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COMMISSAIRE AUX DROITS DE L'HOMME



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## **OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS**

### **HUNGARY'S MEDIA LEGISLATION IN LIGHT OF COUNCIL OF EUROPE STANDARDS ON FREEDOM OF THE MEDIA**

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## Introduction

1. Freedom of expression and freedom of information are bedrocks of any functioning democracy. They help to create the environment in which the protection and promotion of all other human rights become possible. Independence and pluralism among the media should be enshrined in law as a means of encouraging these freedoms to thrive.
2. The Council of Europe, as the guardian of the European Convention on Human Rights ("ECHR"; "Convention"), is well placed to advise member States as to how to ensure that their domestic media law is fully human rights compliant. The principal reference point in this regard is Article 10 ECHR – Freedom of Expression, as interpreted in the judgements of the European Court of Human Rights ("ECtHR"; "the Court").
3. The present Opinion is published by the Council of Europe Commissioner for Human Rights ("the Commissioner") in order to offer a more detailed explanation of his concerns regarding recent reforms to the legislative and regulatory environment in which media operates in Hungary.<sup>1</sup> The Opinion follows the Commissioner's visit to Budapest of 27-28 January 2011, at the end of which he issued a press release<sup>2</sup> to state some of his major concerns regarding Hungary's media legislation, including:
  - prescriptions as to what content shall be provided by all media outlets (including online and on-demand media);
  - the use of unclear definitions for content regulation, which may be subject to misinterpretation;
  - the establishment of a politically unbalanced regulatory machinery with disproportionate powers and lack of full judicial supervision;
  - threats to the independence of public-service broadcast media; and
  - erosion of the protection of journalists' sources.
4. In adopting its media reforms in the second half of 2010, the Parliament of Hungary employed fast-track procedures, which do not appear to have allowed for broad public consultation, nor for the considered input of specialists or professional bodies. Now, however, as international dialogue on the impact of these reforms has developed, the Hungarian authorities have repeatedly expressed their openness to dialogue and have committed to undertake a review and revision process. In doing so, Hungary would benefit from taking full account of the applicable Council of Europe standards.
5. The first section of the Commissioner's Opinion (Section I) highlights provisions of Hungary's media legislation that constitute encroachments on media freedom, citing reasons why these provisions are at variance with Council of Europe standards. The second section of the Opinion (Section II) highlights threats posed by Hungary's media legislation to independence and pluralism among the media.
6. In addition to the nuisances posed by the individual provisions highlighted, the Commissioner finds that the "media package" as a whole threatens a corrosive cumulative

<sup>1</sup> To recall, in the second half of 2010, the Parliament of Hungary adopted a series of amendments to existing media-related provisions – including a new Article 61 of the Constitution (amended 6 July 2010), and Act LXXXII of 2010 on the amendment of certain acts on media and telecommunications (passed 10 August 2010) – and passed important new legislation in the form of Act CIV of 2010 on the freedom of the press and the fundamental rules regarding media content (the "Press and Media Act", passed 9 November 2010), and Act CLXXXV of 2010 on media services and mass media (the "Mass Media Act", passed 21 December 2010).

<sup>2</sup> See CommHR's Press Release of 1 February 2011, "Hungary: Commissioner Hammarberg initiates dialogue and calls on the authorities to ensure freedom of expression and media pluralism".

impact that is more than the sum of its parts. The legislation fails in several aspects to guarantee foreseeability, impartiality and proportionality of application, particularly in terms of the sanctions put forward for perceived infringements. Similarly, the expected checks and balances of media regulation appear to be undermined by an apparent lack of independence on the part of the Media Authority, coupled with the absence of effective domestic remedies in challenging the Authority's decisions. The aggregate result is an unfortunate narrowing of the space in which the media can operate freely in Hungary.

7. The Commissioner emphasises his readiness to participate constructively in ongoing multilateral dialogue aimed at assisting the Hungarian authorities in bringing their media laws and subsequent practice into compliance with their international obligations. Towards this end, each Section of the Opinion concludes with proposals as to how the problematic elements of Hungary's media legislation might be addressed in accordance with Council of Europe standards.

## I. Encroachments on the freedom of the media

### 1.1 Prescriptions on what information and coverage shall emanate from all media providers

#### Relevant provision(s) of Hungary's media legislation

##### Article 13 of the Press and Media Act 2010

*Article 13 (1): "All media content providers shall provide authentic, rapid and accurate information on local, national and EU affairs and on any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation."*

*Article 13 (2): "Linear and on-demand media content providers engaged in news coverage operations shall provide comprehensive, factual, up-to-date, objective and balanced coverage on local, national and European issues that may be of interest for the general public and on any event bearing relevance to the citizens of the Republic of Hungary and members of the Hungarian nation."*

#### Applicable Council of Europe standards

8. According to well-established case law of the ECtHR, Article 10, paragraph 1, of the Convention not only extends its protections to information, ideas and opinions which are favourably received or regarded as inoffensive or as a matter of indifference, "but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'".<sup>3</sup>
9. The Court has placed particular importance on protecting free expression insofar as it concerns the media. Whilst the press bears a responsibility not to overstep the bounds set, for example, to protect the reputation of others,<sup>4</sup> it is nevertheless its role to impart information, ideas and opinions on political issues just as on issues in other areas of public interest. In addition to the duty of the press to impart such content, the public also has a right

<sup>3</sup> *Handyside v. the United Kingdom* (Application no. 5493/72), judgment of 7 December 1976, paragraph 49.

<sup>4</sup> At the same time, it must be borne in mind that all European legal orders are in any event equipped with laws that may offer protection to the state or individuals, in cases where the freedom of expression is not exercised within the limits of the responsibilities that accompany this freedom.

to receive it. Freedom of the press undoubtedly offers a population one of the best means of discovering and forming an opinion on the ideas and attitudes of its political leaders.<sup>5</sup>

10. Among the principal requirements for regulations, including legislation, interfering with the rights and freedoms enshrined in the Convention are precision and foreseeability. Thus a norm cannot be regarded as a 'law', in terms of the Convention, unless it is formulated with sufficient precision to enable its subjects to regulate their conduct accordingly. Persons must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences that will follow from a given action.<sup>6</sup>

### **Hungary's media legislation in the light of Council of Europe standards**

11. The adoption of legislation regulating *a priori* the content of media output is irreconcilable with the right to freedom of expression enshrined in Article 10 ECHR. The media has a crucial role as a watchdog in a democratic society, not least in helping to create an informed, critical public. It is therefore undesirable that the media be tasked to conform to subjective criteria, especially where those criteria are expressed in vague and imprecise terms liable to misinterpretation.
12. Article 13 of the Press and Media Act, in seeking to prescribe subjective criteria for the information and coverage provided by *all* forms of media, imposes an unnecessary restriction on the free dissemination of information and opinions through the media.
13. Furthermore, the types of criteria prescribed in the same Article 13 do not appear to conform with the requirements of Article 10, paragraph 2, ECHR.<sup>7</sup> The criteria are insufficiently precise to allow media providers to foresee the manner in which they might be applied.
14. Indeed, whether or not Article 13 is interpreted in a manner which restricts media freedom, the very fact that such a possibility exists is enough to have a profound chilling effect on media's preparedness to challenge, dissent and assume unpopular positions, at least insofar as they could be perceived as having deviated from the types of information and coverage prescribed in the legislation.
15. The Commissioner finds that Article 13 is in conflict with the letter and spirit of Article 10 ECHR. It is recommended that Article 13 of the Press and Media Act be deleted.

### **1.2 Imposition of sanctions on the media**

#### **Relevant provision(s) of Hungary's media legislation**

##### Article 187 of the Mass Media Act 2010

*Article 187 (1): "In case of repeated infringement, the Media Council and the Office shall have the right to impose a fine on the senior officer of the infringing entity in an amount not exceeding HUF 2,000,000, [approximately Euros 7,300.00] in line with the gravity, nature of the infringement and the circumstances of the particular case."*

*Article 187 (3): Article 187 (3): "The Media Council and the Office — with due heed to Paragraph (7) — shall have the right to impose the following legal consequences:*

<sup>5</sup> *Lingens v. Austria* (Application no. 9815/82), judgment of 8 July 1986, paragraphs 41-42.

<sup>6</sup> *Sunday Times v. the United Kingdom* (No. 1) (Application no. 6538/74), judgment of 26 April 1979, paragraph 49.

<sup>7</sup> Article 10(2) ECHR states: "Any restriction of the freedom of expression should have a basis in domestic law which is accessible and precise, thus foreseeable, and the restriction of the freedom of expression should pursue a legitimate aim, and be necessary in a democratic society."

- a) it may exclude the infringer from the opportunity to participate in the tenders put out by the Fund for a definite period of time;
- b) it may impose a fine on the infringer in line with the following limits:
  - ba) in case of infringement by a JBE media service provider and the media service provider under the regulations on the limitation of media market concentration, the fine shall be of an amount not exceeding HUF 200,000,000 [approximately Euros 730,000.00];
  - bb) in case of infringement by a media service provider falling beyond the scope of item (ba), the fine shall be of an amount not exceeding HUF 50,000,000 [approximately 183,000.00];
  - bc) in case of a newspaper of nationwide distribution, the fine shall be of an amount not exceeding HUF 25,000,000 [approximately Euros 91,650.00];
  - bd) in case of a weekly periodical of nationwide distribution, the fine shall be of an amount not exceeding HUF 10,000,000 [approximately Euros 36,600.00];
  - be) in case of other newspaper or weekly newspaper or periodical, the fine shall be of an amount not exceeding HUF 5,000,000 [approximately Euros 18,300.00];
  - bf) in case of an online media product, the fine shall be of an amount not exceeding HUF 25,000,000 [approximately Euros 91,650.00];
  - bg) in case of a broadcaster, the fine shall be of an amount not exceeding HUF 5,000,000 000 [approximately Euros 18,300.00];
  - bh) in case of an intermediary service provider, the fine shall be of an amount not exceeding HUF 3,000,000 000 [approximately Euros 10,980.00];
- c) the infringer may be obliged to publish a notice or the resolution on the opening page of its website, in a media product or a designated programme in the manner and for the period of time specified in the resolution;
- d) it may suspend the exercise of the media service provision right for a specific period of time;
  - da) the period of suspension may last from fifteen minutes up to twenty four hours;
  - db) the period of suspension in case of grave infringement may last from one hour up to forty eight hours;
  - dc) the period of suspension in case of repeated and grave infringement may last from three hours up to one week"

### **Applicable Council of Europe standards**

16. First there is jurisprudence from the ECtHR that assists us in assessing whether sanctions imposed on media providers constitute a proportionate level of interference with freedom of expression. In determining proportionality, the nature and severity of the penalty imposed are factors to be taken into account.<sup>8</sup>
17. Second, the Court has indicated that a mandatory penalty should not have the effect of discouraging the press from expressing criticism. Any form of sanction based on subjective criteria is likely to deter journalists from contributing to public discussion of issues affecting the life of the society, and is liable to hamper the press in performing its roles as purveyor of information and public watchdog.<sup>9</sup> In this regard, the mere fact that a journalist has been tried and convicted may in certain cases be more important than the minor nature of the penalty ultimately imposed.
18. In the case of *Dammann v. Switzerland*,<sup>10</sup> although the penalty imposed on the applicant journalist had not been very harsh, the Court reiterated that what mattered was not that he had been sentenced to a minor penalty, but that he had been convicted at all. While the penalty had not prevented the applicant from expressing himself, his conviction had nonetheless amounted to a form of censure that would be likely to discourage him from

<sup>8</sup> See, for example, *Sürek v. Turkey (No. 1)* (Application no. 26682/95), judgment of 8 July 1999 and *Chauvy and Others v. France* (Application no. 64915/01), judgment of 29 June 2004.

<sup>9</sup> See, *mutatis mutandis*, *Barthold v. Germany* (Application no. 8734/79), judgment of 25 March 1985.

<sup>10</sup> *Dammann v. Switzerland* (Application no. 77551/01), judgment of 25 April 2006.

undertaking research, inherent in his job, with a view to preparing an informed press article on a topic of current affairs.

19. In the case of *Ürper and others v. Turkey*, the Court pointed out that the decision of the authorities to suspend the publication of several newspapers for periods of up to one month was based on an assumption that the applicants “*would re-commit the same kind of offences in the future*”. The Court found that the preventive effect of such suspension orders entailed implicit sanctions on the applicants, which had the effect of dissuading them from publishing similar articles or news reports in the future, thus hindering their professional activities.<sup>11</sup>

### **Hungary’s media legislation in the light of Council of Europe standards**

20. The imposition of *any* sanction against journalists, however purportedly minor in nature, may entail an unacceptable chilling effect on media’s willingness to be bold and critical – in a constructive sense – and therefore risks precipitating a form of self-censorship in the media profession. This problem is most acute in instances where a first offence is punished or reprimanded, and where the offender then faces a more severe sanction on the basis of his “repeated infringement”, as is the case in Hungary’s media legislation.
21. Of equal significance is the requirement for sanctions imposed on the media to meet ECHR tests of proportionality. While there is considerable potential for several of the sanctions foreseen in the Mass Media Act to contravene this requirement in the future, by virtue of draconian sentencing, paragraph 3(d) of the Act already appears to be at variance with the Council of Europe standards on temporary suspension of media publications.
22. As such, the Commissioner finds that Article 187 of the Mass Media Act would require substantial revision in order to bring it into full harmony with Article 10 ECHR and the related case-law of the Court. The preferable option in this regard would be to repeal this provision and rely on existing instruments in the Hungarian legal order that provide for acts such as defamation and incitement to violence to be dealt with under different statutes.

### **1.3 Pre-emptive restraints on press freedom in the form of registration requirements**

#### **Relevant provision(s) of Hungary’s media legislation**

##### Article 45 of the Mass Media Act 2010

*Article 45 (1): “Application to register an on-demand media service shall be initiated by the future media service provider thereof. The applicant shall notify the Authority of the following in its application to register an on-demand media service:*

*a) particulars of the applicant:*

*aa) name,*

*ab) address (domicile), designation of site (sites) where the media service is provided,*

*ac) contact information (telephone number and email address),*

*ad) name and contact information (telephone number and email address) of its chief executive officer, representative, and of the person appointed to liaise with the Authority,*

*ae) company registration number or Court of Registration number.*

*b) basic particulars of the planned media service:*

*ba) type (radio or audiovisual)*

*bb) designation*

<sup>11</sup> *Ürper and Others v. Turkey*, (Application no. 14526/07+), judgment of 20 October 2009. The Court considered that alternative, less draconian measures could have been envisaged *in lieu* of suspension, such as the confiscation of particular issues of the newspapers in question, or restrictions on their publication of specific articles.

- bc) profile (general or specialised)*
- c) the planned date of launching the media service.*

*Article 45 (3): "The Authority shall issue an authority decision to enter the on-demand media service into the administrative registry within thirty days. In the event that the Authority fails to issue said decision within thirty days, the application for registration shall be deemed as having been granted."*

*Article 45 (4): "The Authority shall only deny the application to register an on-demand media service in the event that*

- a) a conflict of interest exists vis-à-vis the applicant,*
- b) the application for registration failed to provide, even after notice to rectify deficiency, the requisite data set forth under Paragraph (1),*
- c) the designation of the media service with a pending registration application is identical with – or is confusingly similar to - the designation of a linear media service registered earlier, with valid records at the time said application was submitted, or*
- d) the applicant failed to pay the administrative service fee."*

#### Article 46 of the Mass Media Act 2010

*Article 46 (1): "Application to register a media product shall be initiated by its future publisher. In the event that the founder and publisher of a media product are different persons or business enterprises, they shall incorporate their responsibilities and rights vis-à-vis said media product in an agreement."*

*Article 46 (4): "The Authority shall issue an authority decision to enter the media product in the administrative register within fifteen days. In the event that the Authority fails to issue said decision within fifteen days, the application for registration shall be deemed as having been granted."*

*Article 46 (5): "The Authority shall only deny the application to register a media product in the event that*

- a) a conflict of interest exists vis-à-vis the applicant,*
- b) the application for registration failed to provide, even after notice to rectify deficiency, the requisite data set forth under Paragraph (1),*
- c) the name of the media product with a pending registration application is identical with – or is confusingly similar to - the name of a media product registered earlier with valid records at the time said application was submitted, or*
- d) the applicant failed to pay the administrative service fee"*

#### **Applicable Council of Europe standards**

23. Article 10, paragraph 1, ECHR, recognises that States may require the licensing of audio-visual broadcasters, as well as television and cinema enterprises. However, nowhere in the Convention is provision made for the mandatory registration of the printed press. Indeed, the freedom of the press has been accorded deliberately broader protection in the ECtHR's case-law, acknowledging its role as the traditional watchdog of democracy.
24. In the case of *Gaweda v. Poland* the Court dealt with the authorities' refusal to register two periodicals. The decision was based on a provision in the Polish Press Act, which allowed refusal of registration if a publication would *"be inconsistent with the real state of affairs"*.
25. The Court noted that *"although Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications ... the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, a fortiori, when the consequences of the restraint are to block publication of a periodical completely... This is so*



*because of the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by Article 10.*<sup>12</sup>

26. In this context it is recalled that according to the Council of Europe Parliamentary Assembly's Resolution 1636 (2008) on *indicators for media in a democracy*, print media and Internet-based media should not be required to possess a state licence, other than a mere business or tax registration document (paragraph 8.15).

### **Hungary's media legislation in the light of Council of Europe standards**

27. Print media and Internet-based media should be excluded from the registration requirements, in accordance with the Convention and the aforementioned Resolution of the Council of Europe Parliamentary Assembly.
28. In addition, in order to comply with Article 10, paragraph 2, ECHR, the relevant legislation must be precise in its wording, and thus foreseeable in its application. Article 46(5)a) of the Mass Media Act, which provides *inter alia* that the registration of a "media product" may be denied if "a conflict of interest exists vis-à-vis the applicant", does not appear to meet this requirement. It is recommended that Article 46(5)a) be repealed, or at the very least revised to provide precise criteria under which such a purported "conflict of interest" may arise.

## **1.4 Exceptions to the protection of journalists' sources**

### **Relevant provision(s) of Hungary's media legislation**

#### Article 6 of the Press and Media Act 2010

Article 6 (1): "The media content provider and any person employed by or engaged, in any other legal relationship intended for the performance of work, with the media content provider shall have the right to keep the identity of its informant confidential (hereinafter referred to as: source of information). The right to keep such data confidential shall not apply to the protection of sources disclosing qualified data unlawfully.

Article 6 (2): "The media content provider and any person employed by or engaged, in any other legal relationship intended for the performance of work, with the media content provider shall have the right to keep the identity of their sources of information confidential even in judicial or other official proceedings, provided that the information thereby supplied were disclosed in the interest of the public."

Article 6 (3): "In exceptionally justified cases, courts or authorities may – in the interest of protecting national security and public order or uncovering or preventing criminal acts – require the media service provider and any person employed by or engaged, in any other legal relationship intended for the performance of work, with the media content provider to reveal the identity of the informant."

#### Article 4 of the Press and Media Act 2010

Article 4 (1): "The legal system of the Republic of Hungary recognises and respects the freedom of the press and ensures the diversity thereof."

Article 4 (2): "The freedom of the press also includes independence from the State and from any organisations or interest groups."

Article 4 (3): "The exercise of the freedom of the press may not constitute or abet an act of crime, violate public morals or prejudice the inherent rights of others."

<sup>12</sup> *Gaweda v. Poland* (Application no. 26229/95), judgment of 14 March 2002, paragraph 40.

## Applicable Council of Europe standards

29. Both the Council of Europe Committee of Ministers<sup>13</sup> and the Parliamentary Assembly<sup>14</sup> have issued Recommendations regarding the protection of journalists' sources. With specific reference to Hungary, the latter stated the following (paragraph 4):

*"Referring to the new Press and Media Law of Hungary (Law CIV of 2010 on the freedom of the press and the fundamental rules on media content), the Assembly expresses its concern that limits to the exercise of media freedom fixed by Article 4(3) and the exceptions to the right of journalists not to disclose their sources stipulated in Article 6 of this Law seem to be overly broad and thus may cause a severe chilling effect on media freedom. This Law sets forth neither the procedural conditions concerning disclosures nor guarantees for journalists requested to disclose their sources."*

30. In addition to the previously mentioned Convention standards concerning the "quality of the law" (i.e. precision and foreseeability), the Grand Chamber of the Court held in *Sanoma Uitgevers B.V. v. the Netherlands* that Article 10 ECHR requires procedural safeguards in domestic law, including an assessment by an impartial and independent body, against a decision not to protect a journalist's source.<sup>15</sup> The safeguards should include an assessment of the decision to compel disclosure of sources by an independent and impartial body.

## Hungary's media legislation in the light of Council of Europe standards

31. Article 6 of the Mass Media Act does not guarantee sufficient foreseeability as to the situations in which journalists can and cannot invoke their right not to disclose information relating to the identity of their sources. The exceptions provided for by Article 6 are imprecise and offer an unfeasibly broad scope for state abuse. Accordingly the legislation strips away the right of journalists to protect their sources according to a matrix that is inappropriately weighted in favour of the State. Article 6 should be revised explicitly to account for this need for greater balance.
32. Moreover, certain procedural safeguards required under the Convention appear to be absent from Hungary's media legislation. The law must make clear, again through amendment, that any and every decision to waive protection of a journalist's source must be subject to an assessment by an independent and impartial body.

## II. Problems relating to the independence and pluralism of the media

### 2.1 Weakened Constitutional guarantees of pluralism

#### Relevant provision(s) of Hungary's media legislation

Article 61 of the Constitution of Hungary (as amended 6 July 2010)  
*previous Article 61: provision that obliged the Parliament to pass a law aimed to prevent monopolies of information"*

*amended Article 61: added the 'citizen's right to be provided with "proper" or "adequate" (megfelelő) information about public life'.*

<sup>13</sup> Council of Europe Committee of Ministers' Recommendation Rec(2000)7 on *the right of journalists not to disclose their sources of information*.

<sup>14</sup> Council of Europe Parliamentary Assembly Recommendation 1950 (2011) on *the protection of journalists' sources*.

<sup>15</sup> *Sanoma Uitgevers B.V. v. the Netherlands* (Application no. 38224/03), judgment of 14 September 2010, paragraphs 88-90.

## Applicable Council of Europe standards

33. In the case of *Manole and Others v. Moldova*,<sup>16</sup> the ECtHR declared that there can be no democracy without pluralism, especially in the realm of freedom of expression. The Court added that States must be the ultimate guarantors of pluralism and that the principles on media pluralism derived from Article 10 ECHR “place a duty on the State to ensure, first, that the public has access through television and radio to ... a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country”.

## Hungary’s media legislation in the light of Council of Europe standards

34. Eliminating Parliament’s duty to pass a law precluding information monopolies is in itself a problematic step, which threatens to change the driving force behind such a law from constitutional necessity to parliamentary expediency. The removal of this provision accentuates all the more the need for strong legislative protections of pluralism in Hungary’s media legislation.
35. Moreover, introducing terms such as “proper” and “adequate” into the provision on the right to information is *per se* a weakening of the guarantees of pluralism in Hungary’s constitutional order. The unsatisfactory nature of these terms becomes most obvious when they are contrasted with the State’s obligations to “range of opinion” and “diversity” in the Court’s rulings under Article 10 ECHR.
36. States must not only *protect*, but also *promote* media pluralism. It is recommended that pluralism be more expressly enshrined in the letter and spirit of the Constitution, as well as in national practice.

## 2.2 Lack of independence in media regulatory bodies

### Relevant provision(s) of Hungary’s media legislation

#### Article 14(2) of Amended Act C of 2003 on Electronic Communication

#### Article 124 of the Mass Media Act 2010

Article 124 (1): “The Chairman and four members of the Media Council are elected by Parliament – with a two-third majority of the votes of MPs attending – for a term of nine years by simultaneous electronic voting.”

Article 124 (2): “Eligible for the position of Chairman or member of the Media Council are persons entitled to vote in parliamentary elections and having a clean criminal record, who are not banned from exercising an occupation aligned with the activities in question, possess a higher education degree and at least three years of work experience in programme distribution, media services, regulatory supervision of the media, electronic communications, or in economics, social science, law, technology or management with a focus on the regulatory supervision of telecommunication (including membership of management bodies), or work experience in administration.”

Article 124 (3): “Media Council members shall be nominated

a) no earlier than sixty and no later than thirty days before the expiry date of the mandate of current members,

b) with the exception of cases outlined in item (a), within thirty days from receipt of knowledge of the termination of a mandate,

by the unanimous vote of an ad-hoc committee to which each parliamentary faction delegates one representative (hereinafter referred to as nominating committee).”

<sup>16</sup> *Manole and Others v. Moldova* (Application no. 13936/02), judgment of 17 September 2009.

Article 124 (4): “In each voting round, members of the nominating committee shall be entitled to a number of votes in function of the headcount of the parliamentary faction making the nomination.”

Article 124 (5): “The parliamentary resolution instituting the nominating committee stipulates how long parliamentary factions have to nominate members to the nominating committee. The nomination process may be started even if a certain faction fails to nominate a member to the committee within the deadline set by the parliamentary resolution.”

Article 124 (6): “If, in the scenario outlined under Paragraph (3), item (a), the nominating committee fails to nominate four members within the stated deadline, the nominating committee may propose a candidate in the second round of nomination with at least a two-third majority of votes.”

Article 124 (7): “If, in the scenario outlined under Paragraph (3), item (a), the nominating committee fails to nominate four members within eight days even in the second nomination round, its mandate shall be terminated and a new nominating committee shall be set up.”

Article 124 (8): “If, in the scenario outlined under Paragraph (3), item (b), the nominating committee fails to nominate a member within the deadline stated therein, the nominating committee may propose a candidate with at least a two-third majority of votes.”

Article 124 (9): “If, in the scenario outlined under Paragraph (3), item (b), the nominating committee fails to nominate four members within eight days even in the second nomination round, its mandate shall be terminated and a new nominating committee shall be set up.”

#### Article 125 of the Mass Media Act 2010

Article 125 (1): “The President of the Authority, who is appointed by the Prime Minister, shall become a candidate for the Chairmanship of the Media Council by virtue and from the moment of appointment.”

Article 125 (2): “The Chairman and members of the Media Council shall take office upon being elected, or upon the termination of their predecessor’s mandate, provided they are elected prior to the termination of the mandate of their predecessor.”

Article 125 (3): “If the mandate of the President of the Authority is terminated, it shall automatically result in the termination of his/her mandate as Chairman of the Media Council as well. In this case the new President of the Authority, who is appointed by the Prime Minister, shall become a candidate for the Chairmanship of the Media Council by virtue and from the moment of appointment. The Chairman’s election shall be decided upon by two-thirds of the MPs attending.”

Article 125 (4): “Even if Parliament does not elect the President of the Authority as Chairman of the Media Council, the President of the Authority shall still convene meetings of the Media Council, which (s)he shall attend with consultative powers and with a right to chair those meetings but without being involved in the decision-making process. The power of the President of the Authority to convene and chair meetings shall prevail from the moment of his/her appointment by the Prime Minister and until elected as Chairman of the Media Council with full powers.”

Article 125 (5): “The members and Chairman of the Media Council may be re-elected, provided their mandates have been terminated for reasons other than conflict of interest, dismissal or expulsion.”

Article 125 (6): “The mandate of any new member shall be for the period remaining from the mandate of previously elected members of the Media Council.”

Article 125 (7): “The duration of the mandate of the Chairman of the Media Council is linked to the duration of the mandate of the President of the Authority.”

#### **Applicable Council of Europe standards**

37. By Recommendation Rec(2000)23 on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, the Council of Europe Committee of Ministers set out detailed prerequisites for the rules regarding the membership and functioning of media regulatory authorities. The Recommendation laid emphasis on the importance of protecting

the independence of such authorities from political interference and influence, and called upon all member States to enact strong and explicit protections in their domestic laws.

38. Some of the most important guidelines contained in the Appendix to this Recommendation are the following:

*"3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.*

*4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:*

- regulatory authorities are under the influence of political power;*
- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.*

*5. Furthermore, rules should guarantee that the members of these authorities:*

- are appointed in a democratic and transparent manner;*
- may not receive any mandate or take any instructions from any person or body;*
- do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.*

*6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure..."*

### **Hungary's media legislation in the light of Council of Europe standards**

39. Hungary's review process regarding its media legislation would do well to make express provision for the standards set out in the Recommendations of the Committee of Ministers and the Parliamentary Assembly. The provisions regarding appointment, composition and tenure of existing media regulatory bodies demand amendment not least because they lack *the appearance of independence and impartiality*, quite apart from a *de facto* freedom from political pressure or control.

## **2.3 Lack of safeguards for the independence of public service broadcasting**

### **Relevant provision(s) of Hungary's media legislation**

#### Article 102 of the Mass Media Act 2010

Article 102(2): *"The Board of Trustees is vested with employer's rights in relation to the Director Generals of public service broadcasters, which includes the appointment of Director Generals and the termination of their employment. Director Generals are nominated and appointed in the following step-by-step order:*

- a) the Chairperson of the Media Council proposes two Director Generals to the Media Council in relation to each public service broadcaster,*
- b) if the Media Council approves of these candidates, then it shall submit the nominations to the Board of Trustees, asking it to select one of the candidates,*
- c) if the Media Council does not approve of either of the candidates proposed by the Chairperson of the Media Council, then the Chairperson of the Media Council shall propose a new candidate. The Media Council may nominate a candidate to the Board of Trustees only if it had already approved two candidates*

- d) the Media Council may also propose certain substantive elements to be included in the Director General's work contract,*
- e) during the first round of voting, members of the Board of Trustees – including its Chairperson – shall come to a decision concerning the appointment of the Director General with a two-thirds majority of votes,*
- f) if the Board of Trustees fails to make a selection with a two-thirds majority of votes from the two candidates nominated by the Media Council within thirty days from the date when they were nominated, then a new nomination procedure shall be carried out,*
- g) in the course of the new nomination, two new candidates shall be proposed per public service broadcaster,*
- h) during the vote taking place after a new nomination, all members of the Board of Trustees – including its Chairperson – shall come to a decision concerning the appointment of the Director General with a simple majority of votes.”*

### **Applicable Council of Europe standards**

- 40. Recommendation No. R (96) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting<sup>17</sup> contains guidelines on the content of legislative and regulatory frameworks governing the missions, organisation and running of public service broadcasting organisations.
- 41. The Commissioner notes in particular that according to this Recommendation “[t]he rules governing the status of the boards of management of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference”.
- 42. Further guidelines provide that “[t]he legal framework governing public service broadcasting organisations should stipulate that their boards of management are solely responsible for the day-to-day operation of their organisation”. As specified in the Explanatory Memorandum, this guideline aims at clarifying that interference in the day-to-day management of the activities of public service broadcasting organisations is prohibited not only for all authorities outside the organisations but also for their own supervisory bodies.

### **Hungary's media legislation in the light of Council of Europe's standards**

- 43. The aforementioned provisions of the Mass Media Act concerning the appointment of the top officials of the public service media mean that the Prime-Minister-appointed President of the Authority, who is also the President of the Media Council, is the only one who has a right to propose candidates for the senior management of the public service broadcasters. The other members of the media council (on their independence see Section 2.2 above) can approve or reject the proposals. The Board of Trustees can select among two candidates. These provisions appear to run counter to Council of Europe standards aimed at preserving the independence of the public service broadcasting from interference, notably political, from any external authority.
- 44. Moreover, all public service broadcasting newsmakers are made the employees of a Fund set up under the Media Council (Organisational and operational rules of the Fund Chapter V. Divisions). These rules make the Head of the Media Council the indirect employer of all journalists of all public service broadcasting. The Commissioner considers that this is not reconcilable with Council of Europe standards aimed at preserving the independence, especially editorial, of the public service broadcasting from interference, notably political, from any external authority.

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<sup>17</sup> Adopted by the Committee of Ministers on 11 September 1996, at the 573rd meeting of the Ministers' Deputies

45. These provisions taken together give the President of the Authority and Media Council far reaching powers and control over public service media, contrary to Recommendation No. R (96) 10 of the Committee of Ministers.
46. It is recommended that the Hungarian legislation in this area is brought into line with Council of Europe standards on the independence of public service media, and in particular Recommendation No. R (96) 10 of the Committee of Ministers.

## **2.4 Absence of an effective domestic remedy for media actors subject to decisions of the Media Council**

### **Relevant provision(s) of Hungary's media legislation**

#### Article 163 of the Mass Media Act 2010

*Article 163 (1): "No appeal shall lie against the official decision of the Media Council passed in its capacity as Authority of the first instance. The official decision of the Media Council may be challenged at court by the client — and as regards the provisions expressly applicable to him/her —, the witness, the official witness, the expert, the interpreter, the owner of the object for inspection, the representative of the client and the official mediator by claiming infringement of the law, at the administrative court within thirty days upon announcement of the official decision, by lodging a petition against the Media Council."*

*Article 163 (2): "The court proceedings instituted under a petition for the revision of the Media Council's decision shall be subject to the provisions of the Act on the Code of Civil Procedure on lawsuits in public administration, with due heed to the deviations herein contained."*

*Article 163 (3): "The submission of the petition shall not have a staying effect on the execution of the decision, the court may be requested to suspend the execution of the challenged decision."*

*Article 163 (4): "The Media Council shall forward the petition — together with the documents and representations of the case — to the court within fifteen days of receipt thereof."*

*Article 163 (5): "The petition for non-contentious proceedings against the challengeable decisions of the Media Council under separate appeal shall be submitted within fifteen days of the notification of the order."*

*Article 163 (6): "No judicial review proceedings may be instituted on the official decisions of the Media Council."*

#### Article 164 of the Mass Media Act 2010

*Article 164 (1): "In proceedings specified under Article 163, courts of both first and second instance shall pass judgement within 30 days."*

*Article 164 (2): "Judicial review proceedings shall fall within the exclusive competence of the Metropolitan Court of Budapest."*

*Article (3): "The court shall have the powers to alter decisions passed by the Media Council."*

#### Article 165 of the Mass Media Act 2010

*Article 165 (1): "The client shall have the right to appeal against the official decision of the Authority passed hereunder at the Media Council, with the exception of decisions against which no appeal lies under the Act on the General Rules of Administrative Proceedings and Services or under this Act."*

*Article 165 (2): "The decision of the Office may be challenged under an appeal by the client having been party to the proceedings of the first instance."*

*Article 165 (3): "The decision of the Media Council of the second instance may be challenged at court by the client, — and as regards the provisions expressly applicable to him/her — the witness, the official witness, the expert, the interpreter, the owner of the object for inspection, the representative of the client and the official mediator by claiming*

*infringement of the law, at the administrative court within thirty days upon announcement of the official decision, by lodging a petition.”*

*Article 165: “(4) The submission of the petition shall not have a staying effect on the execution of the decision, the court may be requested to suspend the execution of the challenged decision.”*

*Article 165 (5): “The petition for non-contentious proceedings against the challengeable resolutions of the Office under separate appeal shall be submitted within fifteen days of the notification of the order.”*

*Article 165 (6): “The judicial review proceedings shall fall within the exclusive competence of the Metropolitan Court of Justice.”*

#### Article 166 of the Mass Media Act 2010

*Article 166: “In conducting its proceedings defined in Articles 68–70 and 167–181, the Authority shall apply the provisions of the Act on the General Rules of Administrative Proceedings and Services or this Act with due heed to the deviations for the various types of proceedings.”*

### **Applicable Council of Europe standards**

47. Article 6 ECHR concerns access to justice and the right to a fair trial. The Article requires that there must always exist the possibility of judicial review by an independent and impartial tribunal in instances where administrative decisions have affected a person’s civil rights and obligations.
48. In addition, Article 13 ECHR guarantees the availability of an effective remedy at national level to enforce a person’s substantive rights and freedoms under the Convention, regardless of the form in which they appear in the domestic legal order. The effect of Article 13 is to require that the State provides a remedy in a domestic forum in which the competent national authority is empowered both to deal with the substance of the relevant Convention complaint, and to grant appropriate relief.
49. According to the case-law of the ECtHR, no effective remedy exists in instances where the scope of the review conducted by a domestic court or authority is so weak or limited that it is unable properly to determine whether there has been a violation of the Convention.
50. In the case of *Glas Nadezhda EOOD and Elenkov v. Bulgaria*,<sup>18</sup> the applicants complained, under Article 13 in conjunction with Article 10, about the refusal by the Supreme Administrative Court to review the merits of a decision by the National Radio and Television Committee (NRTC) to deny a radio broadcasting license. The Court found a violation of Article 13 ECHR, noting that the Supreme Administrative Court’s scope of review fell short of the substantive and procedural scrutiny required.
51. Hence the Court has concluded that an approach to judicial review which fails to scrutinise the deciding authority’s discretion on substantive grounds is not compliant with the Convention.

### **Hungary’s media legislation in the light of Council of Europe standards**

52. A decision by the Media Council, for example the decision to fine a media outlet for ‘unbalanced’ reporting may only be appealed to an administrative court whose review is limited to an assessment of its compatibility with the media legislation itself. The administrative court appears to have no competence to review such a decisions in light of other standards, including the provisions of the ECHR.

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<sup>18</sup> *Glas Nadezhda EOOD and Elenkov v. Bulgaria* (Application no. 14134/02), judgment of 11 October 2007.



53. The absence of an effective domestic remedy against decisions taken by the Media Council is irreconcilable with Articles 6 and 13 ECHR.
54. It is recommended that Article 163(1) of the Mass Media Act and other pertinent provisions be urgently amended with a view to ensuring their full compliance with the Convention. In particular, the remedy against a decision of the Media Council should allow for a review in light of the provisions of the Convention, notably Article 10 ECHR.

### **III. Conclusion**

55. Freedom, independence and pluralism among media are indispensable characteristics of a healthy democracy. The State is enjoined, not least by Council of Europe standards deriving from Article 10 ECHR, to protect, nurture and promote media freedom in a manner that encourages, not dissuades, media actors to fulfil their roles as purveyors of a diverse range of information and watchdogs of state action.
56. The wide range of problematic provisions in Hungary's media legislation, as identified in this Opinion, is sufficient to warrant a wholesale review of the "media package" passed by Parliament in the second half of 2010. It is recommended that the goals of such a review include the reinstatement of precise legislation promoting pluralistic and independent media, and the strengthening of guarantees of immunity from political influence on the part of the media regulatory mechanisms.
57. More generally, there should be a serious, concerted and urgent effort to free the media, particularly the printed press, from content prescriptions, the imposition of sanctions, pre-emptive restraints via registration procedures, and threats to the integrity and anonymity of sources.
58. The Commissioner reiterates that the best guide for the Hungarian authorities as they undertake their wholesale review is the body of Council of Europe standards that have been developed in Court judgments, recommendations and resolutions over the past six decades. In particular, express legislative incorporation of standards contained in Article 10 ECHR and the jurisprudence of the ECtHR would go a long way in alleviating the Commissioner's concerns with Hungary's media legislation.