

# Publicness revisited – a dialogue for a future media regulatory framework



Center for Independent Journalism

Mertek Media Monitor

25 February 2014

The 'Publicness revisited - a dialogue for a future media regulatory framework' project is co-organized with the Centre for Independent Journalism and it's supported by the EEA/Norway Grants. The operation of Mertek Media Monitor is supported by Open Society Foundations.

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## ON THE REGULATORY PROPOSAL

Over the past year research projects carried out by Mertek Media Monitor have disclosed a considerable amount of information about the distortions of the public sphere, the destruction of the media market and journalists' continuously narrowing professional latitude in the performance of their work. The results of these projects have served as a background for our efforts to rethink the framework of media regulations and media policies. Overall, seven draft proposals concerning a new regulatory scheme have been drawn up, five of which (the documents on the media authority, the regulation of the media market, self-regulation, media education, public service) were created in co-operation with the Független Média Központ (Center of Independent Journalism) and the EEA/Norway NGO Fund, as well as with the support of Ökotárs (Hungarian Environmental Partnership Foundation) and its partners. We made the draft papers available online and gave the members of the public the possibility to submit comments. This opportunity was complemented by a public discussion of each draft proposal. Finally, we integrated the opinions we received into the original draft documents.

Does it even make sense to talk about the potential directions of progress in terms of media regulations/policy when the decision-maker does not evince even the slightest hint of openness to engage in joint thinking about these changes; where the absence of chances for real change and the potential risks associated with taking a stand preclude from the very start a significant portion of stakeholders from participation? It does, at least insofar as we owe it to ourselves to show that it is possible to this differently. It is possible to draft a regulatory scheme by way of public debates and open discussions about professional documents on the subject matter. And it is possible to create solutions rooted in the rule of law, without ignoring the particularities of the Hungarian situation. That is the process we used to draw up the proposed regulatory scheme.

What kind of public sphere do we want?

The starting point of our regulatory scheme is that the objective of media regulations and the entire arsenal of media policies ought to be the creation of a media system framework that promotes public discourse. Our proposal suggests that public discourse means more than the constitutional requirement of a plural media selection. For one, it implies a media selection and media self-understanding that provides opportunities for debating various viewpoints, and which itself reacts critically and reflectively to messages emanating from the sphere of politics and business; which seeks to understand phenomena and render them intelligible to the public; and which overall assumes a proactive and stimulating role in overcoming the prevailing extreme levels of social and political division. At the same time, the notion of social discourse also has implications in terms of expectations of the audience. In order to match these expectations, the audience must be capable of relating openly, but at the same time also critically, to the media's messages. We expect to realise this long-term objective through media education and the promotion of consumption media consumption.

What ought to be the limits of free speech and what content-related rules should apply to the media?

The proposal suggests that beyond applicable general civil and criminal law restrictions, specialised media law regulations or media law sanctions should only be proffered in instances when European community law unequivocally so demands. With regard to media law provisions, the question is not whether the print and online press have to be regulated - we are convinced that that is unnecessary - but today the question is obviously whether we need such provisions to regulate television and radio content. For all types of media, self-regulation is an adequate instrument for supplanting specialised media law provisions. Since regulations tend to react to fundamental social interests and problems, however, we find a state supervisory mechanism acceptable as long as its objective is not to apply sanctions but to monitor the media presence of those social phenomena that the regulations seek to address, to promote their public debate and keep them on the public agenda. Our position is that an ombudsman type of institution would be most suitable for such purposes. Beyond its application to public media, the requirement of balanced coverage may also be justified in the case of commercial media services that reach audiences who are less conscious about their media consumption; national general interest media fall into this category. A specific definition of balanced coverage must be arrived at, and its application must be realised, with the inclusion of the affected media providers in the framework of self-regulation schemes.

Is it possible to create a professionally independent media authority?

Our fundamental attitude towards the future of the media authority was its full abolition, primarily - though not exclusively - based on the appalling experiences gathered in the domestic context. In drafting our detailed proposal, however, we have concluded that this cannot be fully realised. It is possible, however, to create an institutional arrangement that - in contrast to the current media authority - is decentralised and works with a narrowly circumscribed margin of appreciation when taking official action. A significant portion of the functions currently discharged by the media authority could be transferred to other authorities, and in certain cases to a public media ombudsman who does not exercise public authority or to a self-regulation organisation. Decisions concerning the diversity of the media system, primarily issues involving market entry and market expansion, will continue to be made by an official body, whose composition must reflect the diversity of our society. Instead of a permanent body, these functions could also be carried out by an organisation similar to the election committee.

What elements must a media regulation scheme that is sensitive to the needs of the market and keen to reduce market distortions be built on?

In its ideas concerning the regulation of the media market, the draft proposal seeks to delineate the authorities' margin of appreciation as narrowly as possible, as well as to create the most consistent and predictable regulatory framework conceivable. We suggest that radio frequency tenders be conducted in a procedure that is more rigid than the currently used system and provides both, the authority and market players, with less flexibility, but is at the same time also simpler and more

consistent and predictable than the current procedural scheme. Frequencies should strictly be awarded pursuant to a long-term frequency management plan that is based exclusively on objective and measurable assessment criteria and provides very little leeway in terms of diverging from the conditions laid down in the tender procedure. The proposal would retain transmission obligations incumbent on broadcasters only in the case of specifically designated public media services and local community services. The document suggests to abolish the involvement of the media authority in tender procedures that result in decisions that are binding for the competition authority. Restrictions on media concentration would revert back to limitations on the number of concessions - though certain elements of the effective regulations would be retained.

Is there any chance of rebuilding public service media?

The draft proposal wishes to regulate public service media through a multi-tiered system in which the detailed definition of responsibilities and the associated budget planning process result from a transparent and professional decision-making process that takes place outside the public media organisations. The structure of public service content; the ratio of individual types of contents disseminated by the public media in the discharge of their public mandate; the number of platforms and channels needed to realise public service content provision; and the funds necessary for realising public service content provision must be determined in the framework of the public mandate. The public service institution structure presented in the draft proposal does not diverge significantly from previous Hungarian solutions and typical European models. No matter how complex an institutional structure may be, it cannot provide guarantees against one-sided partisan political influence. Thus ultimately the best safeguard against external influence is the commitment to public service of those working in public media, which we believe could be promoted by developing internal professional control mechanisms, both of the formal and informal kind.

On the whole, this regulatory proposal sees the state's most vital function in disclosing and presenting social phenomena. It regards reducing the risk of arbitrary applications of the law as a pre-eminent objective; takes account of the long-term impact of media market distortions; does not give up on the institution of public media; and in shaping the media system it relies on media education and a renewed self-regulation framework. Ultimately, it imagines the future of the media system as a system that is once again subject to the rule of law and is capable of promoting social discourse.

Budapest, 25 February 2014.

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## **1. OBJECTIVES OF THE MEDIA REGULATION**

### **What do we expect from media regulations?**

Before debating the details of the regulatory framework, it is necessary to clarify what type of public sphere this regulation should help bring about. Further regulatory instruments could emerge from an analysis of this particular idea of the public sphere.

### **Does the media have a social role today, and if so, then how is it defined?**

In our view the Hungarian media's ability to create a public sphere that could serve as an arena for social discourse is currently limited. But there can be no democracy without social discourse, without a public sphere that allows for the debate of our public affairs. The public sphere is an indispensable precondition for engendering a debate about public affairs that is fact-based, argumentative, open, and capable of bringing about a rapprochement of diverse viewpoints, or at least a mutually intelligible frame of reference.

### **Considering the existing consumption patterns, in how far does the current selection of media programmes live up to the expectations concerning the media's social role?**

We need to consider that even though the diversity of available media programmes is a fundamental precondition of a well-informed public and of a high quality public discourse that makes the former possible, it is by no means the only necessary safeguard to this end. Research has shown that at this time a significant portion of the audience does not use other news sources - in fact it makes no efforts to inform itself further - apart from those offered by the content providers with the greatest reach, even while those news neither provide comprehensive information nor promote public discourse. Hence the quantity and quality of widely available public affairs content is not in sync with the audience's efforts - or lack thereof - to inform itself about public affairs. Only small parts of the audience make an effort to learn, compile and compare the available wealth of information - in the form of news media services, print and online press products -, which implies that a wide selection is insufficient in and of itself.

The media policy instruments for changing the audience's attitude towards information are rather limited. Promoting awareness and understanding in media consumption would constitute progress in this very area, however.

### **Which media policy measures limit the effectiveness of the media's social functions?**

We would like to emphasise the following among the media policy measures that are the causes of distortions in the public sphere

- the continual narrowing of the limits of expression, the vagueness of the threshold of legal intervention, which leads to excessive caution when it comes to public speech, and the disappearance of relevant opinions;

- lacking transparency in the operations of public service media and in their chains of responsibility, as well as the removal of any substantial review of their operations, which have combined to render the discharge of their public service responsibilities impossible;
- the transformation in the national news agency's activities, the centralisation of public service news services, which indirectly threaten the diversity of information in the entire media system;
- biased, arbitrary and non-transparent frequency tenders, which have led to significant changes in the ownership structure of the radio market, as well as to closer intertwinements between political and business interests than experienced ever heretofore;
- the non-transparent reshaping of the business latitude available to media market players (non-public reduction in fees, arbitrary application of rules on media concentration), which has indirectly exerted a significant impact on the dramatic decline in the ratio and quality of public affairs programming in the commercial television channels' news shows;
- manipulation of the already crisis-stricken advertising market, which has significantly enhanced the political dependence of media market players;
- the substantial impairment of the state of media education, which will impede the emergence of a critical audience.

### **What is the role of commercial media services in shaping public discourse?**

Various media naturally have differing roles in creating public discourse.

It would clearly be wrong to claim that national commercial television channels participate in providing public affairs information only to comply with the relevant legal requirements. Their newly launched channels broadcast news shows with relatively high levels of public affairs content even without being legally obligated to do so. Nevertheless, it would be impossible to expect that commercial television channels' news shows - which openly label themselves infotainment - assume a decisive role in operating public discourse. Even the audience regards them primarily as sources of entertainment. Still, their economic weight and audience share makes it impossible to discount their role in the media system.

In a situation wherein nearly 70% of the audience feel that commercial television channels constitute the most important source of information, these media providers cannot refuse to face up to their social responsibilities. In our view only a competitive regulatory framework can strike a balance between market interests and the social responsibility of media enterprises, however. In our view only a competitive regulatory environment can make a balance between business interest and social responsibility of media enterprises. Instead of new rules restricting operation of media companies, a new approach is required: advertising market without state distortion, separation of political and business interest are the preconditions for high quality public affairs programmes rather than infotainment programmes creating the illusion of being well-informed.



### **What is the role of public service media in shaping public discourse?**

It is incumbent on the public service media to emerge as the primary forum of public discourse and public sphere. No matter how rich the selection of available new sources may be now, how interactive the public digital spheres have become, universally applicable news forums for debating public affairs have thus far only partially emerged in the digital media system. Even though the domestic experience with public service media offer little cause for overt optimism, our conviction remains that given the current state of the public sphere we need a public service content provision system that works well and efficiently exploits the possibilities inherent in digital content provision, while it is also behaves ethically and is committed to fostering public discourse.

### **To what degree do online services contribute to the emergence of public discourse?**

Various types of online content services are increasingly crucial spaces of social discourse. The possibilities for accessing online content have significantly broadened over the past few years. We assess that these services do not require special content regulation beyond the general legal framework that applies in any case. In designing regulations, however, it is important to be mindful of the fact that even online content services can be subject to bottlenecks that will allow for interventions into the information stream - filtering and blocking data streams, applying different conditions to forwarding individual data packages - by both, state institutions and market players.

Ultimately, the creation of a public sphere that fosters public discourse takes significant efforts on the part of journalists, editorial offices and media enterprises, as well as the audience and political decision-makers. By itself, no kind of regulation is capable of transforming bad practices, attitudes or political culture, for that matter. Nevertheless, without regulations and media policies that provide for a free and open media system we are guaranteed not to make progress towards this end.

## 2. MAIN ELEMENTS OF THE DRAFT CONCEPTION ON 'CONTENT REGULATION'

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

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

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

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

Partly as a result of technological changes, and partly stemming from the legal framework created by the European Union, content providers can easily circumvent individual national regulations. In the Hungarian television market this process is nearly complete, and correspondingly the regulations pertaining to television broadcasters affect only a few providers. As far online content providers are concerned, those whose operations most frequently result in infringements of the law also tend to be the ones that have found ways to remove themselves from the scope of Hungarian regulations. The regulatory failures concerning these providers poignantly illuminate that the severity of the regulatory framework cannot change the fundamental features of the media system,

even as serious restrictions on the freedom of expression encumber the activities of media service providers who otherwise operate lawfully.

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

### ***Protecting human dignity***

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

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

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

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

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

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

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

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

### ***Hate speech***

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

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

keep the underlying social problems on the public agenda, and to promote the quest for adequate answers to these problems.

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

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

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

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

When it comes to the media law assessment of hate speech, no consistent and reliable legal practice has emerged to this day. The Constitutional Court has examined both the previous and the existing media law regulations, and it has found that they constitute a constitutionally acceptable limitation on the freedom of the press. Yet the Court's decisions fail to provide clear guidance on the precise interpretation of the relevant media law provisions. Though the media authority's practice has given rise to some important decisions that help delineate what qualifies as hate speech, at the same time other rulings submitted in the same period evince a misunderstanding of the legislative goals concerning the regulation of hate speech. The application of the law has been marked to a

great degree by a haphazard, case-by-case approach rather than the consistent application of principles; approaching the issues in this way does not allow for reining in incitement in the media.

The Constitutional Court has on two separate occasions (decision No. 1006/B/2001. AB; decision No. 165/2011. (XII. 20.) AB) adopted the position that the media law provision banning incitement to hatred is substantially, and in particular in terms of the pertinent threshold of intervention, coterminous with the conduct defined as incitement against a community in the Criminal Code. At the same time the Constitutional Court also held in 2007 – with rather questionable reasoning – that media law consequences may also pertain in cases when a breach of criminal law regulations cannot be determined to apply. Pursuant to the Court's reasoning, media should not be allowed to act as "amplifiers" of hate speech. The Court's opinion emphasised the influential effect of television or motion pictures on audiences, as well as the milder character of media law sanctions as compared to criminal law penalties. We do not believe that the Court's reference to media influence to be well-founded in this case, however, and it must also be pointed out that the application of media law sanctions might ultimately result in silencing a given media outlet, and hence on the whole its allegedly milder character is rather doubtful. This reasoning was superseded by another ruling of the Constitutional Court in 2011, however, wherein the Court bound the effective media law regulations in all aspects to the criminal law standard. What follows is that there are at most two differences between the criminal law and the media law provisions on hate speech: for one, the targets of media law sanctions are media providers; second, since the media law sanctions themselves are designed to match the character of media services, they are consequently differ in substance from criminal law sanctions. On the other hand, it does not follow from the more recent Constitutional Court ruling that it would be disallowed to return to media law standards that are more lenient than those in criminal law, by adopting other regulations than those in the currently effective media laws.

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

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

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



### *The requirement of balanced coverage*

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

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

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

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

In 2007 the Constitutional Court construed the requirement of balanced coverage considerably more narrowly than the then effective media laws. It held that the legislator can extend this requirement to public service media providers and those commercial radio and television channels that "wield significant power over public opinion" (Decision No. 1/2007. (I. 18.) AB). The very purpose of public service media broadcasting, its role in shaping public discourse, inevitably calls for retaining the requirement of balanced coverage. The Constitutional Court's approach towards commercial radio and television could in principle be used to reconcile the erosion of arguments that militate in favour of balanced coverage with the need for ways to disseminate information that take into account consumers' real behaviour when it comes to consuming news. In our view, the media providers that wield significant power of public opinion are those with the greatest reach – including larger portions of viewers/listeners who are less conscious about their news consumption –and hence also the ones that should be subject to the requirement of balanced coverage.

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

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

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

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

### ***Child protection***

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

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

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

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

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

### 3. MEDIA AUTHORITY

1. Originally, our concept concerning the future of the Media Authority suggested its full dismantling, based primarily on the dire experiences with the institution in Hungary. However, during the elaboration of the detailed concept, we reached the conclusion that the elimination of the authority cannot be accomplished with full consistency. Nevertheless, we believe that the current authority should be replaced with a decentralized structure of institutions having a very narrow scope of appreciation. This would at the same time give more importance to certain media regulatory fields than before.
2. Concerning most of the current tasks and duties of the Media Authority, we believe - partly based on international examples, partly based on the current activities of the institutions in question - that they can be transferred to other authorities, or in certain cases to other state entities (e.g. media ombudsman) with no special authority powers and/or self-regulatory bodies.
3. The main duty of the media ombudsman would be to examine the different social phenomena on the basis of the analysis of the media content, and raise awareness about these trends. Its prime mission would be to deal with the issues of hate speech and the protection of human dignity in media.
4. The issues concerning the media diversity, the market entry, the market expansion would be dealt with a body which - in its composition - should reflect the diversity of the society. This institution would use the manpower and infrastructure of telecommunications authority, however, rules about its operations should be set respecting its utmost professional autonomy.
5. The regulation should aim that the decisions concerning the media structure would be made based on objective criteria. If this expectation can be consistently respected during the media market regulation, then a permanent body can be replaced with one which functions like the National Election Committee.

**Which are the local particularities which have until now hampered the establishment of a politically independent, professionally authentic media authority?**

It has become evident by now that the different regulatory and institutional solutions which perform well in a Western European context, do not work at all in a Hungarian environment. The formal guarantees cannot counterbalance the attempts of the political interference. The selection of persons to work in the institutions, the distorted ideas concerning the media of the different parties, their power games, the total lack of a well-thought media policy created such operational conditions among which the professionally authentic performance of the institutions became impossible. While the political influence in the case of ORTT (National Radio and Television Authority - the former Hungarian media authority), the former media authority was diverse, the current Media Council reflects the intention of the establishment of a one-party rule in the media

system. A total political independence is, naturally, just an illusion, and over a certain point it is by no means a regulatory question. However, it is possible to use legal means to eliminate the attempts of a one-party rule or a one-sided interference of the media system. Moreover, such a regulatory framework should be set up which foster professional autonomy and the channelling of the widest possible interests of the society into the media system.

**Which are the different tasks concerning the application of the law, the regulatory functions which can be defined as duties in relations to the supervision and the administration of the media system?**

We can differentiate the various tasks of the current media authority along several aspects. We can find duties, especially among the media content supervision tasks, which are parallel with the mission of other authorities or the courts, and we can also define ones over which no other state body exerts control.

It is worth sorting the different media authority tasks on the basis of the extent of the scope of appreciation during the decision making process. The more quantified or quantifiable the given task, or the more evident the consequence is of the infringement of the norm - or the fulfillment of the conditions of the norm - the less the scope of appreciation.

A further aspect in differentiating among the different authority tasks may be the extent and the direct or indirect nature of the impact the task makes on the achievement of the constitutional media regulatory goals, and the establishment of a diverse media structure capable of fostering social dialogue. In fact, the wider the media policy scope of appreciation in a given task, the more influence it has on the media structure as a whole, and thus the achievement of the media policy goals. Until now, the Hungarian media regulation gave the media authority a considerable and barely limited leeway, which increased the risk of arbitrary decision-making.

**What organizational framework is needed in order to fulfill the tasks concerning the supervision of the media content and the media market? What are the advantages and risks of the different options?**

We believe that the experiences of the Hungarian media regulation justify an organizational solution which puts only to the least possible degree the question of the media supervision in the focus of political discussions. We are also convinced that the technological and economic transformation of the media market will in the next few year lead to the rethinking of the media supervision in other markets, too. These changes will, independently from the Hungarian situation, result in the narrowing of the regulatory leeway, the irrelevance of the traditional authority operation.

The characteristics of the ideal supervisory system, in our opinion, are the following:

- the supervisory tasks concerning the media content and the media market should be decentralized, certain task (mostly the ones which are independent from the type of the media) should be relocated to different state bodies which otherwise deal with these issues;

- the media policy scope of appreciation should be considerably narrowed, and the media policy decisions should be codified, whenever it is possible;
- a significantly weakened (both from the point of jurisdiction, competence and organization) state entity similar to the previous media authority (before 2010) should be preserved. It would serve as a special media policy decision making forum for the issues directly influencing the media system, and - by necessity - including media policy considerations;
- the main focus of state intervention should be the monitoring, analysis and continuous discussion of tendencies detected on the basis of individual cases;
- preference should be given to self regulation in the media supervision.

**Is it possible to fulfil the responsibilities of the state concerning the supervision of the media content and the media market without a media authority established specifically for these purposes?**

In the current media landscape, it is appropriate to formulate general content requirements valid for all media types. As opposed to the media laws in effect, these requirements should not be regulations enforced by individual sanctions, but rather expectations included in the general legal framework (civil, penal codes, data protection legislation). In all issues where this solution can be applied, there is no need for the designation of an authority for applying the rules. First and foremost, the prohibition of hate speech, and the protection of human dignity can be mentioned in this respect.

In our opinion, most of the supervisory tasks which ultimately necessitate sanctions could be delegate to institutions which currently also deal with duties concerning the operation of the media system. Another part of these tasks can be solved in the framework of the self-regulatory system. The duties concerning child protection would be principally dealt with the self-regulatory entities of the various media industry segments, and an autonomous body could make the necessary coordination and the supervision of tasks outside the self-regulation. The rules of the advertising time, the sponsorship and the product placement should be supervised by the consumer protection authority. The duties concerning the application of the rules on political advertisements could be dealt with the National Election Committee, or the below-mentioned new media policy decision-making body. The rules on the media concentration should be established in such a way that during the market entry process they can be applied without discretion, or during the market competition authority process.

The tasks concerning the frequency tendering and the distribution of other broadcast capacities would necessitate an institutional background which excludes the government's or any political interference into the media system. The administrative background necessary for these tasks could stay with the telecommunications supervisory authority, however the decisions significant from a constitutional or media policy point of view should be made by the decision-making body which reflects the diversity of the society. In the case when the tendering and capacity distribution tasks

could also be dealt within a formal procedure, with the least discretion possible, the independence of the decision-making body has less significance. If the distribution of the frequencies are made in respect of objective criteria exclusively, then the tendering itself does not bear special risks for one-sided political interference.

We believe it is necessary to operate a media supervisory institution which - instead of individual complaints - concentrate its efforts on the integrality of the media system and the public discourse. We therefore suggest the creation of an ombudsman-type institution. The ombudsman-character of such an institution should be manifested fundamentally in its separation from the administrative hierarchy, that is in its independence, and in the lack of obligatory decisions and sanctions. Unlike however the traditional ombudsman institutions, the entity we suggest should focus on the societal trends. The phenomena discovered in this way and the individual cases behind the trends could thus mean an important impulse for.



#### 4. REGULATION OF THE MEDIA MARKET

1. The regulatory framework that influences the structure of the media system and the business discretion of media enterprises exerts a significant impact on the diversity of media supply. Although in terms of the instruments they employ media regulations qualify as market regulations, their objectives are not primarily geared towards shaping business conditions but towards realising a pluralistic media system through business-related means. Hence market developments should only be influenced by media law instruments to an extent and in ways that are essential for realising media policy and constitutional objectives.

2. The Hungarian media system struggles with numerous features and problematic legacies that regulations need to respond to. This simultaneously limits the possibility of adopting international best practices. Thus rather than identifying theoretically ideal solutions, we have sought to draft proposals that are compatible with market realities and market experience. We have at the same time strived to ensure that our regulatory solutions do not react exclusively to currently prevailing market and regulatory problems, and that in seeking to remedy these problems they do not encumber the situation of lawfully operating providers who seek market success rather political influence.

3. In line with our draft proposals thus far, we have sought to delineate the authorities' margin of appreciation as narrowly as possible, and to create the most consistent and predictable regulatory environment possible. The process of drawing up the draft proposal has also made clear that many of the regulatory details cannot be fully developed without deeper consultations involving market players. That is why the draft proposal leaves more questions open than we generally tend to.

4. In connection with the regulation of market entry, the draft proposal stresses the voluntary registration of press products and issue of frequency tenders for radio stations. The objective of voluntary registration is to ensure that all providers that wish to benefit from the legal guarantees due to journalists can thereby declare their corresponding intent. We suggest that radio frequency tenders be conducted in a procedure that is more rigid than the currently used system and provides both, the authority and market players, with less flexibility, but is at the same time also simpler and more consistent and predictable than the prevailing procedural scheme. According to the proposal, frequencies should strictly be awarded pursuant to a long-term frequency management plan that is based exclusively on objective and measurable assessment criteria and provides very little leeway in terms of diverging from the conditions laid down in the tender procedure. Only local services may operate as community providers, and they shall not have the right to expand.

5. We wish to simplify and narrow further the legal obligations incumbent upon broadcasters, which should in our view only extend to certain services provided by the public media and local community media services. Since the relationship between content providers and broadcasters



cannot be regulated in full detail, we would retain a dispute resolution forum to arbitrate disputes concerning transmission obligations. This forum would consist of members delegated by the communications authority and the media supervisory body.

6. We also propose more consistent and predictable solutions when it comes to restrictions on concentrations in media ownership. We consider that an intervention threshold in the television market based on audience share provides a sustainable approach. Yet in situations when the intervention threshold is triggered, we would propose the use of an instrument that can be employed without further deliberation and is easy to control - though it is not optimal from a market and media policy perspective -, namely the sale of the least watched service. In terms of concentrations of ownership across various media markets, we would like to return to a system of restrictions on ownership that is based on previously set fixed figures. Rendering state advertising spending transparent is also a key instrument of scaling back politically motivated cross-media concentrations - and cross-financing associated with the latter - that are apparent in the media market. Instead of restricting vertical concentrations between players in the broadcasting and content provision markets, we propose non-discriminative access to dissemination capacities and content services. We suggest to abolish the involvement of the media authority in competition proceedings which result in decisions that are binding for the competition authority. We would leave the door open for a public debate on proper methods for measuring media pluralism.

## 5. POTENTIAL MODELS OF MEDIA SELF-REGULATION IN HUNGARY

1. The media can only discharge its real functions if the state performs its own content regulation obligations with restraint and limits itself to the most essential regulatory needs. Self-regulation is also needed because the media tend to commit numerous mistakes that cannot be construed legally. Self-regulation is not necessarily more permissive - in fact it is often stricter and is always more detailed - but it always follows a different logic: based on rules defined through ethics, accuracy, personality rights and other qualitative considerations, it is also capable of considering the circumstances of individual cases, the traditions of the profession of journalism, trends, the requirements of due diligence, the particularities of the given genre and technology, as well as the substantial/moral context.
2. Media self-regulation can work in various ways, there is no single best solution. To work efficiently, however, self-regulation needs to involve all of the so-called stakeholders in some shape or form (as agents actively shaping it, as sources of funding, external controllers, etc.), and in its application the various levels and forms of self-regulation must be connected with and based on one another.
3. As a principle, no single actor or sphere of interest may play a dominant role, neither in terms of its voter share nor in terms of funding. In financing self-regulation schemes, the shares of contributions and their renegotiation at regular intervals is a source of conflict among those involved in and subject to self-regulation.
4. The most frequently voiced criticism of self-regulation mechanisms is that they establish an industry that regulates itself and is entitled to administer its own justice. What is created, thus the argument, is a guild. This is prevented through the use of safeguards that work simultaneously within individual editorial offices and in the self-regulation system as a whole, such as ethics codes in editorial work, effective mechanisms for lodging complaints, public editors, the public itself, the involvement of external experts in complaint proceedings and the institution of media ombudsman.
5. The state's main responsibility with regard to self-regulation is primarily to recognise media self-regulation as a form of regulation that is independent of media law procedures and is not subordinated to the latter. State regulations may at the same time posit as a condition of applying for government grants that organisations seeking funding submit to self-regulation, that they publish their ethics code and annual ethics reports, as well as data on ownership transparency. In many countries the state contributes to funding self-regulation, generally through normative mechanisms that minimise the possibility of using subsidies to gain influence; state funding may not exceed 40% of the self-regulated institution's budget.

## **6. THE ROLE OF MEDIA EDUCATION IN MEDIA POLICY**

1. Today, media literacy is no longer an issue that falls exclusively into the realm of education policy or the informal promotion of knowledge. On account of its complexity, it occupies a pre-eminent spot in media regulation as well. The issue of media literacy affects all groups and plays a role in the democratic workings of social processes.
2. Promoting and improving media literacy depends on the co-operation of numerous governmental and non-governmental actors: educational institutions, child protective services, the media authority, media industry and the civil sphere all need to be involved in tackling this problem.
3. Future media regulations must explicitly make provisions concerning the promotion and improvement of media literacy. Coordinating activities that involve several players and arranging for the most optimal use of the available resources must be the responsibility of the media authority which also discharges child protection functions.

## 7. RETHINKING PUBLIC SERVICE MEDIA

Since regime transition, the public service media has failed to emerge as an essential institution either in terms of serving as a source of comprehensive and unbiased information, as an instrument for the production of cultural values or a forum of public discourse. The current situation could not have arisen had there been potent organisational, professional and ethical safeguards in place within the affected public media institutions to counterbalance the changes in the political and regulatory environment, and if the idea of a media whose role is to serve the public had enjoyed the requisite level of societal support.

In our view the public service mission fundamentally consists of promoting, improving and perfecting public discourse. Public service thus understood is capable of adequately addressing any relevant social issues in the appropriate form of expression, using whichever platform best serves the underlying communication objective. In this sense promoting public discourse is a concept that shapes the entire programming policy. Though it does not constrain any specific programming policy or editorial decisions, it nevertheless makes it possible to design a selection of public service content that is distinct from the selection offered by any other content provider.

Our position is that regulating public service media could be realised through a multi-tiered system in which the detailed designation of responsibilities, as well as the associated budget-planning, result from an expert decision-making process that takes place outside the public media institutions. The public mandate should serve to clarify the structure of the selection of public service programming; the ratios of individual types of content (structure of programming, content service concept) within the scope of public service responsibilities; the platforms and channels necessary for creating the envisioned selection of public service content; and the funding necessary for creating the envisioned selection of public service content.

For the purposes of drawing up and reviewing compliance with the public mandate, we propose setting up a body composed in equal one-third parts of the delegates of democratically legitimated parties in Parliament, of the representatives of organisations of the civil, cultural and scientific spheres, and of delegates representing the profession of journalism.

Our position is that a complicated institutional structure and efforts to obscure relevant policy decisions fail to provide sufficient safeguards against political influence on the public service media. Ownership rights are exercised by the National Assembly - or one of its parliamentary committees -, which is democratically legitimated and also has the authority to make budgetary decisions. The regulations concerning so-called closed companies limited by shares - which public media corporations tend to be - provide for the possibility of setting up so-called peremptory boards of supervision, which are authorised to elect and recall the members of the management board; the law further stipulates that certain peremptory decisions may only be rendered after prior approval by the supervisory board.

Individual media service providers are managed by three-member management boards. Its members are appointed by the supervisory board, which must also consider the opinion of the body that is responsible for drafting and reviewing the public mandate. The president of the management board must be selected by way of an open application process. In the course of the process, the body responsible for the public mandate investigates whether the applicants' professional ideas are compatible with the substantial requirements of the public mandate.

Ultimately, the most important safeguard against external pressure is the commitment of those who work in the public service institutional system to a notion of public service; our view is that this may reinforced through developing formal and informal professional control mechanisms within the organisation itself. An important element of the concept is that the public service media system of the future gives rise to a professional/ethical code of conduct - resulting from an organised debate - that will provide journalists working in the public media system with answers to the challenges they face, also by drawing on the experiences of the previous, failed system; that an internal institutional arrangement emerges which coherently structures various professional/ethical debates; and that an internal self-regulation scheme is created that delineates the rules of procedure - which should also be clearly intelligible to the public - to handle potential professional/ethics blunders and problems.

We propose that the central budget continue to fund public service media. Our view is that enshrining the funding framework in the agreement on the public mandate could provide the necessary guarantees to ensure that no political influence can be exercised through reducing - or increasing, as the case may be - funding. Parliament should guarantee the specific amount of funding provided by budgetary resources for the public media for a period of three years at a time, and the deviation allowed from this previously guaranteed amount during each annual budget debate ought not exceed +/- 1%. The funding guaranteed for each subsequent three-year period should not be allowed to change in excess of +/- 5 % as compared to the previous three-year cycle.

The public media institutional system outlined above does not differ fundamentally from previous Hungarian solutions or the typical European models. Thus one might legitimately question whether this model is indeed capable of overcoming the flaws and risks inherent in the earlier arrangements. A system organised from bottom-up may be an alternative to a centralised top-down public service institutional scheme. In such a model public service broadcasting operates primarily as a network of local non-profit broadcasters - as a network broadcaster of sorts -, which is supported at the centre by a publicly-funded organisation that provides massive capacities for programme production. A precondition for the functioning of such a system is that there are viable non-profit media providers which have access to sources of funding - preferably not exclusively from the state - that they need to conduct their operations on an ongoing basis.