to advertising, streamlining sponsorship rules, and allowing product placement.¹⁰⁷

The extent of regulatory penetration in the Hungarian media market has been significantly constrained by certain previous policy measures, notably by the concept of digital switchover for terrestrial broadcasting. As a result of this concept, there will be no more nationwide television tenders, because digital terrestrial capacities will be allocated by the operator of the digital terrestrial platform, which decides in its own discretion which media services to carry. In this way, the single legal condition for providing television services on any platform – cable, satellite, IPTV, digital terrestrial – will be simple registration by the Media Council. The state's acquisition in 2013 of the platform operator Antenna Hungária Zrt from its previous owner has essentially opened up the possibility of the state decisively and non-transparently shaping the conditions for accessing terrestrial digital broadcasting capacities.

Following several amendments, the date of the digital switchover was set by law at December 31, 2014. Practically, the switch-over was finished in October 2013. The switchover, which occurred in two steps, was consummated without any accompanying scandals; there were no masses of viewers left without access to television. The implementation of the technological transition was assisted by the government's massive communication campaign. According to a communiqué released by the NMHH the switchover affected some 570,000 households out of a total of 3.7 million. Some 135,000 of these received public assistance to purchase a set-top-box.¹⁰⁸

3.2.2.1. Regulation of market entry

The Preamble to the Audiovisual Media Services Directive expressly states that 'No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.' Contravening this provision, the Media Act has made it mandatory to register not only downloadable audiovisual media services but print and online press products as well. One of the concerns the European Commission voiced over the regulation in Hungary had to do with the excessively broad registration requirement, which it said imposed an unreasonable restriction on the freedom of service provision and opinion. Consequently, Hungarian legislators revised the registration provisions soon after the Media Act had entered into force.

Press products must be reported at the time of commencing the activity. There is no requirement to report content in the course of subsequent operation, but the failure to comply with the registration obligation carries a fine of up to one million forints. In the case of press products, the media authority is not allowed to use deletion from the records as a sanction. In December 2011, the Constitutional Court upheld the mandatory registration of press products as being constitutionally acceptable, pointing out that, 'beyond the obvious bureaucratic burden, the reporting obligation and the keeping of such records do not hinder or restrict the release of a press product, let alone preventing it.'¹⁰⁹ At the same time, the Constitutional Court did not address the accuracy of criteria defining the services subject to the registration obligation or the deterring power of the contemplated sanctions, nor did it examine whether there was any regulatory objective that could not be accomplished by any means other than mandatory registration. Apart from these concerns, the expertise of the Council of Europe warns that the mandatory registration of print and internet-based media is incompatible with the principles followed in the practice of the European Court of Human Rights.¹¹⁰

The registration of television services involves the reporting of detailed information regarding programming. The commencement of broadcasting is subject to obtaining a resolution confirming the reg-

107 Mttv. Sections 23-35

108 http://nmhh.hu/cikk/161427/Nezopont_Intezet_Sikertortenet_a_digitalis_atallas

109 Constitutional Court Resolution No. 165/2011. (XII. 20.) AB

110 E Salomon and J Barata *Expertise by Council of Europe* (fn 86) 14.

istration. The failure to register carries general media law sanctions. Subsequent violations may result in the deletion of the service from the records by the Media Council.

Tendering as a method of licensing services is now limited to radio frequencies, including local stations.¹¹¹ The rules of bidding for analogue terrestrial frequencies essentially follow the logic of the country's 1996 media law. The media authority continues to select the winner in the outcome of a rather convoluted and costly process even today, when virtually all the bids concern local radio frequencies.

In its resolution 46/2007. (VI. 27.) AB, the Constitutional Court has found that the former media law 'failed to implement a transparent tendering mechanism.' Among other objections, the Constitutional Court pointed out that 'the evaluation criteria to be applied to bids for a media service license are not regulated by the law, and the entire decision-making process remains impossible to follow for the bidders and the public at large.' Ironically, the new Mining Act does not contain such rules either. Formerly, the industry authority would be liable to set forth and publish the evaluation criteria as part of the general tender terms. The new law neglects to provide for this liability. In fact, the outlines for defining the evaluation criteria are nowhere to be found in writing, leaving the authority free to define those criteria arbitrarily, as it sees fit. This oversight alone would be sufficient to call into question the fairness of any bidding process.

Practically every single tender announcement by the Media Council is based on the same set of criteria, in which precedence is given to the ratio of programs with local public affairs content, followed in importance by the amount of the media service fee payable (in this respect the variation among the bids is significantly narrower owing to the continued application of the former proportional scoring system) and, weighing the least, by the subjective evaluation of the proposed programming plan. This routine suggests that the media authority continues to ignore to survey the given local media market and to tailor the tender to the actual program selection on offer. It also definitely tends to favor uniformity over diversity. The bidders' own ideas about programming content only merit consideration under the subjective criteria heading, once again giving free rein to uncontrollable and arbitrary interpretations of the law in practice.

The above is not the only regulatory solution posing a threat to the fairness of tendering. It is in the Media Council's power not to declare any given media service license/frequency tender closed until a bid that meets its satisfaction has been filed. The potential for arbitrary application of the law is also inherent in the authority's ability to rescind the tender announcement, and even to modify its terms no later than 15 days before the deadline for submitting the bids.¹¹² For the rest, the authority may discontinue the tender at any time if it considers that the given media policy objectives cannot be ensured by accomplishing the tender procedure.¹¹³ The frustration of media policy objectives thus constitutes a cause for termination on grounds that simply cannot be ascertained or verified. Another provision that makes it difficult to grasp the legislative intent behind it is the one that permits the Media Council to terminate the tender process if it concludes that declaring any one of the bidders as the winner would jeopardize the responsible, proper, and effective management of the frequency asset as a public resource.¹¹⁴ A frequency management issue of a technical nature is unlikely to arise, given that the given frequency and the range of reception are specified in the tender announcement itself.

These provisions were applied only exceptionally, in two cases. There is namely no need to manipulate the outcome of tenders in the manner previously described when the main media body, whose members were all nominated by one party, can operate „normally,” that is based on its own standards. Among the exceptions was an October 2013 decision wherein the Media Council terminated a Debrecen commercial radio station's right to submit a frequency application. The decision argued that a new entrant would endanger the already existing stations, and that the market was not likely to support the lasting establishment of a new player. The Authority's opinion also stated that there were existing players in the Debrecen market who were struggling to pay their fees, and that one radio's licence had already been revoked on those grounds in 2011. Yet this reasoning makes it difficult to explain why the Media Authority launched the tender in the first place, given that the circumstances it cites in its decisions were already well-known when the tender was announced. It is also remarkable that all four of the applications sub-

111 When the license to operate a national radio station was freed up due to the bankruptcy of one of the two national commercial channels, the Media Council did not issue a tender for the relevant frequency but assigned it to public radio instead. As a result, there is no possibility to submit an application to operate a national commercial radio station. See Gábor Polyák Gábor: A Kossuth jobban teljesít [Radio Kossuth does better], Mérték Blog, 7 January 2014, <http://mertek.hvg.hu/2014/01/07/a-kossuth-jobban-teljesit/>

112 Mttv. Section 53

113 Mttv. Section 61

114 Mttv. Section 61

mitted stemmed from local companies, including one which had lost its frequency in a previous tender to the municipal media holding. It appears therefore that the local media players did see some opportunities in the local market and – at the very least from the broadcasters’ perspective – there was some demand for launching a new commercial channel.

The arbitrary element in all these processes is compounded by the rather broad opportunity that the law allows for obtaining a media service provision license without a tender process. Such authorization may be granted, for a period of up to three months, to media providers capable of discharging a public function in times of a state of emergency, natural catastrophe, or industrial disaster, and of serving a certain community’s ‘special educational, cultural, information needs, or needs associated with a specific event affecting the given community.’¹¹⁵ It was on the basis of this provision that the authority awarded a Budapest frequency to Catholic Radio as a media service fulfilling the ‘special educational, cultural and information needs of people living and working in Budapest, ‘meeting the ‘special information demands of families,’ ‘helping to reinforce social cohesion by presenting positive examples,’ and ‘reaching out to individuals and families regardless of world view or religious belief.’¹¹⁶ It seems safe to assume that this particular notice posted by the media authority was designed to compensate the winner for the loss of its nationwide frequency rather than to serve those needs of the public that could not, ostensibly, be met by means of a regular tender process.

It would be fair to say that on the whole the Media Council’s tender practices are part of and serve a media policy whose main objective is to improve the market positions of media companies with ties to the government, while at the same time they seek to weaken companies that compete with the aforementioned favoured enterprises.¹¹⁷ No other conceptual media policy framework emerges from the calls for tenders, nor is there any apparent consideration of the needs of local markets.

Based on way the frequency tenders work, it can be stated unequivocally that the Media Authority intends to redraw the media map in the radio market. Though the Media Council lacks a public frequency management plan, and it also failed to publicly release the media policy considerations it relies on when reassigning frequencies, the contents of the calls for tender, and in fact the lack of tenders for certain frequencies, render the media policy objectives pursued by the Council unequivocal.

As a result of the transformations in the media market, previously successful radio stations have partly or completely disappeared from the market. The biggest loser of the Media Council’s tenders is Rádió 1, which has gone from a successful national network to a brand name used by some local stations. The radio that operated the former network has since ceased operations. Rádió Juventus has also reduced its operations, and in autumn 2013 its owners sold the station. The Media Council’s tender practices have also liquidated Klubrádió’s¹¹⁸ network. There were also some pre-eminently successful players in these tenders, who have managed to emerge as radio stations with national coverage. One of these preferred players is the right-wing talk radio Lánchíd, whose circle of owners is identical to the group that controls Class FM. Lánchíd saw its coverage area increase by 13 additional frequencies. Four religious stations can also be mentioned: Magyar Katolikus Rádió (Hungarian Catholic Radio), Szent István Rádió, Európa Rádió, which is associated with the Reformed churches, and Mária Rádió, another Catholic station. As a result of tenders, Katolikus Rádió has sixteen new frequencies, Szent István Rádió has seven, while Mária Rádió won eight. Using these local frequencies - which they won as individual applicants - these stations will avail themselves of an opportunity specified in the call for tenders and either commit themselves to broadcasting centrally produced content or have already pledged to do so in subsequent amendments of their agreements with the Media Council. Hence their broadcasts will not serve local public discourse but to disseminate homogeneous centrally-produced shows. While previously competitive offerings were the

¹¹⁵ Mttv. Section 48 (4)

¹¹⁶ Media Council Resolution No. 328/2011. (III. 9.)

¹¹⁷ Krisztina Nagy: A Médiatanács frekvenciapályáztatási gyakorlata 2010-2013 [The Media Council’s frequency tender practices, 2010-2013]; Gábor Polyák – Erik Uszkiewicz (eds.): Foglyul ejtett média. Médiapolitikai frások. [Captive media. Writings on media policy], Gondolat Kiadó, 2014, pp. 68-105.

¹¹⁸ Klubrádió’s tender applications were especially closed watched, since it was in the context of its applications that a formal mistake called the „Klub rule” emerged as a central element in the tender process, and it had an impact on the tender practices in general, leading to a corresponding appreciation of Klubrádió’s significance in terms of media policies. The only radio station in the market that espouses a forceful opposition voice used to operate a Budapest-based network that covered large swathes of the country. In the investigated period between 2010 and 2012 the station submitted 15 applications to retain its previous market position or to expand it. It failed to win even a single frequency, and in the second period all tender proceedings wherein it had participated were declared unsuccessful. Three binding judicial decisions were rendered concerning tenders involving the frequency that was considered the station’s Budapest-based central frequency, 95.3. In all these cases the proceeding court set aside the Media Council’s decision concerning Klubrádió, citing legal violations by the Council.

norm in certain local markets – which was not without its own potential for conflicts -, these days many municipalities lack a genuinely local radio, and apart from national stations all they have access to are the generic broadcasts of the recently expanding players.

In the meanwhile, the Media Authority has conserved the monopolistic character of the national radio market when it decided not to issue a tender for the frequencies used by the Neo FM national network, which went bust in 2012, but awarded them to the public media instead. As a result of this decision, there is no more competition in the national radio market, since November 2012 Class FM has emerged as the sole players in the national market.

3.2.2.2. Media concentration

One thing that can be said with certainty about the regulatory concept for curbing industry concentration is that it is much better attuned to the realities of the market than the previous media law. It is more proportionate in delimiting the maneuvering space of media providers, and more attentive to the real constitutional motive of curtailing market concentration, which is the promotion of diversity in the media selection on offer. Even so, this field is no different in that, here too, the specific details of the regulation incorporate loopholes for arbitrary interpretation in practice.

The regulation is of the so-called audience-share type, allowing media businesses to acquire new licenses and market segments as long as their annual average audience share (ratings) remains below the specified threshold of 35%.¹¹⁹ This ceiling amounts to a potential restriction in respect of a single enterprise, Magyar RTL/IKO Media only. The chances of any other media group in Hungary to even approach this magnitude of audience share are virtually nil.

Beyond the ban on stockpiling licenses beyond a certain limit, the law provides only general guidance as to the substance of the desirable measures. The Media Act proposes three methods to enhance the diversity in the media: ‘by modifying the media service’s program structure, by increasing the proportion of Hungarian works and programs prepared by independent program makers, or in any other way.’ [Section 68 (1)] Although the media service provider is required to define actual measures in consultation with the media authority, the law does not supply any useful yardstick for the authority to weigh proposals. [Section 68 (3)] It is the media provider’s burden to prove that the proposed measures are ‘suitable for decreasing the information monopoly that has existed previously, and for increasing media market diversity and pluralism.’ [Section 68 (4)]. Such a demonstration, however, would appear to be quite an onerous task in the absence of the appropriate standards, let alone methodological and procedural safeguards.

The law does not in any way restrict cross ownership between diverse types of media. The constitutional risk this implies is particularly severe in light of the market processes transpiring in Hungary. At the time the Media Act was passed by Parliament, more than one of the dominant actors in the daily market had been put up for sale. In the Hungarian market, cross ownership is not so much a problem of large media ventures as the strategy of businesses close to certain political parties. Additionally, local media markets have been increasingly affected by a process of concentration whereby radio and television stations are gradually subsumed under municipal media holding. In this way, the absence of targeted regulation puts into jeopardy the pluralism of informing the public – a principle otherwise often reiterated by the Media Act itself. Under the circumstances, the threat is not just theoretical but very much real-world, and this lends weight to the constitutional concerns over the legislative failure to hold back cross ownership.

The very lenient rules of media concentration are compounded by the decision of the legislature to require the Media Council to participate as contributing specialized authority in processes conducted by the Hungarian Competition Authority,¹²⁰ whenever a merger involves ‘enterprises or the affiliates of two groups of companies [...] bearing editorial responsibility.’ However, the Media Council is not allowed to withhold endorsement ‘when the level of merger between independent sources of opinion after the merger will ensure the right for diversity of information within the relevant market for the media content service.’ Obviously, this caveat leaves much latitude for arbitrary interpretation in practice without fear of accountability, not least because the courts are not in the position to overrule a deliberated decision by the Media Council in this regard.

By requiring the approval of the specialized authority to be applied to ongoing official processes,¹²¹ the law effectively enabled the Media Council to step in and interfere with the Axel-Springer/Ringier merger,

119 Mttv. Section 68

120 Mttv. Section 171

121 Mttv. Section 216 (5)

which had been under scrutiny by the Competition Authority quite some time before the adoption of the Media Act.

The two ventures involved in the contemplated merger are among the largest enterprises in Hungary's print media market. Apart from major interests in the magazine segment, Axel-Springer holds a dominant stake in the regional daily market, while Ringier is the majority owner of *Népszabadság*, the leading political daily, and *Blikk*, the largest-circulation tabloid paper, among other publications. The proposed merger of the two would have been a reasonable response to the economic woes of the print media market, notwithstanding the fact that it would have undoubtedly created an overriding market force. Consequently, it is not so much because of the end result itself that the Media Council could be called to task for its refusal to approve the merger, but because of the low professional standards of the explanation attached to the resolution.¹²² This lends support to the suspicion that the authority's position in the matter had been decided at the time the National Assembly enacted the Media Act, and that the ulterior motive behind that decision was to weaken *Népszabadság* as a daily known for its critical attitude to the ruling parties. In the wake of the media authority's resolution and ongoing market developments, for a while it seemed that the paper would be acquired exclusively by the foundation of the opposition Socialist Party,¹²³ which would have amounted to the end of the last political daily run by a professional investor. At the end of the day, however, Ringier decided not to sell. In 2014, Axel Springer and Ringier launched their merger anew, under changed conditions. The two publishers sold a significant portion of their Hungarian media portfolios – including their entire holdings in political and public affairs media – to a financial investment company, the Vienna Capital Partners group.¹²⁴ This removed not only *Népszabadság* from the scope of the merger, but also Axel-Springer's county-level newspapers, which still number among the most successful public affairs press outlets in the print category. In this form, the merger was found unproblematic by both the Media Council and the Hungarian Competition Authority,¹²⁵ so much so that the Media Council's relevant decision does not even contain an opinion – in accordance with the parties' corresponding request.

122 See especially: M Gálik and A Vogl 'Az új médiakoncentráció-szabályozás első vizsgálója: az Axel Springer és a Ringier kiadói csoport megíúsult összeolvadása a magyar piacon' (2011) 3 *Médiakutató* 83-97.

123 The Foundation has held a minority stake in the daily to this day.

124 The VCP group was involved in the transaction through the Lumen Hungary Holding Zrt., which it controls.

125 Vj-6/2014/35; Vj-7/2014/46

4. CONCLUDING THOUGHTS

While pluralism features prominently among the fundamental principles embraced by the Media Act, the regulatory details and the practices in applying its provisions tend to work precisely against a free and pluralistic media system. Two years after the law enforcement entered into force, it seems safe to declare that it has impaired the healthy operation public discourse in Hungary, even if the damage is not always as extreme as could possibly be inferred from a first glance at the text of the law.

Any change in the media regulations in Hungary should entail consequences on the European level. Despite the fact, however, that the European Union – notably its Parliament and Council – has attentively followed and frowned on these developments from the start, the measures posing a clear danger to the freedom of the media in Hungary have failed to elicit a legally binding response from Europe so far. This goes to show that community-level media regulation, particularly the Audiovisual Media Services Directive, was adopted as a result of political compromises that continue to prevent the European harmonization of media policy issues regarded as sensitive by certain member states. The European Commission has found nothing to criticize in terms of fundamental rights; its recommendations expressed in 2011 exclusively concern narrow fields of regulation under the Audiovisual Media Services Directive.

In the absence of the appropriate legal underpinnings, the ongoing exercise of political pressure from the EU remains ineffectual, lending support to the argument that the unredeemed threats of sanctions only demonstrate the feebleness of the European Union. In the long term, then, Hungarian media regulation could prove most profitable by fermenting a revision on the European level of the arsenal we have at our disposal to defend the freedom of the media and fundamental rights.

