



Permanent Representative of Hungary to the United Nations Office
and Other International Organizations in Geneva

Mr. Frank La Rue
Special Rapporteur on the promotion and protection of the
right to freedom of opinion and expression

United Nations
Geneva

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Geneva 18 May 2012

Dear Mr. Special Rapporteur,

Please allow me to thank you for your letter of 14 March 2012 giving a concise and clear outline of your views on decision 165/2011. (XII. 20.) AB of the Constitutional Court.

I am pleased to inform you that on 10 May the Hungarian Government has submitted bill T/7022 *"on the amendment of certain acts related to media services and press products"* to the Parliament.

The purpose of this bill is to accurately implement the findings of the Constitutional Court as set forth in its decision.

In line with this approach, the bill, inter alia:

- provides for strengthening the protection of journalistic sources by establishing exclusive judicial competence in this regard and for defining a complete and properly elaborated set of procedural guarantees;
- aims at abolishing a number of obligations originally imposed also on the print and online media by amending the provisions establishing them;
- suggests the revision of the legal basis for the procedures of the Media and Telecommunications Commissioner that, when adopted, will deprive the Commissioner of the possibility to launch any inquiry related to any particular medium.

I am pleased to inform you that the general debate on the amendments to the above-mentioned bill started on 14 May 2012. Upon adoption of the final text by the Hungarian Parliament we will proceed in order to provide you with the English translation of the bill.



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This may address the concerns expressed in your detailed analysis of the Hungarian media laws, posted on 31 March 2011.

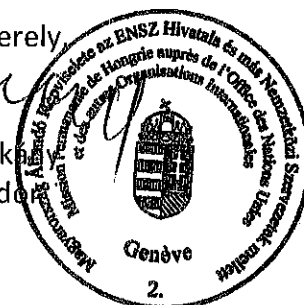
In the second part of your letter you highlighted your remaining concerns which are also addressed in the present response.

I hope you will find the information provided satisfactory and useful for your work. Should you have any further observations or comments, please do not hesitate to share them with us.

I firmly believe that our common commitment to freedom of opinion and expression provides a solid ground for continuing our fruitful dialogue on issues of media regulation.

Yours sincerely

András Dékány
Ambassador



Response of the Government of Hungary to the Letter of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression AL G/SO 214 (67-17) HUN 2/2012 dated 14 March 2012

Introduction

At the end of 2010, the Hungarian Parliament adopted two Acts (Act CIV of 2010 on the freedom of the press and the fundamental rules on media content, [hereinafter: Press Freedom Act] and Act CLXXXV of 2010 on media services and mass media [hereinafter: Media Act]), thereby rearranging the landscape of media regulation. The material and territorial scope of both Acts have been established in Hungary in accordance with the recommendations of the Council of Europe and of the European Union. The scope and manner of application of all provisions under the media regulations are clearly defined; furthermore, most of these provisions were borrowed by the Hungarian legislator, almost verbatim, from the respective norms applicable throughout the European Union. The Hungarian legislator paid careful attention to draft regulations that are in line with Article 10 of the European Convention on Human Rights. Therefore the provisions contained in such regulations meet European expectations and are typically present in other European countries as well.

Scope of the media legislation

In its decision No. 165/2011 (hereinafter: the decision), the Constitutional Court addressed a number of issues relating to media regulation and the constitutionality of regulations, including the procedure regarding the adoption of the Act, the obligation of registration of printed and online press, the protection of information sources, the obligation of data provision, and the Media and Communications Commissioner.

The Constitutional Court paid particular attention to ensuring that the legal consequences of its decision do not affect the regulations on media services, therefore the Court resolved to define the consequences of unconstitutionality in the context of the provisions of the personal scope of the Press Freedom Act and annulled the expression “and relating to published press products” as set forth in Article 2 (1) of the Freedom of Press Act, effective 31 May 2012. In doing so, the decision clearly states that “[...] it is the legislator’s right to create the possibility of constitutional content control in the future even with regard to press products”.

The Constitutional Court further established that the new media regulations may not be deemed unconstitutional provided that effective and essential control by the Courts is available and the limitation passes the test of necessity and proportionality. Indeed, freedom of the press, despite its role in a democratic society, is not an unlimited fundamental right. Limitations may be imposed regarding content; however, constitutionality is conditional on these limitations being narrow and justified (necessary and proportional) and the availability of the option to resort to court of law to challenge the decision of the authority imposing the limitations.

Examination of the Press Freedom Act and the Media Act reveals that the National Media and Infocommunications Authority („the Media Authority”) has powers to check compliance with the provisions laid down in Articles 14 – 20 with regard the printed and online press. The Constitutional Court therefore examined in detail whether the limitations set forth in Articles 14-20 of the Press Freedom Act are necessary and proportionate, when applied to the press.

The Constitutional Court – in examining the first sentence of Article 16 of the Press Freedom Act and Article 17 (1) of the same Act on the prohibition of inciting hatred – cited the provisions of its former decision, where the issue of inciting hatred was held to constitute a constitutional limitation on the freedom of press. It is based on the fact that *“it is ipso facto impossible to have media content that rejects the core values of institutional democratic rights as a means to formulate and elaborate democratic public opinion”*.

Action taken in pursuance of Article 14 (1) and the second part of Article 16 of the Press Freedom Act (protection of human dignity and human rights) is to be deemed as a special procedure by the Media Authority which aims at the protection of the “institutional content” of human rights. In its decision, the Constitutional Court refers to one of its former decisions (Constitutional Court decision No. 46/2007), according to which the Media Authority - in proceedings instituted for the protection of human rights – will decide on matters other than individual rights. In comparison with the impact that audiovisual media may exert, printed and online press may have a sharply different impact, therefore *“this power to act – in this form covering human rights in general – is to be deemed as a disproportionate limitation”*, that is, its application to the press is unconstitutional.

In contrast to the above, the statement of facts as laid down in Article 14 (2) of the Press Freedom Act (the prohibition of coverage of persons under humiliating or defenceless conditions) is suitably narrow – as held by the Constitutional Court – to allow authorities to act also in relation to the press. The absence or limitation of capability to protect individual rights covers cases where the authorities have the rightful powers to act, therefore in this context the regulation is not to be deemed to constitute disproportionate limitation on the press.

In its decision and in line with its former practice, the Constitutional Court gave no separate examination as to the content and soundness of the provisions of the Freedom of Press Act and accepts their limiting properties. *„Protection of minors after all is based on public morals, the scope and content of which is subject to locations and times”*. Under its decision, the Constitutional Court has established that the provisions on the protection of minors are not to be deemed as disproportionately limiting in its properties even in case of printed and online press products.

In examining Article 15 (withdrawal of statement made to the press) and Article 18 (protection of privacy) of the Press Freedom Act, the Constitutional Court held that in such cases an identifiable person is in place vis-a-vis the publisher of the press product, with his own definite and enforceable civil rights. Therefore, limitations allowing action by public administrative bodies (Authorities) to intervene in case of violation and enforcement of individuals’ rights should not be in place.

In examining Article 20 (restrictions on commercial announcements) of the Press Freedom Act, the Constitutional Court held that commercial announcements are intended primarily to attain financial objectives, therefore their publication – in contrast to opinions regarding public life – will entail a much lower protection of the freedom of press, resulting in a justified need for a wider scope of protection by the state. The limitation is justified by the interests of the group being targeted with commercial announcements. In its decision, the Constitutional Court referred to one of its former decisions which held that such limitation is directly affecting the advertiser’s freedom of commercial announcement while only having an indirect effect on the publisher of the announcement – in this case the media content provider

– rendering the difference between various media outlets irrelevant. Therefore, under its decision, the Constitutional Court held the regulations to be constitutional.

Media Council

Taking into account that in Europe there is no standard regarding the selection (appointment) of the members of the regulatory authorities or the organisational structure of such authorities (some European countries even stipulate much fewer guarantees of independence than the Hungarian media regulations) therefore, in our view, the Hungarian solution is in conformity with international practice.

The Media Act contains, without exceptions, the formal guarantees of the Media Council's independence, including election by the Parliament, the fact that its members cannot be recalled or instructed, the long duration of the mandate, possibility of reviewing administrative decisions, etc.

First, the independence of the Council members is warranted by the requirements in the Media Act regarding the nomination procedure. Media council members are elected by Parliament which is the supreme body of popular representation, and, as a branch of power within the state, is separated from the executive branch. For this reason, the nomination or election of members of regulatory authorities by the Parliament cannot cause any constitutional or democratic deficit. This is in line with the relevant Recommendation Rec (2000) 23 of the Council of Europe which articulates the objective that member states shall include provisions in their legislation ensuring that the media authorities are not influenced by political pressure, and their members are appointed in a transparent and democratic manner.

The Media Act stipulates that nominations must be carried out by unanimous decision. If no compromise can be reached by unanimous voting, a decision can be reached by qualified majority. In case of governments having a simple majority, the requirement of a qualified majority still represents an obligation for the parliamentary fractions to reach an agreement, which prevents the possibility of any direct relationship between candidates and political parties. Indeed, the above referenced nomination and election process cannot provide in any way the opportunity to one or more political parties, the Government, or the Parliament to impose controlling influence on the content of media services and press products.

Given the current political circumstances, the governing parties are capable of adopting decisions requiring a two-thirds majority. Nevertheless, it is still a fact that one of the strongest guarantees known in Hungarian public law is the requirement for the Parliament to adopt decisions with a two-thirds majority.

Second, the independence of the Media Council is guaranteed by extensive conflict of interest rules which apply to its members. According to Article 118 of the Media Act, the members or their close relatives may not hold any high public office, or local government or government positions; may not have business interests in the fields of media, advertising, or communication; may not hold political positions; may not be employed by any political party; and may not pursue any political activity in political parties

Third, Article 123 (2) of the Media Act stipulates that the Media Council and its members have to proceed in accordance with the law and cannot be instructed with respect to the fulfilment of their official duties.

Fourth, the mandate of members is free and they cannot be recalled.

Finally, the Media Act (contrary to the previous Radio and Television Broadcasting Act, with respect to all decisions of the Media Council) also provides the opportunity of judicial review.

Sanctions and fines

It is to be noted that the sanctions set forth under Hungarian media regulation are not at all exceptionally harsh or powerful, unlike in some other European countries where criminal sanctions (even imprisonment), as well as high financial penalties may be applied against persons violating the rules of the media system. (In this regard, it should be noted that the maximum fines under the Hungarian rules are far from being considered to be the highest possible fines in Europe).

In accordance with the principles of graduality and proportionality, “first time” offenders are subject to the least severe sanctions. This may be sufficient to achieve the desired effect. When imposing a sanction for the first time, it is important that it should be proportionate, effective and may be increased gradually. The importance of the principle of graduality is reflected in the progressive – thereby more calculable – sanctioning when imposing a fine repeatedly, or possibly applying any other sanction or measure upon repeated offences.

Higher sanctions may indeed be imposed for subsequent or repeated offences. Certain sanctions are to be considered the *ultima ratio* of media administration. As such, the Media Council may suspend a media service or, as a last resort, delete it from its register.

It is also important to note that for the purposes of sanctioning, the principle of equal treatment is clearly reflected under Article 185 (2) of the Media Act, thus providing an additional safeguard for impartiality. In particular, a) each case should be considered on the basis of facts, b) unjustified discrimination may not be applied between the various offenders, c) preferably, identical sanctions should be applied to identical offences, and d) similar organizations or persons committing identical offences are to be considered identically, or at least similarly, when determining the weight and amount of the applied sanction.

The fact that the given public legal norm within the sanctions provides the option for the authority to make the functioning of the offender “impossible” (ultimately, preventing the continuation and repetition of the violation), if no other means of public law are available for the authority, is fully aligned with the function and objective of sanctioning. As such, it does not raise constitutional concerns. The ultimate sanction of the respective field of law must be applied upon particularly serious and repeated legal violations, which are especially dangerous to society, and violate or threaten protected values.

In its decision No. 165/2011 (XII. 20.), the Constitutional Court explained – with reference to its decision No. 34/2009 (III. 27.) – that even the Constitutional Court finds numerous constitutional ways of deleting the offender from the registry – that is, banning a publication – upon the violation of statutory provisions adopted on the basis of such principles. Therefore, such a sanction cannot be considered to be an unconstitutional violation of the right to the freedom of the press, if the sanction is proportionate and aligned with the individual circumstances and characteristics of the legal violation and of the offender. This requirement

is ultimately guaranteed by the possibility of reviewing the decisions of the Media Council by an independent judicial forum.

The following conclusions of the Constitutional Court – reached in its decision No. 165/2011 (XII. 20.) need to be emphasised: “Although, without a doubt, the possibility of the state’s subsequently initiated systematic inspection and sanction constitutes a limitation of the freedom of the press, the mere possibility of this – with effective and substantive judicial control as a guarantee – cannot be regarded as unconstitutional” (see also decision No. 46/2007. (VI. 27.) AB of the Constitutional Court).

Content regulation

The obligation to provide balanced coverage does not apply to press products and on-demand media services but only to linear (traditional) media services providing information services. The regulation on balanced coverage has existed in the Hungarian legal system since 1996 (and is used in many other European countries); the media authority and the courts have therefore also developed a solid case law. In its decision no. 1/2007 (I. 18.), the Constitutional Court held constitutional the obligation of balanced coverage for media service providers falling within the scope of the Radio and Television Broadcasting Act. The content of the obligation of balanced coverage set forth in the Media Act is in compliance with the constitutional requirement of clear norms and is specified jointly by Article 12 of the Media Act and Article 13 of the Press Freedom Act.

Linear media services engaged in information services shall, with regard to „the general news and information programmes broadcast by them” provide „diverse, comprehensive, factual, up-to-date, objective and balanced coverage” on issues that may be of interest to the general public and on any events and debated issues of relevance, based on criteria defined by law. It has to be highlighted that this obligation – just as in the past – does not constitute a disproportionate restriction of editorial freedom: only the editor or the media service provider can decide what events are of public interest, in other words, what events will be reported in their different programmes.

Article 181 (1) of the Media Act can be interpreted in a way, according to which the authority may only examine the last requirement (i.e. “balanced coverage”) out of the requirements of Article 13 of the Press Freedom Act (obligation of “diverse, factual, timely, objective, and balanced coverage”), because Article 181 of the Media Act sanctions exclusively cases of the infringement of the balanced coverage obligation. Similar way, according to the list of competences (Articles 182-184) the authority shall only examine the balanced coverage obligation, therefore the rest of the requirements remain *lex imperfecta*.

In addition, the proceedings of the media authority examining compliance with the obligation of balanced coverage – in contrast with its general administrative investigatory proceedings – is special in the sense that, if an infringement is established, only the specific legal consequences defined by the act may be imposed. That is, no fines may be imposed; the media license may not be suspended; no "blackouts" may be ordered, and neither the media service agreement nor the media license may be terminated. The authority may only require the media service provider to publish the decision of the Media Council or to provide the petitioner with an opportunity to publish its position.

Ambiguous terms

Provisions restricting the freedom of the press are either based on international (EU) legal background or widely known and applied in Europe.

Offences related to incitement to hatred or discrimination are based on the requirement included in the UN Declaration on the Elimination of All Forms of Racial Discriminations adopted on 20 November 1963, and the International Convention on the Elimination of All Forms of Racial Discrimination adopted on 21 December 1965 in New York which affirmed the necessity of “speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person” as well as on Article 6 of the AVMS Directive¹, which says: “Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.”

According to Recommendation No. R (2000) 7 of the Committee of Ministers of the Council of Europe on the right of journalists not to disclose their sources of information and the declaration of 2007 confirming the recommendation, Member States are required to provide specific and clear protection for the media in order to ensure that the anonymity of sources is maintained. According to our data, there are even two EU Member States which have not yet put in place any statutory protection for maintaining the secrecy of journalistic sources.

In this regard, the Constitutional Court recognised that the new Press Freedom Act is a step towards fulfilling the above mentioned requirement. The ruling of the Constitutional Court repealed the possibility of relying on public interest as grounds for obliging journalists to reveal their sources in court and regulatory proceedings, and to further comply with the recommendation, obliged the Parliament to set up procedural guarantees for the protection of journalistic sources throughout the entire legal system.

¹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities