Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

ANALYSIS AND ASSESSMENT OF A PACKAGE OF HUNGARIAN LEGISLATION AND DRAFT LEGISLATION ON MEDIA AND TELECOMMUNICATIONS

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Introduction

The present analysis was commissioned by the OSCE Representative on Freedom of the Media with a view to assessing the package of legislation (encompassing T/359 on amendment of the Constitution; T/360 on amendment of the Act on Electronic Telecommunication, the Act on Radio and Television, the Act on Digital Transition, and the Act on National News Agency; and Bill T/363 – a new Law on Press Freedom and Basic Rules of Media Content). The objective is to evaluate its contribution to protecting freedom of expression and of the media in Hungary, serving the democratic development of the Hungarian media system, and promoting the observance of European standards in the media field in the country.

The sole frame of reference that is applied in conducting this analysis and assessment – based exclusively on a close reading of the legislation, draft legislation and amendments available at the time of writing (in English translation arranged for by the Office of the OSCE Representative on Freedom of the Media) – is provided by OSCE principles and commitments in the field of freedom of expression, free flow of information and freedom of the media; by Council of Europe standards emanating from Article 10 of the European Convention on Human Rights; and by European Union policies and legislation. Reference will also be made to documents issued by other international organizations.

For reasons of space, given the very extensive body of detailed legislation covered in this analysis, it will not be possible at this stage to conduct an article-by-article examination of the provisions of each law or draft law separately. Rather, a cross-cutting approach will be adopted, identifying selected main sets of problematic issues of a systemic nature and discussing them on the basis of all the pieces of legislation. Such an analysis must unavoidably seek to establish whether sufficient care has been taken in drafting legal provisions to guard against their (mis)implementation in a way that would run counter to well-established free speech or democratic principles in the media field.

I have also been asked to formulate recommendations, where needed, on possible changes in the package. Some legislation covered by the present analysis has already been adopted and has entered into force. Some part of it is yet to be debated in Parliament. Therefore, recommendations relating to adopted legislation should be treated as advice on implementation and regulatory practice, with a view to amending the laws in the spirit of these recommendations in the near future. Recommendations related to Bill T/363 are intended to assist in its improvement. All should help to bring the package into line with internationally accepted standards in the field and with the requirements of the democratic development of the Hungarian media system and media policy and regulation.

The author wishes to acknowledge the work of many excellent experts in Central and Eastern Europe in the field of media policy and regulation, which provided a general inspiration for the present analysis. He also wishes to express his gratitude for the technical assistance received from the Office of the OSCE Representative on Freedom of the Media. Of course, he alone is responsible for the contents, and any possible shortcomings, of this analysis and assessment.

GENERAL ASSESSMENT

The package represents an attempt to modernize Hungarian media law by responding to the challenges posed by technological change leading to the emergence of new communication services. This, however, is done mainly by extending the traditional regulatory framework to the new media, an approach widely recognized as inappropriate.

At the same time, the package represents an equally far-reaching effort to put into place a new axiological, legal and institutional framework for media regulation and supervision.

The results can be assessed as (i) on the one had instituting a system for media content regulation (including Internet- and ICT-delivered media content) going in its sweep and reach beyond almost anything attempted in democratic countries and beyond the limits of what is accepted in the international debate as an appropriate and justified approach to regulating new communication services, and (ii) on the other, as introducing – often in disregard or violation of the needs of a democratic system of social communication and of the letter and spirit of international standards - stricter regulation, more pervasive controls and limitations on freedom of expression.

Few of the new measures and changes of the existing framework can be described without reservation as serving the cause freedom of expression and media freedom. They will introduce **a highly centralized governance and regulatory system, with many new and unnecessary bodies of oversight and supervision and with many decision-making processes involving a succession of inputs by disparate bodies – probably breeding conflicts and inefficiencies, but also multiplying opportunities for political control. The whole system may have a serious chilling effect on media freedom and independence ((by encouraging self-censorship) and on the exercise of freedom of expression.**

Traps are created that content providers cannot avoid falling into, giving the authorities an opportunity to penalize them for it. Some provisions are transferred from the Civil Code to media legislation, presumably to make it easier to apply them in an administrative procedure, rather than a judicial one.

The new institutional framework may, if deliberately (mis)used for this purpose, create conditions for the realization of the "winner-takes-most" or indeed "winner-takes-all" scenario in the current term of Parliament, in defiance of the principle of the division of powers and of the checks and balances typical of liberal democracy. As such, the design of this framework runs directly counter to democratic standards in the field of media system organization and governance.

Accordingly, this package, which exceeds what is justified and necessary in a democratic c society, is cause for very serious concern. It needs urgently to be reconsidered and amended, so the legislation can serve its proper function of enhancing Hungarian democracy. Parliament might serve this cause by initiating a revision of the adopted parts

of the package and not considering Bill T/363 until it has been comprehensively rethought and re-written.

OVERVIEW OF RECOMMENDATIONS

I. SCOPE OF REGULATION

I.1 Material Scope

CONCLUSION

Bill T/363 creates a seamless content regulation regime for traditional and new Internet media content, administered by one body and applying the same criteria to all these cases. It does so in a way that while ostensibly covering only media services, the provisions of the law could in fact be applied practically to all Internet content. It defines the material scope of regulation in an imprecise, open-ended way, giving the National Media and Telecommunications Authority and the Media Council discretionary power to apply the regulatory regime to any future services it sees fit.
The printed press and the Internet have so far been virtually free from content regulation. This Bill, if adopted in the present form, will significantly change their situation, subjecting them to a content regulation regime almost without precedent in democratic countries. This constitutes unwarranted and unjustified interference with freedom of expression and of the media, and may create conditions for suppression of this freedom.

RECOMMENDATION

The draft law requires urgent revision:

1. The serious flaws in the definition of its scope should be removed, so that it relates (in a way that provides legal certainty) primarily to broadcasting and audiovisual media services (in line with AVMSD) and retains only general provisions for the print media and for media services on the Internet.
2. The concept of "media content" should be replaced with the term "media services", meeting the criteria listed above (whether or not provided by professional communicators), to avoid "mission creep", in that regulators could successively extend their scope of activity. A graduated regulatory system (taking as an example the AVMSD system of introducing a clear difference between levels of regulation for linear and non-linear services) should be introduced, adjusting the degree and methods of regulation to the particularities of each type of media service.
3. Any regulatory regime with regard to the printed press and Internet-delivered media services (unless they are covered by the AVMSD) should rely primarily the civil and penal code and additionally primarily on self-regulation and co-regulatory schemes (with regulatory intervention reserved only for cases when they cannot be fully effective) , involving the Media Council in multi-stakeholder cooperation with trade and professional associations as co-regulators, administering codes of conduct and enforcing jointly developed standards and rules.

4. It is not possible to develop "future-proof regulation" in this field. Any such attempt is bound to be ineffective and unworkable. The AVMSD is expected to have a life of 10 years, at best, with further changes needed after that. This is why internationally accepted standards and the state of international debate on new and not fully defined media services and the policy and regulatory approach to them should be closely followed and applied. Otherwise, the law, though seeking to cover everything, will leave many new media and services undefined and unregulated, ceding excessive powers to the Authority and Media Council to fill the gaps at their own discretion, and leaving their policies and regulatory practice open to legal challenge, as they will find no clear basis in Bill T/363 and other legislation.

I.2 Territorial Scope

CONCLUSION

In a very unusual approach, Bill T/363 would establish world-wide territorial scope for itself, at least as far as Internet content "aimed at" Hungary, and originating technically from Hungary, is concerned. In both cases, the objective appears to be to gain the ability to take action against providers of vaguely defined unwanted content. In the first case, this could involve seeking to prosecute them abroad and blocking access to such content coming in from abroad. In the second case, the intention seems to be to produce a chilling effect on users seeking to disseminate content worldwide that might turn out to be unwanted by the authorities. Under this law, Hungary would give itself powers which it cannot effectively apply, but which would require instituting a system of surveillance, supervision and possible repression that are unacceptable in a democratic society.
This proposed system represents a serious challenge to freedom of expression on the Internet and would, if adopted, be in obvious violation of international law.
This does not apply to audiovisual media services, as defined in the AVMSD, as its provisions are observed.

RECOMMENDATION

Provisions on territorial scope, especially with regard to the Internet, should be thoroughly revised in line with international law. Article 3 (5) and (6) should be deleted, as is already proposed with reference to para. (6) in Amendment 17.

II. FREEDOM OF EXPRESSION AND CONTENT REGULATION

II.1 Freedom of (transfrontier) broadcasting

CONCLUSION

In addition potentially to reducing the range of Hungarian content providers able to launch their activities (see below), Bill T/363 could serve the purpose of depriving Hungarian audiences of access to information available via the Internet media (see above) and from broadcast media, especially transfrontier broadcasting, though Hungary could hardly do so under the international commitments that the country has undertaken.

RECOMMENDATION

In order to remove any doubt as to the legislator's intentions and to prevent the appearance of contradiction and conflict between different parts of the legal framework in force in Hungary, Article 25 of Bill T/363 should not annul Article 3 (1) of RTBA.

II.2 Registration

CONCLUSION

The registration system would create a legal, administrative and potentially also a political barrier to the entry of new content providers into the media landscape, or to the extension of activities by existing providers. It could also be used to silence existing media outlets. While licensing of terrestrial broadcasters must still be maintained, the introduction of the system of registration and its extension to Internet communicators is unacceptable and would place Hungary alongside authoritarian countries seeking to control all forms of social communication.

RECOMMENDATION

Article 5 and Article 22 Bill T/363 should be deleted, as already proposed with regard to Article 22 by Amendment 18. The system of notification could be retained under four conditions in relation to the printed press, online journals, television and radio channels or the Internet, i.e. provided that the content providers may launch operation immediately after notification; the law clearly specifies what information must be filed with the registering authorities and any action preventing a content provider from continuing operation requires a court order.

II.3 Prevention of information monopolies

CONCLUSION

The constitutional aim of preventing information monopolies has not been replaced by equally effective and forceful guarantees that this goal will be pursued actively and with determination, with full support from the State.

RECOMMENDATION

The part of Article 61 (4) of the Constitution, listing a potential law about prevention of information monopolies among those requiring a two-thirds majority of Members of Parliament should be reinstated.

II.4 Right to information, the obligation to inform

"Appropriate information in relation to public affairs"

CONCLUSION

Depending on how "appropriate information" is interpreted, the public may either be informed fully and objectively, or selectively and tendentiously. In the latter case, both public authorities and administration, and the regulatory authorities would fulfil quasi-censorship functions as gate-keepers preventing some information from reaching the public. The very possibility that the Constitution could allow such a situation to arise without violating its letter and spirit is completely unacceptable

RECOMMENDATION

The word "appropriate" should be deleted from Article 61 (3) of the Constitution as soon as possible. In the meantime, Bill T/363 should be supplemented to provide an interpretation of the term "appropriate information" preventing its use for any other purpose than to guarantee for the public full, accurate and objective information in relation to public affairs.

Information obligations of content providers

CONCLUSION

Obligations imposed on content providers under Article 13 (1) and (2) of Bill T/363 represent *ex ante* content regulation and are therefore unacceptable as violating, and not promoting, freedom of expression. Given that the obligation is impossible to implement for most content providers, as well as the wholly disproportionate penalty of possibly withdrawing the consent to provide information that can be imposed by the regulatory authorities, this system cannot be described otherwise than as a "sword of Damocles" hanging over every content provider and capable of falling at any moment, depriving the content provider of the right to continue operation.

RECOMMENDATION

Articles 13 (1) and (2) should be deleted as a violation of media freedom and to free content providers from an obligation most of them cannot meet. Accordingly, mention of Article 13 should be deleted from Article 23 of Bill T/363. The proposal in Amendment 17 that Article 23 (2) should be deleted deserves support and should be implemented. The general principle expressed in Article 10 of Bill T/363 is sufficient for the purpose of enshrining the right of the public to such information. The Media Council could be given the task, as it implements its media and licensing policy, to ensure that the type of information referred to in Article 13 (1) and (2) is easily available to the general public from the totality of content at the disposal of the public.

An additional issue is that while Article 23 mentions "*the system of sanctions and procedures stipulated in the Act on the regulation of the media*," in fact that part of the Bill is missing. Parliament is being asked to adopt a law which specifies obligations binding on content providers, but does not specify what penalties they would incur in case of failure to meet them. This is one more reason not to subject this Bill to parliamentary procedure before the missing part has been provided, while most of the Bill is thoroughly reviewed and revised.

Right of Reply

CONCLUSION

This new approach to the right of reply can be recognized as reducing the scope of editorial freedom by obliging content providers to publish a potentially unlimited number of replies to statements of opinion. This could overload publications and media with such content, limiting the space for other editorial content. As such, it constitutes a case of interference with media freedom. The extended right of reply to statements of fact and opinions is usually introduced in countries where political figures and public officials refuse to recognize the principle from the CoE "Declaration on freedom of political communication in the media" that they are "subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions".

RECOMMENDATION

Article 12 (1) and (2) of Bill T/363 should be wholly revised in conformity with CoE and EU standard-setting documents on the right of reply, primarily by reducing the scope of the right to that of rectification. As concerns para. 2, this – as envisaged in Amendment 21 – should mean the deletion of this text.

Hate speech

CONCLUSION

The new rule would introduce a restriction stricter than any other in the current legal system. It would add churches, other nations and "any community" to the scope of protected subjects and extend the obligation to printed press and online content. Even unintentional insult or incitement to hatred would be sanctioned: not only media content that is directed to insult or exclusion, etc. but also one which is capable of insulting, excluding, etc. is prohibited.

RECOMMENDATION

General rules on insult and inciting hatred apply to all media, including internet-delivered media, but those should be applied by courts. The role of the Media Council should be limited to the broadcast media.

The provision should be retained in its present wording in the Criminal Code, as no specific restrictions, administered by the Authority, are needed or justified in the case of the printed press

and online media. If Article 3 (3) of the Hungarian RTBA is retained, it should be revised to avoid an over-extensive definition of "hate speech" contained in it, leaving too much room for discretionary interpretation of the term. It should follow the Council of Europe "Recommendation No. R (97) 20 On 'Hate Speech'", which defines the term as follow: "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".

III. THE NATIONAL MEDIA AND TELECOMMUNICATIONS AUTHORITY

III.1 Converged Regulator or a Federation of Officials?

CONCLUSION

The institutional design of the Authority will not turn it into a converged regulator and is unlikely to ensure its smooth and effective functioning. It consists of too many bodies that are, at least on paper, supposed to be independent of one another and operate at a distance from one another, linked together only by virtue of having the same person, President of the Authority, in charge. It will probably soon be found that much of the Authority's time and effort will be spent on ensuring coordination and cooperation, and eliminating potential or real conflicts among its disparate parts.

CONSIDERATIONS

It will not be possible to find a solution to this situation without structural change within the Authority. At first glance, three ideas could theoretically be considered. The first two of these are stopgap solutions:

- The Authority and the Media Council have different chairpersons, with the MC chairperson elected by the members from among themselves. The law creates mechanisms of consultation and coordination between the heads of the two bodies and a mechanism for resolution of conflicts;
- The Authority's President has two deputies: one responsible for the telecom side, the other (who is also the chairperson of the Media Council, elected by the MC members from among themselves) responsible for the media side. The Authority's President cannot dismiss the MC chairperson or overrule the collective decisions of the Council;
- The Authority's structure and organization are completely reformed to make it a truly convergent regulatory authority. In that case, the example of the Italian 9-member *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) could be considered. AGCOM comprises the following organs: the president, the commission for infrastructures and networks, the commission for services and products and the Council. Each commission is a collective body made up of the president and four commissioners. The Council comprises the president and all the commissioners.

III.2 The President of the Authority, the Chairperson of the Media Council

Method of Appointment

CONCLUSION

Direct appointment by the Prime Minister is not unusual in the case of heads of telecom regulators. On the other hand, the manner of appointment of the Media Council Chairperson amounts to nothing less than government capture of Parliament. Parliament is left no choice but to vote for the Prime Minister's candidate. Moreover, should it fail to elect that person, its decision will be disregarded in the sense that the President would still chair meetings of the Media Council (with a voice, but not a vote) and the only option left to Parliament would be eventually to elect that same person to this position – or leave the position unfilled, thus considerably weakening the MC. This is very likely if the governing party/coalition does not have a two-thirds majority in Parliament. Then, the solution designed to promote the development of consensus on the chairmanship of the MC could easily turn into an opportunity for obstruction by opposition parties.
The constitutionality of this solution could be open to question, given that under Article 19 (1) of the Constitution "The Parliament is the supreme body of State power and popular representation in the Republic of Hungary". By adopting these provisions, in which the executive branch imposes its will on the legislative branch, Parliament can be said to have denied its own role of "ensuring the constitutional order of society".

CONSIDERATION

A solution to this problem depends on the choice of solution to the general structural problem discussed above under III.1. In any case, it should sever the direct link between the government and the Authority.

Term of office

CONCLUSION

In a worst-case scenario, these provisions could turn out to be an "insurance policy" that even if a given parliamentary majority is not returned to power in the next election, "its" people will remain in the Authority and the MC. If that is indeed the case, "cohabitation" between the "old" composition of the Presidency and Media Council within the Authority and the "new" majority in Parliament and in the government, may put them on a collision course, leading to conflicts. Should another party or coalition be returned to power with a 2/3 majority, this could lead to another change of the law to ensure conformity between the political composition of both sides.

RECOMMENDATION

The following changes should be adopted:

- The term of office should be reduced to 6 years at most;
- There should be no possibility of re-election after having served a full term;
- Membership of the MC should be staggered.

The powers of the Authority's President and of the Media Council

CONCLUSION

In short, there is not an area in the telecommunications and media/content provision field where the President does not have decisive say or cannot exert very strong influence, either single-handedly, or through voting and decision-making procedures. This simply cannot be described as being compatible with the basic principles of democracy. Moreover, by being involved in both the choice of chief executive officers of PSM organizations, and in the management of their assets, the President and the entire Authority are given a role that goes beyond that of a regulator: they become another governing body for public service broadcasters.
In the European Union, regulatory bodies should be independent both of the government and of the industry they regulate. This requirement may not be met in this case: on the one hand because of the close ties between the Authority and the Prime Minister and the ruling coalition that elected the members of the MC; on the other, because of the close involvement of the Authority in the operation of public service broadcasters. Direct involvement in the appointment of public service media (PSM) CEOs and in the management of PSM assets must mean a closer link between the Authority and PSM organizations and a less than fully objective approach to PSM, whereas the regulator should treat all segments of the regulated industry equally.

RECOMMENDATION

It is necessary to reduce the scope of those powers. The Authority and the Media Council should assume their proper role as regulatory authorities and not as another tier of PSM management One way of achieving that is to implement ideas proposed under item III.1 above. Additionally, several steps should be taken:

- The Media Council should lose the power to delegate two members of the Board of Trustees and "suggest" who should chair it. The President should lose the power to propose candidates for the jobs of CEOs of public service broadcasters and the MC the competence to present them to the Board of Trustees. Of any areas of competence, this one has the capacity to politicize both the Presidency and the MC most, as it can ensure a direct link between the Prime Minister and parliamentary parties, and the leadership of public service broadcasters.
- There is no real justification for the existence of the Broadcast Support and Asset Management Fund and for the President's role in appointing members of its Board of Supervision. Both solutions can only reduce the independence of public service broadcasters. This system should be dropped (see below).

III.3 The Media Council

Method of appointment

CONCLUSION

In this term of Parliament, the governing party/coalition will be able to propose and adopt a composition of the Media Council that will favour the party or parties in power.

RECOMMENDATION

The manner of appointment will be affected by selection of one of the options listed under III.1. As for MC members other than the chairperson, there are no fail-safe methods of electing only competent and apolitical experts to a body like the MC. Nevertheless, progress could be made if the identification of candidates were taken out of the hands of the politicians and Parliament could only consider candidates recommended by institutions of higher learning and appropriate professional, trade and civil society organizations.

Areas of competence

CONCLUSION

The MC represents the tendency to centralize media governance and regulation in very few hands. This is bound to have a harmful effect on the Hungarian media scene.

RECOMMENDATION

As already noted in section I.1, there should be no basic change or development of the regulatory regime vis-à-vis the press and Internet content. The MC should, however, be given clear tasks related to the development of a self- and co-regulatory system in the printed press and Internet content.

III.4 The Telecommunications and Media Commissioner

CONCLUSION

The Office of the Commissioner provides evidence that the Authority has achieved practically no integration between its disparate parts. It will retain the Complaint Commission, regulated in Title 11 of RTBA, and charged with acting on complaints regarding media content. It will have the Commissioner whose mandate should extend to the media, but does not. In addition, the Authority's President is authorized to conclude annual cooperation agreements on behalf of the Authority with the Consumer Protection Authority (FVF), probably in areas which are the responsibility of the Commissioner. Again, the impression is created of the existence of many

different bodies with overlapping areas of responsibility, a situation conducive to conflicts and duplication of efforts.

RECOMMENDATION

The position of the Commissioner and the Complaint Committee should be merged into a unitary division, responsible for handling all complaints and consumer protection issues. The need for, and scope of, any agreement with the FVF should be reassessed.

IV. PUBLIC SERVICE BROADCASTING

IV.1 Constitutional Amendment

CONCLUSION

Article 61 (4) of the Constitution assigns to PSM a role that is much more narrowly defined than is the norm in European countries, as reflected in the RTBA, and than is required by the needs of Hungarian society.

RECOMMENDATION

In order for the Constitution to define the PSM remit properly, or at least provide constitutional support for such a definition, it should be amended by:

1. Adding in para. (4) that the full and precise definition of the remit is to be found in a relevant statute;
2. Or, by amending para. (4) to reflect the remit fully in line with European standards, as illustrated above. This would be the most complex procedure but also the only one providing legal certainty on what the PSM remit really is.

IV.2 The Public Service Foundation

<u>The Public Service Corporations</u>

CONCLUSION
Incoporation of the news agency into the Foundation can only be explained as an attempt to impose political control on it. Its credibility and impartiality may suffer, as it becomes the object of political infighting that has characterized the public service broadcasters.

RECOMMENDATION

The national news agency should be taken out of the Foundation as soon as possible. The legal and institutional framework within which it operates should be designed to protect its independence and ability to operate impartially and professionally.

Board of Trustees: Composition and Manner of Appointment

CONCLUSION

While attempting to deal with at least some deficiencies of the old system, the new solution almost guarantees a repetition of the highly politicized, conflict-ridden situation that has existed so far. It may also give rise to new conflicts, if the composition of Parliament and the government change and the new parliamentary majority is faced with an unfriendly political majority in the Board. This may be part of the same "insurance policy" that was referred to in section III.2.

RECOMMENDATION

The manner of appointment of the Board should be changed, largely in line with the procedure recommended by Article 19, to create a pluralistic body that represents society as a whole, rather than some parts of the political class.
The procedure could involve the use of "nominating organizations", on the same principle in the case of the Public Service Committee (see below), though in this case the list of organizations could be somewhat different and their role would be to propose candidates for Parliament to vote on.
In addition to Article 19 requirements, the following additional ones could be considered:
- nominees would have to demonstrate professional skills and experience;
- public hearing shall be held with the potential nominees;
- Board members should have staggered, non-renewable terms;

Management of the Foundation

CONCLUSION

The design of the management of the Foundation is clearly inadequate to the tasks of the leadership of a major PSM organization, making it incapable of providing leadership. The Hungarian PSM system has so far been leaderless (even the particular stations have gone without Directors General for months and years on end), and the negative results are clear for all to see.

The system appears to be designed to provide two fig leaves:

- That the requirements of the Act on Business Associations have been met and the Joint Board of Supervision has been created (though its actual tasks and role are unclear);
- And that the constitutional requirement of monitoring "by certain communities of citizens stipulated in legislation" has been fulfilled (though potentially in an ineffective manner).

RECOMMENDATION

Problems identified above could be resolved in part by:

- Extending the tasks of the Board of Trustees so that it would: consider and approve annual financial plans of the particular corporations and monitor their implementation (inter alia by considering quarterly reports of the Public Service Committee and taking action to correct shortcomings and deficiencies);
- Eliminating the Joint Board of Supervision (shifting its duties to the Board), and derogating in the RTBA from the BAA as *lex specialis* in the case of these special public service corporations;
- Instituting forms of regular contacts and cooperation between the Public Service Committee and the CEOs of the corporations on the one hand, and the Board on the other, with both sides having the duty to respond to the Committee's suggestions and proposals;
- Making it mandatory on the Board either to dismiss the CEO whose annual report has been rejected by the Public Service Committee in a duly reasoned decision, or to explain publicly why it has not done so, and what steps are being taken to remove shortcomings identified by the Committee;
- Instituting forms of public accountability on the part of the Board of Trustees, requiring it to report to the public on its plans, including programme plans of the corporations, and to report on their implementation.

The Chief Executive Officers of the Corporations

CONCLUSION

Clearly the rules introduced in Hungary may achieve the opposite effect from that proposed by the CoE Recommendation. They may encourage Parliament and government to seek to ensure that the choice of the President of the Authority, members of the Media Council and of the Board of Trustees makes it possible for them to influence the choice of the CEOs. This will inevitably politicize the whole process and result in the imposition of direct political control over it. This is why it is so important to prevent the creation of what may be a seamless "chain of command" leading from the top to the level of the CEO.

RECOMMENDATION

The following procedures should be introduced for the appointment of the CEOs:

- The CEOs should be elected by an independent Board of Trustees, by way of an open tender, where he or she has to present his or her business plan and programming plan in a public hearing;
- Both appointment and dismissal should take place by a qualified majority;
- The contractual terms should be defined by the Board of Trustees.

Assets and Funding of PSM Corporations

CONCLUSION

The system of asset management and funding has not been created in full. It is also difficult to assess the effects of its introduction, given that so many opportunities for discretionary decision-making have been left open. It can be said, however, that it does not meet a single of the CoE standards cited above.
The financial independence of PSM organizations is seriously undercut by the Broadcast Support and Asset Management Fund, which is totally controlled by the chairperson of the Media Council. The assets of the public service broadcasters are collected into this Fund and the conditions under which the broadcasters may use the assets are defined by the Media Council. The whole system appears to be designed to hamper PSM corporations's finances as much as possible and to deprive them of any security in this matter.

RECOMMENDATION

- The legal fiction of maintaining the licence fee system should be ended. This should be replaced by regulations stating that it is the obligation of the State budget to fund PSM, best by allocating a fixed percentage of GDP for the purpose, with the possibility of providing extra funding if the cost of delivering the remit, as defined in the Public Service Guidelines, is higher than the allocated sum;
- There is no real need for the Broadcast Support and Asset Management Fund. The law should be changed. Assets of the broadcasters should be allocated to the broadcasters themselves or to the Public Broadcasting Foundation, so that the broadcasters can manage their assets and finances independently. The Media Council and the Public Service Foundation should receive budgetary allocations directly from the State budget;
- A separate fund may be created for the sole purpose of providing subsidies for the production and transmission of public service content by independent producers and commercial broadcasters. The monies used for that purpose should not be taken out of the funds earmarked for the financing of the (greviously underfunded) PSM corporations;
- When the Public Service Guidelines are prepared, the cost of meeting the requirements they lay down should be calculated and that amount of money should be made available to the PSM organizations for that purpose. The law should provide for the preparation of an expenditure budget, based on cost of fulfilling the public service programming remit, as developed in the Public Service Guidelines;
- The law should put the State under an obligation actually to allocate funds necessary to cover the approved budget.

I. SCOPE OF REGULATION

I.1 Material Scope

The material scope of Bill T/363 (and indeed the whole package) is defined in Article 2: "the act's effect extends to all kind of media content, for example printed press, traditional radio and television services, non-linear media services and internet content that qualifies as media content".

At first glance, this represents an interesting response to the two processes that are reshaping the media and mass communication generally: (i) the deinstitutionalization of mass communication (anyone, not only professional media organizations, can be a mass communicator) and (ii) the digitalization and hence "dematerialization" of media content (i.e. its separation from its usual physical form: roll of film, book, tape, etc.), thanks to which it can be delivered via different platforms.

However, this has also other implications.

Definition of "media content"

This approach seems to take its cue from the extension of scope of the Television Without Frontiers Directive in the AVMSD, but Bill T/363 adopts a much broader approach. "Media content" is defined in article 1 (5) as "*Content provided by any media service or in printed or Internet-based press publications, whose content is the editorial responsibility of some person, and whose primary objective is the delivery of content consisting of text and images to the public for the purpose of providing information, entertainment or education through electronic telecommunication networks or in a press publication*". "Content provider" is defined as "*the provider of media services or other media content*".

Given the volatility and the fast pace of change in the new technologies and new communication services, and given that all "media content" (including, as we will see, blogs, private Internet sites, etc.) is to be subject to regulation within the same regulatory regime, the question immediately becomes whether this approach is well-founded, offers legal certainty and creates an appropriate regulatory framework.

Amendment 17 proposes a shorter definition of "media content" ("*Media content: Content provided by any media service or in printed or Internet-based press publications"*).
This has the advantage of narrowing the scope of the term and leaving out many types of private Internet content providers. On the other hand, it extends the range of media content (by leaving out the qualification, also included in AVMSD, that such content is distributed "*for the purpose of providing information, entertainment or education").* **So, the amendment goes in two contradictory directions: recognizing as media content, in the traditional way, only that**

delivered by media outlets, while at the same time removing any constraints what types of content, serving what purpose, can be classified as media content.

It also proposes a definition of a "press publication" ("*Press publication: the individual issues of daily papers and other periodicals, Internet newspapers and news portals whose content is the editorial responsibility of some person, and whose primary objective is the delivery of content consisting of text and images to the public for the purpose of providing information, entertainment or education in a printed format or through electronic telecommunication networks*"). These proposals should, to some extent, be welcome, but they still do not go far enough to eliminate problems and major objections to the approach taken in Bill T/363.
In the definition of material scope (Article 2: "*This Act is applicable to all media content, for instance the printed press, traditional radio and television broadcasting as well as on-demand media services and Internet content that constitutes media content*"), the words "for instance" indicate that this is not an exhaustive list of media outlets and formats which are to be covered by the package. It is indeed impossible to develop such an exhaustive list. **Thus, the material scope becomes undefined and open-ended, leaving almost full discretion to the regulator to extend regulation in the future to any media formats the authority would see fit.**

Amendment 17 represents progress in reducing the range of content services to which the Act could be applicable ("*This Act is applicable to all media content, including printed and Internet-based press publications, traditional radio and television broadcasting and on-demand media services*"), but by simply replacing "for instance" with "including" still leaves the scope undefined and open-ended for the future.

Also the definition of "media content" itself is inadequate in distinguishing media content from other content and in providing clarity and legal certainty, for the following reasons:

- It fails to note that only services that disseminate content regularly (always a feature of the definition of media) can be recognized as media (this element is present to some extent, but not clearly enough, in Amendment 17). As a result, the law's scope is extended also to one-off cases of distribution of content, as long as it offers information, entertainment or education. As this can be true in one way or another of most content, according to the draft practically all content is media content

- It fails to mention the editorial process (involving securing an in-house and/or external supply of content, gate-keeping and selection of content; editorial and processing of content; decisions about presentation, structuring and packaging; preparation for distribution) as a constitutive feature and criterion whether we have to do with a media outlet or not. Therefore, the law, when adopted, could well violate Article 12 of "Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market", which exempts "mere conduit" from liability for the information transmitted (see also recital 23 of AVMSD). Nor will it be in line with recital 16 of AVMSD, exempting from the concept of "audiovisual media service" services consisting of the provision or distribution of user generated audiovisual content for the purposes of sharing and exchange within communities of interest;

- It fails to mention the intention to reach, and availability to, the general public (the draft law, and Amendment 17, speak of "the public", not "the general public") as a feature of media services, justifying policy and regulatory treatment commensurate with the possible impact of a particular service (see also the next comment);

- It fails to mention influence on public opinion as a necessary and decisive criterion for recognizing a service as a media service (according to recital 12 of AVMSD, audiovisual media services are "*mass media, that is,[they] are intended for reception by, and […] could have a clear impact on, a significant proportion of the general public*"). Precisely this feature of a content service provides the rationale and justification for regulation. In Bill T/363, this criterion is not mentioned, meaning all content will be subject to the same level of regulation, regardless of how minuscule or even non-existent its audience will be;

- The concept of "editorial responsibility" is not defined in this particular context, so it is not clear whether or not this is understood as in Art. 1(c) of the AVMSD ("*exercise of effective control both over the selection of the programmes and over their organisation … does not necessarily imply any legal liability under national law for the content or the services provided*"). If so, then this is not satisfactory as a criterion for recognizing content as media content, since normally publishers and broadcasters are obliged to accept full responsibility and legal liability for content, usually resulting in a careful editorial process. Amendment 17 proposes a definition of "editorial responsibility in Article 1 ("*Editorial responsibility: substantial responsibility accruing in the course of the selection and compilation of media content*"), but this is close to the AVMSD definition and, as such, insufficient. This definition differs from the description (but not really definition) contained in Article 21 ("*Within the constraints of legislation, content providers make decisions concerning and are responsible for the publication of media content*") which actually suggests editorial liability for contents. Until these inconsistencies are resolved, the Bill does not provide legal certainty on the question of editorial responsibility;

- While the draft law properly allows for content produced or assembled by non-professional content providers to be covered by the definition, it fails to mention that the requirement of observance of professional and ethical standards should be applied in recognizing content as media content, in distinction to gossip or rambling thoughts disseminated by a blogger.

Definitions proposed in this draft law would in fact extend the scope of the law, and the regulatory regime it is part of, practically to all Internet content, with the exception of the most subjective or purely artistic forms of self-expression. This goes far beyond what the international community has come to regard as an appropriate, justified and workable approach to Internet content regulation.

The international community: regulatory restraint in the face of unpredictable change

In short, Bill T/363 does what the European Union has deliberately refrained from doing with the AVMSD. It was intended at one stage to be a "content directive", covering all audiovisual

Internet content. However, as many Member States opposed this plan, its scope was limited to television and TV-like media services, regardless of the delivery platform. A great deal of care was taken in the directive precisely to define (in both a positive and negative manner) which services would be covered by the directive, and which areas of Internet content would not. As we have seen, this is not the case with Bill T/363.

The 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik, called for "the establishment of criteria for distinguishing media or media-like services from new forms of personal communication that are not media-like mass-communication or related business activities". The drafters of Bill T/363 may have tried to do that, but if so, they have not achieved their aim.

The OSCE Permanent Council in its Decision No. 633 "Promoting tolerance and media freedom on the Internet" decided that "*Participating States shall take action to ensure that the Internet remains an open and public form for freedom of opinion and expression*". The CoE has only recently launched reflection on a new notion of media, its definition and the policy and regulatory framework, if any, to be applied to new media. A similar call for reflection and debate was launched by the European Parliament with respect to blogs. Originally, the MEPs wanted to take a more active stance on blogs, but refrained from doing so and in the 2008 "Resolution on concentration and pluralism in the media in the European Union" (2007/2253(INI)), called for "*an open discussion on all issues relating to the status of weblogs*".

Some countries (like the US and Canada) refuse to regulate Internet content even when they have legal title to do so. Australia applies the broadcasting regulatory regime to the Internet, but relies on self- and co-regulation to implement it. The international community is generally wary of imposing traditional regulatory regimes on Internet content, preferring to promote self- and co-regulation. The Council of Europe Committee of Ministers in its 2003 "Declaration on freedom of communication on the Internet" called in Principle 2 on Member States to encourage self-regulation or co-regulation regarding content disseminated on the Internet (see also "Recommendation Rec (2001) 8 of the CoE Committee of Ministers on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection Against Illegal or Harmful Content on New Communications and Information Services").

The European Parliament and Council in their 2006 "Recommendation of the European Parliament and of the Council on the Protection of Minors and Human Dignity and on the Right of Reply in Relation to the Competitiveness of the European Audiovisual and On-Line Information Services Industry", note that "*on the whole, self-regulation of the audiovisual sector is proving an effective additional measure*". They acknowledge that self-regulation may not be sufficient to protect minors from messages with harmful content, but call for any measures taken to offer such protection to strike a balance with the protection of individual rights and freedom of expression. These measures should involve cooperation between the regulatory, self-regulatory and co-regulatory bodies of the Member States. Significantly, it also calls for the particularities of each medium to be taken into account in any action taken.

CONCLUSIONS ON MATERIAL SCOPE

Bill T/363 creates a seamless content regulation regime for traditional and new Internet media content, **administered by one body and applying the same criteria to all these cases**. It does so in a way that while ostensibly covering only media services, the provisions of the law could in fact be applied practically to all Internet content. It defines the material scope of regulation in an imprecise, open-ended way, giving the National Media and Telecommunications Authority and the Media Council discretionary power to apply the regulatory regime to any future services it sees fit.

The printed press and the Internet have so far been virtually free from content regulation. **This law, if adopted in the present form, will significantly change their situation, subjecting them to a content regulation regime almost without precedent in democratic countries. This constitutes unwarranted and unjustified interference with freedom of expression and of the media, and may create conditions for suppression of this freedom.**

RECOMMENDATIONS ON MATERIAL SCOPE

The draft law requires urgent revision:

1. The serious flaws in the definition of its scope should be removed, so that it relates (in a way that provides legal certainty) primarily to broadcasting and audiovisual media services (in line with AVMSD) and **retains only general provisions for the print media and for media services on the Internet**.
2. The concept of "media content" should be replaced with the term "media services", meeting the criteria listed above (whether or not provided by professional communicators), to avoid "mission creep", in that regulators could successively extend their scope of activity;
3. **A graduated regulatory system** (taking as an example the AVMSD system of introducing a clear difference between levels of regulation for linear and non-linear services) should be introduced, adjusting the degree and methods of regulation to the particularities of each type of media service.
4. Any regulatory regime with regard to the printed press and Internet-delivered media services (unless they are covered by the AVMSD) **should rely primarily the civil and penal code and additionally primarily on self-regulation and co-regulatory schemes (with regulatory intervention reserved only for cases when they cannot be fully effective) , involving the Media Council in multi-stakeholder cooperation with trade and professional associations** as co-regulators, administering codes of conduct and enforcing jointly developed standards and rules.
5. It is not possible to develop "future-proof regulation" in this field. Any such attempt is bound to be ineffective and unworkable. The AVMSD is expected to have a life of 10 years, at best, with further changes needed after that. This is why **internationally accepted standards and the state of international debate on new and not fully defined media services and the policy and regulatory approach to them should be closely followed and applied**. Otherwise, the law, though seeking to cover everything, will leave many new media and services undefined and unregulated, ceding excessive powers to the Authority and Media Council to fill the gaps at their own discretion, and leaving their policies and regulatory

practice open to legal challenge, as they will find no clear basis in Bill T/363 and other legislation.

I.2 Territorial Scope

Definition of territorial scope

The territorial scope of the draft law is defined in Article 3 in a way modelled on Article 2 of AVMSD, but extended to all "content providers", i.e. also radio broadcasters, press publishers and Internet content providers.

The draft law adds two provisions in Article 3:

„(5) The present Act is also applicable to content services provided in other countries if a significant part or the entire content provision service is aimed at the territory of the Hungarian Republic, provided this is rendered possible by the provisions of Directive 89/552/EEC on audiovisual media services and the practice of the European Court, and if the rule whose application is intended serves to maintain media pluralism or some other important issue in the public interest.
(6) The present Act is also applicable to the persons and ventures distributing media content within the territory of the Republic of Hungary, and the distribution of media content using equipment installed within the territory of the Republic of Hungary.

Amendment 17 proposes basically the same text, but without mention of "the European Court" and replacing "media pluralism" with "diversity of media". The reason for the first proposed change is not clear (in any case it is not immediately obvious, at least in the English translation, which European Court is meant). Also, because neither "media pluralism" nor "media diversity" are defined in the Bill or Amendment, the significance of this proposal remains to be established. However, the issue itself is crucial in terms of media policy (see II.3 below, where Council of Europe definitions of both concepts are referred to).

The AVMSD (and indeed the European Convention on Transfrontier Television, to which Hungary is a party) contains clear provisions on jurisdiction, the place of establishment and the prevention of double jurisdiction (see Article 2, AVMSD), preventing the receiving country from imposing its legal system on the transmitting country. Therefore, para. (5) cannot be interpreted as applying to audiovisual media services.

Internet content "aimed at" Hungary

It becomes clear, therefore, that paras. (5) and (6) are primarily intended to apply to Internet content. By virtue of para. (5), Hungarian jurisdiction would be extended to any Internet media content provider, wherever in the world he or she may be, as long as "*a significant part or the entire content provision service is aimed at the territory of the Hungarian Republic*".

Even if practical application of para. (5) were legally permissible and possible to implement (and neither is the case), it would still be unacceptable. The grounds for interfering with freedom of expression defined it in are so vague and all-encompassing (such action is to "*serve to maintain media pluralism or some other important issue in the public interest*") as to justify any action against any content provider. This fails the test of Article 10 (2) of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, which carefully defines the limited number of reasons for which such action could be taken.

While there may be some indicators of where the intended audience of Internet content is (language, advertisements addressed to consumers in one country, etc.), it will be difficult from a legal or technical point of view to prove where the content is "aimed at". It is difficult enough to apply this concept to transfrontier television (for which it was originally invented); the difficulties will be multiplied in the case of the Internet. This may leave any action taken on the basis of Article 3 (5) open to legal challenge. More importantly, such extension of jurisdiction to content providers in other countries as envisaged in draft Bill T/363 does not appear to be covered by international law. The 1988 "Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (88/592/EEC), relates precisely to civil and commercial matters, not to content regulation. The Cybercrime Convention in Article 22 littera d. says that "*Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Article s 2 – 11 of this Convention, when the offence is committed […] by one of its nationals, if the offence is punishable under criminal law where it was committed, or if the offence is committed outside the territorial jurisdiction of any State*". **It is most unlikely for any legal system in a democratic country to regard distribution of content referred to in para. (5) as a punishable offence. In any case, Bill T/363 is meant to apply this provision to all content providers, and not just to Hungarian nationals operating abroad as Internet content providers. Other countries are most unlikely to accept that Hungarian jurisdiction can extend to their citizens.**

Any chance of using this provision to prosecute content providers operating from abroad must be close to zero, especially if they take the simplest precautions against being identified. Therefore, the real intended practical effect of this provision can only probably be the creation of legal grounds to filter or block the access of Hungarian users to unwanted Internet content provided from home or abroad, e.g. by requiring Internet service providers to do so. The draft law fails to specify whether this could happen by an administrative decision of the Authority or the Media Council, or whether a court order would be required. In any case, such action would most likely violate Article 3 of "Directive

2000/31/EC of 8June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market", with its careful definition of the circumstances and criteria which must be met for such action to be taken, again under strict international supervision.

The CSCE, in its Meeting of the Conference on the Human Dimension of the CSCE in Moscow declared the public should enjoy freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts.

Such measures would also run directly counter to Principle 3 of the CoE "Declaration on freedom of communication on the Internet", stating that "*Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries*" It would also be difficult to find justification for filtering content for reasons specified in para. (5) in "Recommendation CM/Rec(2008)6 of the CoE Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters". That Recommendation calls on CoE member states to:

- refrain from filtering Internet content in electronic communications networks operated by public actors for reasons other than those laid down in Article 10, paragraph 2, of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;
- to take such action only if the filtering concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body, in accordance with the requirements of Article 6 of the European Convention on Human Rights;

Bill T/363 does not provide any guarantees that these principles would be observed, leaving the matter of interfering with the flow of information and of access to it at the discretion of the regulatory bodies

Internet content uploaded from Hungary

Article 3 para (6) would extend the scope of Bill T/363 to "*the distribution of media content using equipment installed within the territory of the Republic of Hungary",* e.g. to a situation when a person (of any citizenship) uses a computer or similar equipment on Hungarian territory to upload content onto the Internet.

Again the question becomes of the intended practical effect of this provision. That can only be the creation of a system of **supervision/censorship to prevent "unwanted", but only vaguely defined (which again runs directly counter to Article 10 (2) of the European Convention on Human Rights) content from being disseminated via the Internet from Hungarian**

territory. Enforcement of this system would require creating a widespread system of surveillance to identify and take measures against anyone regarded as responsible for such action. While this may not work in practice, it is bound to induce caution and self-restraint, or self-censorship on the part of Internet users uploading content from Hungary, thus reducing the range and volume of content unwanted by the authorities being disseminated via the Internet out of Hungary.

CONCLUSIONS ON TERRITORIAL SCOPE

In a very unusual approach, the draft law would establish world-wide territorial scope for itself, at least as far as Internet content "aimed at" Hungary, and originating technically from Hungary, is concerned. In both cases, the objective appears to be to gain the ability to take action against providers of vaguely defined "unwanted" content. In the first case, this could involve seeking to prosecute them abroad and blocking access to such content coming in from abroad. In the second case, the intention seems to be to produce a chilling effect on users seeking to disseminate content worldwide that might turn out to be unwanted by the authorities. Under this law, Hungary would give itself powers which it cannot effectively apply, but which would require instituting a system of surveillance, supervision and possible repression that are unacceptable in a democratic country.
This proposed system represents a serious challenge to freedom of expression on the Internet and would, if adopted, be in obvious violation of international law.
This does not apply to audiovisual media services, as defined in the AVMSD, as its provisions are observed.

RECOMMENDATIONS ON TERRITORIAL SCOPE

Provisions on territorial scope, especially with regard to the Internet, should be thoroughly revised in line with international law. Article 3 (5) and (6) should be deleted, as is already proposed with reference to para. (6) in Amendment 17.

III. FREEDOM OF EXPRESSION AND CONTENT REGULATION

II.1 Freedom of (transfrontier) broadcasting

According to Article 4 (1) of Bill T/363, "*The legal system of the Republic of Hungary respects and protects the freedom of the press and ensures its diversity. Everyone has the right to express their opinions by means of the media*". This general principle appears to be contradicted by Article 25 of Bill T/363. It repeals Article 3 (1) of the Act on Radio and Television Broadcasting (RTBA), which says: *broadcasting can be exercised freely in the Republic of Hungary,*

information and opinion shall be forwarded freely through broadcasting, and domestic or foreign programmes intended for public reception shall be received freely".

It is rather difficult to imagine the practical effect of a legal provision that repeals the right to the free exercise of broadcasting and the right to disseminate information freely through broadcasting (and retaining only the free publishing of opinions). Even if it could be argued that the general principle is already expressed in Article 4 (1) of Bill T/363, that could not explain the provision that repeals the right of free reception of domestic and foreign programmes intended for public reception. In doing so, Hungary denies commitments it has undertaken under the European Convention on Transfrontier Television, the AVMSD directive and a host of other international documents, all of which guarantee the free reception of transfrontier broadcasting.

CONCLUSION ON FREEDOM OF BROADCASTING

In addition potentially to reducing the range of Hungarian content providers able to launch their activities (see below), Bill T/363 could serve the purpose of depriving Hungarian audiences of access to information available via the Internet media (see above) and from broadcast media, especially transfrontier broadcasting, though Hungary could hardly do so under the international commitments that it has undertaken.

RECOMMENDATION ON FREEDOM OF BROADCASTING

In order to remove any doubt as to the legislator's intentions and to prevent the appearance of contradiction and conflict between different parts of the legal framework in force in Hungary, Article 25 of Bill T/363 should not annul Article 3 of RTBA.

II.2 Registration

Article 5 of Bill T/363 says that *"The commencement of the provision of media services and the publication of media content may require registration by the authorities"*. Article 22 makes it clear that the "may" is misleading because it imposes an obligation to register: *"The content providers falling under the present Act shall register with the authority supervising the media"*.

Thus, registration becomes a key condition that must be met to begin exercising the right to free expression through the media. As this would be the duty of all content providers, this obligation could fall also on internet communicators like bloggers and providers of any media-like content.

Amendment 18 introduces a safeguard in this respect: ("*In case of media content whose registration is not stipulated by other legislation, the corresponding rules shall be stipulated by an Act of Parliament*"). In principle, this should be welcome, as it would prevent arbitrary extension of the registration system. However, it does not go far enough, as it does not challenge the very principle of the need for registration. Moreover, and most importantly, since so far there

has been no system of registration (only of notification), the intention behind this amendment is not clear.

"Registration" would replace the system of "notification" now in force in relation to the printed press and cable channels. "Notification" is a purely administrative procedure, requiring no action on the part of the authorities and allowing the content provider to begin operation immediately upon performing notification. "Registration" creates a new situation in that the putative provider must await the decision of the authorities and the decision may be negative, i.e. registration may be denied. **The procedure may thus create a legal and administrative barrier preventing a person or company from actually becoming a content provider and being able to distribute content. The authorities may also decide to cancel the registration of a content provider (such a competence is not mentioned in Bill T/363 or the Institutions Act, but equally there is no provision preventing such action), thereby forcing them to cease operation.**

International opinion is clearly opposed to the introduction of such systems – not only for new communicators, but also in some cases for traditional ones. In a "Joint Declaration" issued in December 2003, the UN, OAS and OSCE special mandates on freedom of expression and media freedom stated: „*Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical*"
.
Article 19 has called for the abolition of a registration system, introduced in Kazakhstan's Mass Media Law, arguing that **such regimes are nonexistent in democratic countries**.
In its Declaration on the Freedom of communication on the Internet, the CoE Committee of Ministers stated that "*the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect*".

Let us also mention that the creation of a system of enforcing this provision, and thus identifying and sanctioning content providers (especially on the Internet and particularly those operating in foreign countries and aiming their content at Hungary) who operate without registering, would require the establishment of an extensive monitoring and surveillance system. It could hardly be effective, anyway, making these provisions unenforceable to a large extent.

CONCLUSION ON REGISTRATION

The registration system would create a legal, administrative and potentially also a political barrier to the entry of new content providers into the media landscape, or to the extension of activities by existing providers. It could also be used to silence existing media outlets. While licensing of terrestrial broadcasters must still be maintained, the introduction of the system of registration and its extension to Internet communicators is unacceptable and would place Hungary alongside authoritarian countries seeking to control all forms of social communication.

RECOMMENDATION ON REGISTRATION

Article 5 and Article 22 Bill T/363 should be deleted, as already proposed with regard to Article 22 by Amendment 18. The system of notification could be retained under four conditions in relation to the printed press, online journals, television and radio channels, i.e. provided that the content providers may launch operation immediately after notification; the law clearly specified what information must be filed with the registering authorities and any action preventing a content provider from continuing operation requires a court order.

II.3 Prevention of information monopolies

Alongside the question of registration, freedom of expression in Hungary will also be affected by the amendment of the Hungarian Constitution in T/359, removing from it part of Article 61 (4) of the Constitution, which listed a potential law about prevention of information monopolies as one of those requiring a two-thirds majority of Members of Parliament.

If a media market is highly concentrated and controlled by a monopolist, or – more likely – an oligopoly of media operators, then obviously putative new media outlets will find it more difficult to enter the market and provide information and other content. This can deprive many new voices of an opportunity to be heard.

True, the protection of the "diversity of the press" was added to Article 61 (2) of the Constitution. Also, the amended RTBA prescribes the following task for the Media Council: "*[it] protects and maintains freedom of speech through dismantling information monopolies, preventing the formation of new ones and promoting the market entry and the independence of broadcasters. For that purpose, it supervises the media market and adjoining markets, analyses existing competition in the markets concerned and its efficiency, identifies the players in the individual markets concerned and makes the official anti-monopoly decisions stipulated in the Act"*. However, it is not sufficiently clear whether this applies to all media markets, or to broadcasting alone.

The Constitutional Court (CC Decision no. 1/2007. (I. 18.) AB) has stated: "*2. The prevention of creation of information monopolies is a constitutional aim. [Constitution Article 61, paragraph (4)] Following the rapid development of broadcasting technology, 'information monopolies' mean first of all danger of creation of 'opinion-monopolies'. Hence the Constitutional Court accepts the maintenance of the opinion-pluralism as a legitimate aim".*

The prevention of information monopolies is no longer a constitutional aim now. It has been replaced by "protection of the diversity of the press" which is a much softer and less well defined objective. This deprives the Media Council of much-needed support in pursuing this goal which will provoke strong opposition from media operators determined to defend their position and capable of mounting an effective campaign against any such plans. In this sense, efforts to curb media concentration will be much weakened..

The necessity of anti-monopoly rules in the media field is stressed by the UN-OSCE-OAS-ACHPR "Joint Declaration on Diversity in Broadcasting" (2007) as a means to diversity.

"Recommendation Rec(2007)2 of the CoE Committee of Ministers on media pluralism and diversity of media content" explains the difference between promotion of "structural pluralism" of the media, and content diversity. In pursuing the first goal, "*Member states should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public, taking into account the characteristics of the media market, notably the specific commercial and competition aspects. Member states should [also] consider the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets*".

As for "pluralism of information and diversity of media content", the Recommendation calls for an "active policy" in order to ensure that "*a sufficient variety of information, opinions and programmes is disseminated by the media and is available to the public*". The media should be encouraged to "*supply the public with a diversity of media content capable of promoting a critical debate and a wider democratic participation of persons belonging to all communities and generations*". All this calls for active and sustained media policy measures.

CONCLUSION ON PREVENTION OF INFORMATION MONOPOLIES

The constitutional aim of preventing information monopolies has not been replaced by equally effective and forceful guarantees that this goal will be pursued actively and with determination, with full support from the State.

RECOMMENDATION ON PREVENTION OF INFORMATION MONOPOLIES

The part of Article 61 (4) of the Constitution, listing a potential law about prevention of information monopolies among those requiring a two-thirds majority of Members of Parliament should be reinstated.

II.4 Right to information, the obligation to inform

"Appropriate information in relation to public affairs"

According to the newly amended paragraph (3) of Article 61 of the Hungarian Constitution, "*in the interest of establishing a democratic climate of opinion, everyone has the right to appropriate information in relation to public affairs*".

The wording of this paragraph is highly ambiguous.

In its 2004 "Declaration on freedom of political debate in the media", the CoE Committee of Ministers reaffirmed "*the pre-eminent importance of freedom of expression and information, in particular through free and independent media, for guaranteeing the right of the public to be informed on matters of public concern and to exercise public scrutiny over public and political affairs, as well as for ensuring accountability and transparency of political bodies and public authorities, which are necessary in a democratic society"*. The "Declaration" further states that "*Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them*". It proclaims the freedom to criticise the state or public institutions; the freedom of public debate and scrutiny over political figures and public officials; finally freedom of satire.

Other CoE documents formulate standards relating to access to information held by public authorities; access to official documents, media coverage of elections, etc. Similar standards have been defined by other international bodies.

Article 9 of Bill T/363 puts central government and municipal agencies, institutions, officials, persons acting on behalf of authorities or performing public duties under an obligation to assist the performance of the information provision tasks of content providers. Amendment 20 takes this further by clarifying that the "assistance" should take the form of provision of information and data within a reasonable deadline. **However, the Constitution leaves them the freedom to decide what the "appropriate" information is that content providers should gain access to. It is presumably public authorities and administration that will decide what is "appropriate" for the public to know about their own activities. It also presumably the regulatory authorities that will decide what is the "appropriate" information about public affairs for content providers to carry.**

Observance of democratic and international standards could thus be undermined by a way of interpreting the word "appropriate" that would prevent information inconvenient to, or critical of, the authorities or political figures from reaching the public.

CONCLUSION ON "APPROPRIATE INFORMATION"

Depending on how "appropriate information" is interpreted, the public may either be informed fully and objectively, or selectively and tendentiously. In the latter case, both public authorities and administration, and the regulatory authorities would fulfil quasi-censorship functions as gate-keepers preventing some information from reaching the public. The very possibility that the Constitution could allow such a situation to arise without violating its letter and spirit is completely unacceptable.

RECOMMENDATION ON "APPROPRIATE INFORMATION"

The word "appropriate" should be deleted from Article 61 (3) of the Constitution as soon as possible. In the meantime, Bill T/363 should be supplemented to provide an interpretation of the term "appropriate information" preventing its use for any other purpose than to guarantee for the public full, accurate and objective information in relation to public affairs.

Information obligations of content providers

Under Article 13 (1) of Bill T/363, "*It is the task of content providers to provide authentic, fast and accurate information about local, national and European public affairs and about events that are significant for the citizens of the Republic of Hungary and the members of the Hungarian nation*".

This principle is developed in Article 13 (2), which states that "*Linear and on-demand media services shall provide diverse, timely, objective and balanced information about local, national and European affairs in the public interest and events and debated issues that are significant for the citizens of the Republic of Hungary and the members of the Hungarian nation. Failure to provide information about important events of public life may represent an infringement of the obligation to provide information".*

The principle that media audiences and users have a right to information and should have access to such information in the media as defined in the two paragraphs is of course laudable. It should be one of the tasks of the Media Council to make sure that in the totality of content available to the public there should be sources of such information.

Amendment 22 would reformulate this provision in the following way: "*It is the task of the totality of content providers to provide authentic, fast and accurate information about local, national and European public affairs and about events that are significant for the citizens of the Republic of Hungary and the members of the Hungarian nation".* The principle is correct, but as a legal provision this would have no effect, as this is not an actionable requirement: it imposes no specific obligation on anybody and creates no mechanism of accountability for its observance. This is why it would be preferable to turn this in a task of the Media Council which has the necessary instruments of promoting this goal in ways adjusted to the features of particular media outlets.

The imposition of such an obligation on all content providers (possibly including, depending on how the issue of material scope is resolved, bloggers and other unprofessional communicators on the Internet and elsewhere who could be classified as providers of media content) amounts to *ex ante* content regulation, and as such is unacceptable in principle because it is actually the opposite of freedom of expression and freedom of the media. Such programme requirements could only be justified in the case of public service broadcasters.

In the case of *Refah Partisi (The Welfare Party) and Others v. Turkey* (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98), the European Court of Human Rights said: "*the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention*." This principle was amplified in the Court's ruling in the case of *Özgür Gündem v. Turkey* (Application no. 23144/93). The Court recalled "the key importance of freedom of expression as one of the preconditions for a functioning democracy". And it added: "*Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals*" (emphases added).

Under Article 13 (1) and (2) of Bill T/363, **the Hungarian State would not be protecting but violating the freedom of expression of content providers by dictating to them what content they should provide** – all the more so that failure to implement this obligation could bring down sanctions on content providers, as is clear from Article 23 of Bill T/363, which says that "*In cases of infringements of the obligations stipulated in Articles 13-20 of the present Act, the system of sanctions and procedures stipulated in the Act on the regulation of the media may be applied as applicable. The official proceedings may be initiated by anyone".*

This is one of the traps mentioned above. These provisions would give the regulatory bodies discretionary, indeed arbitrary, powers to sanction content providers, based on their own assessment of whether or not the information distributed by a content provider is "authentic", "fast", "accurate", " diverse", "timely", "objective" and "balanced". They could also form their own judgment as to which events are, and which are not, "significant" or "important". All these are imprecise, qualitative criteria which are open to widely differing interpretations.

Regulatory authorities would thus have a free hand in invoking their powers to sanction content providers (but, under Article 23 (2) – also content distributors, which means that contrary to established principles they would be covered by media law) practically at will. Uncertainty as to what regulatory treatment to expect and what editorial content could be found objectionable by the regulator could create an atmosphere of fear among content providers, encourage self-censorship and have a serious chilling effect on the media.

Under Amendment 22, the last sentence in Article 13 (2) (*Failure to provide information about important events of public life may represent an infringement of the obligation to provide information")* would be deleted. As a symbolic gesture, this would be welcome, but its practical effect could be nil, if nothing is done about Article 23 of Bill T/363 (cited above).

In addition to being unacceptable in principle, these provisions are also impracticable and unenforceable, and could actually leave the Hungarian State open to legal challenge and claims for material damages:

- adoption of these provisions would require regulatory authorities unilaterally to change programme requirements contained in licenses to broadcast, potentially imposing on many broadcasters expensive obligations that could undermine their business models. This is true especially of thematic or formatted radio and television channels that may now carry no

information at all, and would need to develop news-gathering capabilities and news departments and leave aside broadcasting time for news programmes. This unilateral action would mean that broadcasters would be deprived of rights acquired under valid licenses and would have to meet onerous and expensive new tasks. **This could be grounds for legal action against the State.**

- In the case of unlicensed content providers (the printed press and Internet content providers), the need to impose and enforce such an obligation would require the creation of a legal and administrative system enabling such action and then a system of monitoring and supervision. Especially in the case of Internet content providers, including foreign ones aiming their content at Hungary, this would be expensive and could hardly be successful. **And in any case would go beyond anything acceptable in a democratic media system;**
- it is impossible to require nation-wide and satellite channels to carry sufficient information about local events, and to require regional and local media to provide sufficient information about "country-wide, national, European events".

CONCLUSION ON INFORMATION OBLIGATIONS

Obligations imposed on content providers under Article 13 (1) and (2) of Bill T/363 represent *ex ante* content regulation and are therefore unacceptable as violating, and not promoting freedom of expression. Given that the obligation is impossible to implement for most content providers, as well as the wholly disproportionate penalty of possibly withdrawing the consent to provide information that can be imposed by the regulatory authorities, this system cannot be described otherwise than a "sword of Damocles" hanging over every content provider and capable of falling at any moment, depriving the content provider of the right to continue operation.

RECOMMENDATION ON INFORMATION OBLIGATIONS

Articles 13 (1) and (2) should be deleted as a violation of media freedom and to free content providers from an obligation most of them cannot meet. Accordingly, mention of Article 13 should be deleted from Article 23 of Bill T/363. The proposal in Amendment 17 that Article 23 (2) should be deleted deserves support and should be implemented. The general principle expressed in Article 10 of Bill T/363 is sufficient for the purpose of enshrining the right of the public to such information. The Media Council could be given the task, as it implements its media and licensing policy, to ensure that the type of information referred to in Article 13 (1) and (2) is easily available to the general public from the totality of content at the disposal of the public.

An additional issue is that while Article 23 mentions *the system of sanctions and procedures stipulated in the Act on the regulation of the media*, in fact that part of the Bill is missing. Parliament is being asked to adopt a law which specifies obligations binding on content providers, but does not specify what penalties they would incur in case of failure to meet them. This is one more reason not to subject this Bill to parliamentary procedure before the missing part has been provided, while most of the Bill is thoroughly reviewed and revised.

Right of Reply

Another new feature of content regulation that imposes excessive obligations on content providers is represented by Article 12 (1) of Bill T/363 which extends the right of rectification into a full "right of reply": "*If in media content, false representations are made or disseminated about a person, or if facts associated with a person are presented in a false light, the person concerned may demand the publication of a reply that indicates the falsehoods and the unfounded statements in the original communication as well as those facts that are presented in a false light along with the actual facts of the matter"*. Article 12 (2) applies this right of reply also to any media content that infringes on somebody's honour or human dignity. By the same token, this regulation would be removed from the Civil Code to media legislation.

This means that the right of reply is extended from correcting potentially false statements of fact to responding to expressions of opinion – also on blogs and other Internet content – within considerably shorter deadlines than now.

For this reason, most international documents recognize only a right to rectification. The right of reply set out in Article 23 of AVMSD applies only to assertion of incorrect facts, and not opinions. The CoE "Recommendation Rec(2004)161 on the right of reply in the new media environment" states that "*Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal right*". The Recommendation allows the medium operator to refuse to publish a reply for a number of reasons, including "*if the reply is not limited to a correction of the facts challenged*"

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"Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry" accepts the exercise – also through co-regulatory or self-regulatory measures - of the right of reply ("*by any natural or legal person, regardless of nationality, whose legitimate interests, in particular, but not limited to, reputation and good name, have been affected by an assertion of facts in a publication or transmission*") in such online media as on-line such as newspapers, periodicals, radio, television and Internet-based news services, and taking into account the particularities of each medium.

CONCLUSION ON THE RIGHT OF REPLY

This new approach to the right of reply can be recognized as reducing the scope of editorial freedom by obliging content providers to publish a potentially unlimited number of replies to statements of opinion. This could overload publications and media with such content, limiting the space for other editorial content. As such, it constitutes a case of interference with media freedom. The extended right of reply to statements of fact and opinions is usually introduced in countries where political figures and public officials refuse to recognize the principle from the

CoE "Declaration on freedom of political communication in the media" that they are "*subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions*".

RECOMMENDATION ON THE RIGHT OF REPLY

Article 12 (1) and (2) of Bill T/363 should be wholly revised in conformity with CoE and EU standard-setting documents on the right of reply, primarily by reducing the scope of the right to that of rectification. As concerns para. 2, this – as envisaged in Amendment 21 – should mean the deletion of this text.

Hate speech

Article 17 of Bill T/363 states that "*media content should not be capable of inciting hatred against any persons, nations, communities, national, ethnic, linguistic or other minorities, or any majority, or any church or religious group; or insulting any community, whether openly or implicitly"*.

At present, the printed and online press is subject only to the general rules of the Criminal Code: (§ 269). As interpreted by Constitutional Court, this section should apply only in cases when the imminent danger of violating individual rights is present as a direct result of the inciting words. Rules of the Civil Code allow only individual complaints for persons infringed individually in their personal rights.

According to the OSCE Permanent Council Decision No. 633 on "Promoting tolerance and media freedom on the Internet", OSCE would issue early warning when laws or other measures prohibiting speech motivated by racist, xenophobic, anti-Semitic or other related bias are enforced in a discriminatory or selective manner for political purposes. As internet content monitoring is not technically possible, **any strict content rules** – including those on hate speech – **can be enforced only in a discriminatory manner**.

Under the European Convention on Human Rights, a key criterion of whether a legal provision or an action does or does not violate freedom of expression is whether it is necessary in a democratic society. In light of this, it is doubtful whether protecting a church itself, or a majority against incitement to hatred are legitimate aims in a democratic society. There is no precedent of such in the practice of the European Court of Human Rights. On the contrary: in the case of Giniewski v. France the Court found that the sanctions imposed on a journalist who criticised the Papal encyclical „Splendor of the Truth" dissuaded the press from taking part in the discussion of matters of legitimate public interest, therefore constituted a violation of Article 10.

The specific protection of a church at the expense of restricting free speech is not necessary in a democratic society. The same is true of protecting "the majority", as such a provision may be applied in a spirit of nationalism. Action under these provisions would not be proportionate to

the benefits of the provision, because it would restrict or prevent public debate on legitimate topics.

CONCLUSION ON HATE SPEECH

The new rule would introduce a restriction stricter than any other in the current legal system. It would add churches, other nations and "any community" to the scope of protected subjects and extend the obligation to printed press and online content. Even unintentional insult or incitement to hatred would be sanctioned: not only media content that is *directed to insult or exclusion, etc.* but also one which is *capable of insulting, excluding, etc.* is prohibited.

RECOMMENDATION ON HATE SPEECH

General rules on insult and inciting hatred apply to all media, including internet-delivered media, but those should be applied by courts. The role of the Media Council should be limited to the broadcast media.

The provision should be retained in its present wording in the Criminal Code, as no specific restrictions, administered by the Authority, are needed or justified in the case of the printed press and online media. If Article 3 (3) of the Hungarian RTBA is retained, it should be revised to avoid an over-extensive definition of "hate speech" contained in it, leaving too much room for discretionary interpretation of the term. It should follow the Council of Europe "Recommendation No. R (97) 20 On 'Hate Speech'", which defines the term as follow: "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".

III. THE NATIONAL MEDIA AND TELECOMMUNICATIONS AUTHORITY

III.1 Converged Regulator or a Federation of Officials?

The Institutions Act (former Bill T/360) brings the former telecommunications and broadcasting regulatory authorities under one roof and gives them a joint head and office.

That required the resolution of a number of sensitive issues of a political and structural nature. We will examine how that was dealt with below. We begin with some comments on whether the organizational and substantive design of the Authority fulfills the promise of the modernization of the regulatory system to make it capable of discharging its tasks in the convergent digital media landscape.

Dismantling the two hitherto existing regulatory authorities and creating a new, purpose-built, convergent one would have been a much better way of achieving this aim, enabling the new body to develop policy and regulation in a comprehensive manner. Instead, a fairly mechanical merger was conducted, potentially retaining the separate mindsets and legal and institutional cultures of the two bodies within one organizational framework, not to mention the fact that it is also a marriage of two different political logics: government oversight over the telecom part and parliamentary oversight over the media part within one and the same organization. Unless a special effort is made, the much-needed fusion of telecom and media perspectives, facilitating a convergent approach to the two areas, will be very difficult to achieve.

According to the amended Act no. C of 2003 on electronic communications (ECA), the Authority has the following units with their "independent scopes of authority": the Chairperson, , the Media Council (described as an "independent legal entity"), the Office of the National Media and Telecommunications Authority and the Government Frequency Management Authority. If each of those bodies does indeed have an "independent scope of authority", then **the Authority is more like a federation of different offices than a convergent or even integrated regulator.**

The decision to create the Media Council as a collective, parliament-appointed body responsible for content regulation was probably motivated by concerns that a situation in which the President of the Authority would single-handedly regulate both telecom and media markets would give one person dictatorial powers over the entire communications scene of huge importance from a democratic, cultural and economic point of view. **Nevertheless, the detailed institutional and organizational solutions adopted in the Institutions Act create just such a situation: the President, appointed by the Prime Minister, and chairing also the Media Council, together with the built-in majority of Council members appointed by the governing party or coalition (see below), will enjoy just such dictatorial powers (see below).**

CONCLUSION ON THE STATUS OF THE AUTHORITY

The institutional design of the Authority will not turn it into a converged regulator and is unlikely to ensure its smooth and effective functioning. It consists of too many bodies that are, at least on paper, supposed to be independent of one another and operate at a distance from one another, linked together only by virtue of having the same person, President of the Authority, in charge. It will probably soon be found that much of the Authority's time and effort will be spent on ensuring coordination and cooperation, and eliminating potential or real conflicts among its disparate parts.

CONSIDERATIONS ON THE STATUS OF THE AUTHORITY

It will not be possible to find a solution to this situation without structural change within the Authority. At first glance, three ideas could theoretically be considered. The first two of these are stopgap solutions:

- The Authority and the Media Council have different chairpersons, with the MC chairperson elected by the members from among themselves. The law creates mechanisms of consultation and coordination between the heads of the two bodies and a mechanism for resolution of conflicts;
- The Authority's President has two deputies: one responsible for the telecom side, the other (who is also the chairperson of the Media Council, elected by the MC members from among themselves) responsible for the media side. The Authority's President cannot dismiss the MC chairperson or overrule the collective decisions of the Council;
- The Authority's structure and organization are completely reformed to make it a truly convergent regulatory authority. In that case, the example of the Italian 9-member *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) could be considered. AGCOM comprises the following organs: the president, the commission for infrastructures and networks, the commission for services and products and the Council. Each commission is a collective body made up of the president and four commissioners. The Council comprises the president and all the commissioners.

III.2 The President of the Authority, the Chairperson of the Media Council

Method of Appointment

According to Article 14(2) of ECA, the President is appointed by the Prime Minister for a period of 9 years. The Authority is "*a central government agency*" and, according to Article 9(1) of ECA "*contributes to the execution of the Government's policy, as stipulated by legislation, in the area of frequency management and telecommunications*". In line with Article 9 (6) of the same law, the Authority is supposed to "*perform its tasks and exercise its scope of authority independently, in compliance with legislation*", though it is hard to see how the two principles can go together. **The President may not, according to the law, be given instructions in relation to his/her actions and decisions associated with his/her office, but if it is the Authority's function to execute government policy, then such policies do become a source of instructions for the President.**

On the other hand, the President appears to enjoy a relatively strong position in that reasons for possible dismissal by the Prime Minister are primarily formal and leave little room for arbitrary decisions in this matter.

The President of the Authority is also the sole candidate for the position of the Chairperson of the Media Council, to be appointed by Parliament by a two-thirds majority – also for a 9-year term of office, with no limit on the terms of office he or she can serve in either position.

Under Article 34 (4) of RTBA, "*If Parliament fails to elect the Chairperson of the Authority to be the chairperson of the Media Council, the Chairperson of the Authority shall still call the sessions of the Media Council and shall participate in those meetings with consultation and chairing rights, but he/she shall not participate in decision-making. The right of the Chairperson of the Authority to call and chair sessions shall commence upon being appointed by the prime minister and it shall remain in effect until the Chairperson is elected the fully authorised chairperson of the Media Council".*

CONCLUSION ON MANNER OF APPOINTMENT

Direct appointment by the Prime Minister is not unusual in the case of heads of telecom regulators. **On the other hand, the manner of appointment of the Media Council Chairperson amounts to nothing less than <u>government capture of Parliament</u>**. Parliament is left no choice but to vote for the Prime Minister's candidate. Moreover, should it fail to elect that person, its decision will be disregarded in the sense that the President would still chair meetings of the Media Council (with a voice, but not a vote) and the only option left to Parliament would be eventually to elect that same person to this position – or leave the position unfilled, thus considerably weakening the MC. This is very likely if the governing party/coalition does not have a two-thirds majority in Parliament. **Then, the solution designed to promote the development of consensus on the chairmanship of the MC could easily turn into an opportunity for obstruction by opposition parties.**
The constitutionality of this solution could be open to question, given that under Article 19 (1) of the Constitution "*The Parliament is the supreme body of State power and popular representation in the Republic of Hungary*". By adopting these provisions, in which the executive branch imposes its will on the legislative branch, Parliament can be said to have denied its own role of "*ensuring the constitutional order of society*".

CONSIDERATION ON THE MANNER OF APPOINTMENT

A solution to this problem depends on the choice of solution to the general structural problem discussed above under III.1. In any case, it should sever the direct link between the government and the Authority.

<u>Term of office</u>

9 years is the longest known term of office for members of equivalents of broadcasting regulatory authorities in Europe. According to a Council of Europe 2003 study "An overview of the rules governing broadcasting regulatory authorities in Europe", terms of office range between

4 and 6 years (7 years in the case of Italy), with the possibility of re-election limited in most cases (in the relatively few countries where it is available at all) to one additional term of office.

The President and MC members can be reappointed or re-elected an unlimited number of times. **Even if they have only two consecutive terms of office, that amounts to 18 years, a whole era in terms of political, technological and market developments.**

In theory, of the President/Chairperson, and members of the MC, are competent, apolitical officials, a 9-year term of office, extending over more than two terms of Parliament, could ensure stability to the Authority and the media and telecommunications markets, regardless of the results of general elections. **In practice, the apolitical nature of the President and members of the MC will be difficult to achieve, given the manner of their appointment. Nor can competence always be guaranteed.**

CONCLUSION ON THE TERM OF OFFICE

In a worst-case scenario, these provisions could turn out to be an "insurance policy" that even if a given parliamentary majority is not returned to power in the next election, "its" people will remain in the Authority and the MC. If that is indeed the case, "cohabitation" between the "old" composition of the Presidency, Media Council and governance bodies of PSM and the "new" majority in Parliament and in the government, may put them on a collision course, leading to conflicts. Should another party or coalition be returned to power with a 2/3 majority, this could lead to another change of the law to ensure conformity between the political composition of both sides.

RECOMMENDATION ON THE TERM OF OFFICE

The following changes should be adopted:

- The term of office should be reduced to 6 years at most;
- There should be no possibility of re-election after having served a full term;
- Membership of the MC should be staggered.

<u>The powers of the Authority's President and of the Media Council</u>

The President, appointed by the Prime Minister, has very extensive powers with regard to telecommunications and media, including public service media:

- Regulates telecommunications almost single-handedly;
- Chairs and leads the work of the Media Council (in which he/she has a stronger position than the chairman of the ORTT, due to a change of rules, the reduced number of members and an in-built majority of members representing the governing parties at the time of appointment)

which is responsible for the licensing of commercial broadcasters and for regulation, supervision and oversight of all broadcasters, as well as all media content providers;

- Delegates (with the rest of the Council) two members of the PSM Board of Trustees; nominates two candidates for each position of chief executive officer of a public service broadcaster (and then chairs, and votes, during the meeting when the Media Council recommends those candidates to the Board of Trustees for appointment) and appoints the chairperson and 4 members of the Board of Supervision of the Broadcast Support and Asset Management Fund, managed by the Media Council, to be responsible for exercising some owner's rights and obligations associated with the assets of public service broadcasters and the national news agency, and for (co)funding public service broadcasters. The Media Council also adopts the Public Service Guidelines, providing a detailed description of the public service remit requirements, binding on PSM corporations.

CONCLUSION ON THE POWERS OF THE PRESIDENT OF THE AUTHORITY

In short, **there is not an area in the telecommunications and media/content provision field where the President does not have decisive say or cannot exert very strong influence, either singlehandedly, or through voting and decision-making procedures. This simply cannot be described as being compatible with the basic principles of democracy.** Moreover, by being involved in both the choice of chief executive officers of PSM organizations, and in the management of their assets, the President and the entire Authority are given a role that goes beyond that of a regulator: **they become another governing body for public service broadcasters**.

In the European Union, regulatory bodies should be independent both of the government and of the industry they regulate. This requirement may not be met in this case: on the one hand because of the close ties between the Authority and the Prime Minister and the ruling coalition that elected the members of the MC; on the other, because of the close involvement of the Authority in the operation of public service broadcasters. Direct involvement in the appointment of PSM CEOs and in the management of PSM assets must mean a closer link between the Authority and PSM organizations and a less than fully objective approach to PSM, whereas the regulator should treat all segments of the regulated industry equally.

RECOMMENDATION ON THE POWERS OF THE PRESIDENT OF THE AUTHORITY

It is necessary to reduce the scope of those powers. The Authority and the Media Council should assume their proper role as regulatory authorities and not as another tier of PSM management One way of achieving that is to implement ideas proposed under item III.1 above. Additionally, several steps should be taken:

- The Media Council should lose the power to delegate two members of the Board of Trustees and "suggest" who should chair it. The President should lose the power to propose candidates The President should lose the power to propose candidates for the jobs of CEOs of public service broadcasters and the MC the competence to present them to the Board of Trustees. Of any areas of competence, this one has the capacity to politicize both the Presidency and the

MC most, as it can ensure a direct link between the Prime Minister and parliamentary parties, and the leadership of public service broadcasters.

- There is no real justification for the existence of the Broadcast Support and Asset Management Fund and for the President's role in appointing members of its Board of Supervision. Both solutions can only reduce the independence of public service broadcasters. This system should be dropped (see below).

III.3 The Media Council

Method of appointment

The Council consists of the President of the Authority and four more members, all to be elected by Parliament by a 2/3 majority. According to Article 33 (3) of RTBA, "*Candidates for membership of the Media Council shall be nominated by unanimous vote of a mandate-proportional nominations committee consisting of one member of each parliamentary faction (hereinafter nominations committee*" (what this means is that delegates of the individual parliamentary factions have the numbers of votes equal to the numbers of Members of Parliament in their factions).

Under Article 44 (2) of RTBA, the Media Council will have a quorum in the presence of a simple majority of the members (3 members), including the chairperson.

There do not appear to be any safeguards in the legislation against a situation in which the ruling majority does not have a 2/3 majority in Parliament and the opposition chooses to obstruct the election of the Media Council by refusing to support the candidates identified by the nominations committee. Similar situations have in the past resulted in public television and public radio being deprived of presidents for long stretches of time. It appears that in particular situations this may also be the case with the whole Media Council.

CONCLUSION ON THE MANNER OF MC APPOINTMENT

In this term of Parliament, the governing party/coalition will be able to propose and adopt a composition of the Media Council that will favour the party or parties in power.

RECOMMENDATION THE MANNER OF MC APPOINTMENT

The manner of appointment will be affected by selection of one of the options listed under III.1. As for MC members other than the chairperson, there are no fail-safe methods of electing only competent and apolitical experts to a body like the MC. Nevertheless, progress could be made if the identification of candidates were taken out of the hands of the politicians and Parliament

could only consider candidates recommended by institutions of higher learning and appropriate professional, trade and civil society organizations.

Areas of competence

The MC inherits all the powers of the ORTT and gains new ones (preventing and dismantling information monopolies and "monitoring compliance with the constitutional principles concerning the freedom of the press and provides information about it to Parliament". Should Bill T/363 be adopted, it will gain extensive new powers of regulating all print and internet media and content.

CONCLUSION ON AREAS OF MC COMPETENCE

The MC represents the tendency to centralize media governance and regulation in very few hands. This is bound to have a harmful effect on the Hungarian media scene.

RECOMMENDATION ON AREAS OF MC COMPETENCE

As already noted in section I.1, there should be no basic change or development of the regulatory regime vis-à-vis the press and Internet content. The MC should, however, be given clear tasks related to the development of a self- and co-regulatory system in the printed press and Internet content.

III.4 The Telecommunications and Media Commissioner

The Commissioner, appointed and employed by the President of the Authority is called upon, under Article 126 or the ECA, to proceed against the actors of the media market (service providers, dealers or vendors), if their activities, services, products, measured characteristics or omissions violate the contractual or lawful rights of a user, or subscriber, or if there is a risk of such a violation. Users, subscribers, consumers' organisations may initiate procedures and file petitions, and the Commissioner may also act *ex officio* if the lawful rights of a user or subscriber are violated. The Commissioner may propose measurements to the Authority. He or she may request any data, information and explanation, but has no right to sanction.

The Commissioner is not expected to concern him/herself with media content, though the title suggests this should be within his/her purview.

CONCLUSION ON THE COMMISSIONER

The Office of the Commissioner provides evidence that the Authority has achieved practically no integration between its disparate parts. It will retain the Complaint Commission, regulated in Title 11 of RTBA, and charged with acting on complaints regarding media content. It will have the Commissioner whose mandate should extend to the media, but does not. In addition, the Authority's President is authorized to conclude annual cooperation agreements on behalf of the Authority with the Consumer Protection Authority (FVF), probably in areas which are the responsibility of the Commissioner. Again, the impression is created of the existence of many different bodies with overlapping areas of responsibility, a situation conducive to conflicts and duplication of efforts.

RECOMMENDATION ON THE COMMISSIONER

The position of the Commissioner and the Complaint Committee should be merged into a unitary division, responsible for handling all complaints and consumer protection issues. The need for, and scope of, any agreement with the FVF should be reassessed.

IV. PUBLIC SERVICE BROADCASTING

IV.1 Constitutional Amendment

As recently amended, Article 61 (4) states: "*In the Republic of Hungary, public service media services assist in the cultivation and enrichment of the national identity, the European identity, Hungarian and minority languages and cultures, in strengthening national coherence and in meeting the requirements of national, ethnic, family and religious communities. Public service media services shall be supervised by an independent public administration authority and owner's body whose members shall be elected by Parliament. The achievement of the objectives of that authority shall be monitored by certain communities of citizens stipulated in legislation".*

This amendment should be welcome in that it explicitly gives constitutional status to the existence of public service media (PSM) and ascribes a role for civil society in monitoring their performance. At the same time, it gives grounds for concern because of a much restricted definition of the PSM remit, leaving out what are some of the chief rationales for these medias' existence.

Concerning the remit, the EU "Amsterdam Protocol on the System of Public Broadcasting in the Member States" states that "*the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism*". For its part, the CoE "Recommendation Rec(2007)3 to member states on the remit of public service media in the information society" notes that PSM should serve as:

a) a reference point for all members of the public, offering universal access;
b) a factor for social cohesion and integration of all individuals, groups and communities;
c) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;
d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;
e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.

Comparing these three definitions of the remit, it is clear that the constitutional definition concentrates primarily on issues of identity, culture, national coherence and meeting the requirements of different communities. It leaves aside many elements of the broader European concept of the remit, including service to democracy, providing a source of impartial and independent information and comment and a forum for pluralistic public discussion and democratic participation of individuals; or contributing to audiovisual creation and production. The European Commission's 2001 "Communication from the Commission on the application of State aid rules to public service broadcasting" (2001/C 320/04) also mentions the fact that the regulation of PSM has been based on common values, such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection.

True, many of these elements are included in the definition of the remit in the RTBA, but **without grounding in the Constitution, these elements (e.g. referring to service to democracy, freedom of expression, impartial and independent information and comment, pluralistic public discussion, etc.) may at some time in the future be removed from the statute in a way that cannot be challenged on constitutional grounds.**

CONCLUSION ON THE CONSTITUTIONAL AMENDMENT

Article 61 (4) of the Constitution assigns to PSM a role that is much more narrowly defined than is the norm in European countries, as reflected in the RTBA, and than is required by the needs of Hungarian society.

RECOMMENDATION ON THE CONSTITUTIONAL AMENDMENT

In order for the Constitution to define the PSM remit properly, or at least provide constitutional support for such a definition, it should be amended by:

3. Adding in para. (4) that the full and precise definition of the remit is to be found in a relevant statute;
4. Or, by amending para. (4) to reflect the remit fully in line with European standards, as illustrated above. This would be the most complex procedure but also the only one providing legal certainty on what the PSM remit really is.

IV.2 The Public Service Foundation

The Public Service Corporations

The Institutions Act has merged, at the ownership and supervisory level, Magyar Televízió Zrt, Duna Televízió Zrt., Magyar Rádió Zrt. and Magyar Távirati Iroda Zrt., owned by the Public Service Foundation. **The corporations (collectively referred to as the public service corporations) may operate, in theory, according to the general rules of the Act on Business Associations, but with significant differences. Such divergences from the general rules include the fact that a separate body acts as the general meeting of all of them or that they have a joint board of supervision.**

One of the corporations forming part of the Foundation is now Magyar Távirati Iroda, the national news agency, which had operated as a stand-alone news agency since 1950. MTI provides news not only to broadcasters but the entire range of printed and Internet-based press as well in Hungary. It is regulated by a separate statute, Act no. CXXVII of 1997 on the national news agency. Its operation has reportedly been balanced and free of party political conflicts. Previously, it was owned by Parliament, it was supervised by the Owner's Consultation Committee, a body elected by Parliament and based on the principle of party (same number of members delegated by government and opposition parties).

CONCLUSION ON THE COMPOSITION OF THE FOUNDATION

Incoporation of the news agency into the Foundation can only be explained as an attempt to impose political control on it. Its credibility and impartiality may suffer, as it becomes the object of political infighting that has characterized the public service broadcasters.

RECOMMENDATION ON THE COMPOSITION OF THE FOUNDATION

The national news agency should be taken out of the Foundation as soon as possible. The legal and institutional framework within which it operates should be designed to protect its independence and ability to operate impartially and professionally.

Board of Trustees: Composition and Manner of Appointment

The Institutions Act merges the hitherto existing public service broadcasting foundation into one, exercising the founder's and shareholder's rights in respect of the public service corporations (constituting their general meeting of shareholders), to be run by the Board of Trustees. The Foundation may not determine the programming and the content of the programmes and programme items of public service media providers.

The Foundation is managed by a Board of Trustees. 6 of its 8 members are elected by Parliament by a 2/3 majority for a period of nine years (3 by the governing party/ties; 3 by the opposition). The chairperson and one other member of the Board of Trustees are delegated by the Media Council, also for a term of nine years. The legislation provides safeguards for various contingencies related to the election of the Board, but – given the 9-year term of office – not for situations of changes of government, appearance of new parliamentary parties, or the fact that a Board member may cease to represent the party that originally nominated him/her. The long term of office could theoretically constitute a guarantee of stability in PSM, regardless of the results of successive general elections. However, as the governing party may end up with a majority of Board members at the time of appointment (given that 2 Board members are appointed by the Media Council with its own built-in majority of the governing party at the time of appointment), this may lead to continuous conflicts between various factions within the Board.

Civil society representation in the previous boards of trustees of PSM organizations has been eliminated. Previously, the civil society supervision of public service media was facilitated within the boards of trustees of the three public service media foundations, through 21-23 civil society members (appointed annually by drawing lots), as against no less than 8 members of the politically-appointed Presidency of the board..

These solutions go against Decisions 37/1992. (V. 26.) and 22/1999. (VI. 30.) of the Constitutional Court which declared that neither Parliament, nor the Government may exercise a significant influence on public service broadcasting. Decision 22/1999 added that the members elected by Parliament may not become a majority on the Board. The decision explicitly declared that the members of the Presidency, who are elected by Parliament, shall not outnumber the non-governmental delegates, as that would be unconstitutional.

According to the CoE Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting states: "*The rules governing the status of the supervisory bodies of public service broadcasting organisations, especially their membership, should be defined in a way which avoids placing the bodies at risk of political or other interference. These rules should, in particular, guarantee that the members of the supervisory bodies: are appointed in an open and pluralistic manner; represent collectively the interests of society in general".*

According to Article 19's Public Service Model Law, members of PSM supervisory boards should be appointed by Parliament in the following procedure:
(a) the process should be open and transparent;
(b) only candidates nominated by civil society and professional organizations should be considered for appointment;
(c) a shortlist of candidates should be published in advance and the public should be given an opportunity to make representations concerning these candidates;
(d) a candidate will be appointed only if he or she receives two-thirds of the votes cast;
(e) membership of the Board as a whole should, to the extent that this is reasonably possible, represent a broad cross-section of the society;
According to Article 19, the Board should appoint its own Chairperson and Vice-Chairperson.

CONCLUSION ON THE COMPOSITION AND MANNER OF APPOINTMENT

While attempting to deal with at least some deficiencies of the old system, the new solution almost guarantees a repetition of the highly politicized, conflict-ridden situation that has existed so far. It may also give rise to new conflicts, if the composition of Parliament and the government change and the new parliamentary majority is faced with an unfriendly political majority in the Board. This may be part of the same "insurance policy" that was referred to in section III.2.

RECOMMENDATION ON THE COMPOSITION AND MANNER OF APPOINTMENT

The manner of appointment of the Board should be changed, largely in line with the procedure recommended by Article 19, to create a pluralistic body that represents society as a whole, rather than some parts of the political class.
The procedure could involve the use of "nominating organizations", on the same principle in the case of the Public Service Committee (see below), though in this case the list of organizations could be somewhat different and their role would be to propose candidates for Parliament to vote on.
In addition to Article 19 requirements, the following additional ones could be considered:
- nominees would have to demonstrate professional skills and experience;
- public hearing shall be held with the potential nominees;
- Board members should have staggered, non-renewable terms;

Management of the Foundation

Three bodies are involved in the process of management:

- The Board of Trustees, dealing primarily with organizational and financial management;
- The Joint Board of Supervision, appointed by the Board of Trustees (the Act on Business Associations requires that every share company must have its own board of supervision; its status and tasks are unclear and the impression is created that it was written into the law to satisfy a legal requirement, without giving it a real purpose;
- The Public Service Committee, composed of 14 persons delegated directly by educational, professional and civil society institutions and organizations. The Committee supervises the performance of the public service remit of PSM corporations, as formulated in part in Public Service Guidelines (first adopted by the Media Council, but then open to annual amendments by the Public Service Committee, subject to approval by the Board of Trustees). The Guidelines are legally binding and feature the detailed public service obligations of the individual public service corporations.

It is significant that each of the three bodies performs (if at all) primarily supervisory functions and – with the exception of amending the Public Service Guidelines – provide no strategic or

operational leadership in the public service media sector. Their role is largely reactive and bureaucratic.

The role of the Public Service Committee should be crucial in terms of programming, but the legal provisions on its tasks and status are vague and its actual impact on the performance of the remit appears limited, in fact doubtful.

Article 62 of the RTBA states that the Committee "*monitors compliance with the requirements applicable to public services continuously and supervises the compliance of Magyar Rádió Zrt., Magyar Televízió Zrt., Duna Televízió Zrt. and Magyar Távirati Iroda Zrt. (hereinafter the public service corporations) with the provisions of the Guidelines*". The law provides for no forms of contact between the Committee and the CEOs of public service corporations, or indeed between the Committee and the Board of Trustees, during which results of monitoring could be used during the year to remove any shortcomings in the performance of the remit. The Committee considers the annual reports of the CEOs of the corporations. Should it reject the report, it "*may consider the submission of a proposal to have the chief executive's employment terminated to the Board of Trustees. The Public Service Committee may adopt such a resolution with a two-thirds majority … If, despite the proposal, the Board of Trustees does not terminate the chief executive's employment, the Public Service Committee shall schedule another hearing of the chief executive for three months later".* The purpose of the second hearing is not very clear, but **it is obvious that even formal rejection of a CEO's report, based on a negative evaluation of the performance of the remit, may lead to no consequences for the CEO.**

This is one of the reasons why the composition of the Board of Trustees should be depoliticized and the manner of the appointment of the CEO must be changed. **If the appointment of the CEO (originating with a proposal by the President of the Authority) is conducted along political lines, then the first response of both the President of the Authority and of the Board of Trustees to criticism of the CEO will be to rally on his/her side and to come to his/her defence, as the criticism will be interpreted as a political attack, and not a justified substantive assessment of the CEO's performance. In such circumstances, any motion for the dismissal of the CEO coming from the Public Service Committee would have little chance of being given serious consideration.**

CONCLUSION THE MANAGEMENT OF THE FOUNDATION

The design of the management of the Foundation is clearly inadequate to the tasks of the leadership of a major PSM organization, making it incapable of providing leadership. The Hungarian PSM system has so far been leaderless (even the particular stations have gone without Directors General for months and years on end), and the negative results are clear for all to see.

The system appears to be designed to provide two fig leaves:

- **That the requirements of the Act on Business Associations have been met and the Joint Board of Supervision has been created (though its actual tasks and role are unclear);**

- **And that the constitutional requirement of monitoring "by certain communities of citizens stipulated in legislation" has been fulfilled (though potentially in an ineffective manner).**

RECOMMENDATION ON THE MANAGEMENT OF THE FOUNDATION

Problems identified above could be resolved in part by:

- Extending the tasks of the Board of Trustees so that it would: consider and approve annual financial plans of the particular corporations and monitor their implementation (inter alia by considering quarterly reports of the Public Service Committee and taking action to correct shortcomings and deficiencies);
- Eliminating the Joint Board of Supervision (shifting its duties to the Board), and derogating in the RTBA from the BAA as *lex specialis* in the case of these special public service corporations;
- Instituting forms of regular contacts and cooperation between the Public Service Committee and the CEOs of the corporations on the one hand, and the Board on the other, with both sides having the duty to respond to the Committee's suggestions and proposals;
- Making it mandatory on the Board either to dismiss the CEO whose annual report has been rejected by the Public Service Committee in a duly reasoned decision, or to explain publicly why it has not done so, and what steps are being taken to remove shortcomings identified by the Committee;
- Instituting forms of public accountability on the part of the Board of Trustees, requiring it to report to the public on its plans, including programme plans of the corporations, and to report on their implementation.

The Chief Executive Officers of the Corporations

The CEOs of the corporations are appointed by the Public Service Board of Trustees, on a recommendation of the President of the Authority and the whole Media Council. No tender procedures are called for. The terms and conditions of the employment contracts of the chief executive officers shall be prescribed by the Media Council. Such contracts could conceivably contain provisions regarding possible dismissal of the CEO, irrespective of what any statute says on the subject. This could limit the CEO's independence.

The chief executive officer is entitled and obliged to appoint two deputy chief executive officers. The Board of Trustees approves the conditions of the employment contracts of the deputy chief executive officers.

The CEO can be dismissed upon a motion of the Public Service Committee by simple majority of the Board of Trustees, if the public service remit is not fulfilled. His/her contractual terms are defined by the Media Authority, and the Board accepts the contract together with the person of the CEO.

Council of Europe "Recommendation No. R (96)10 on the Guarantee of the Independence of Public Service Broadcasting" provides that rules governing the status of members of boards of management or persons assuming such functions in an individual capacity should be defined in a manner which avoids placing the boards at risk of any political or other interference.

Article 19 Public Service Model Law recommends that the Managing Director of a public service broadcasting organization be appointed by a two-thirds majority of the Board, and that the Managing Director should have the right to appeal against any removal from office.

CONCLUSION ON THE CEOs

Clearly the rules introduced in Hungary may achieve the opposite effect from that proposed by the CoE Recommendation. They may encourage Parliament and government to seek to ensure that the choice of the President of the Authority, members of the Media Council and of the Board of Trustees makes it possible for them to influence the choice of the CEOs. This will inevitably politicize the whole process and result in the imposition of direct political control over it. This is why it is so important to prevent the creation of what may be a seamless chain of command leading from the top to the level of the CEO.

RECOMMENDATIONS ON THE CEOs

The following procedures should be introduced for the appointment of the CEOs:

- The CEOs should be elected by an independent Board of Trustees, by way of an open tender, where he or she has to present his or her business plan and programming plan in a public hearing;
- Both appointment and dismissal should take place by a qualified majority;
- The contractual terms should be defined by the Board of Trustees.

Assets and Funding of PSM Corporations

According to the Institutions Act, Parliament is to issue a resolution regulating the part of the assets of the Public Service Foundation and public service corporations that is to be transferred to state ownership free of charge, and in whose respect the totality of owner's rights and obligations shall be exercised and discharged by the Broadcast Support and Asset Management Fund, to be managed by the Media Council. The corporations shall only be entitled to use the assets in accordance with the principles stipulated in the parliamentary resolution and with the conditions stipulated by the Media Council.

According to Article 77 (1) of the RTBA, "*The Broadcast Support and Asset Management Fund (hereinafter the Fund) is a separate asset management and financial fund whose task is to provide support to public service broadcasting, national news services, the broadcasters of*

public broadcasts and non-profit broadcasters, public service programmes and productions, to protect and enrich culture, to support a diversity of programmes, to manage and enrich the assets…".

The parliamentary resolution regulating the transfer of assets shall stipulate the guidelines concerning the utilisation and the management of the assets transferred prescribed for the Media Council. Based on those guidelines, the Media Council shall stipulate the detailed rules of the utilisation and the management of the assets transferred, including the conditions with which the individual asset items, components, assets may be used by the public service corporations. for the performance of their public service duties.

In addition to directly funding PSM corporations, the Foundation and the Media Council ("*Parliament may supplement, at the cost of the Fund, the budget of the Media Council by up to 5% and the budget of the Foundation by up to 3% of the licence fees received by the Fund under any title*"), the Fund will also allocate money for returnable or non-returnable subsidization, via open tenders, of public service programmes produced by the broadcasters in Hungary, in compliance, in particular, with the provisions governing cinema productions (with PSM organizations eligible for up to one third of the amount).

The financing of the public service media system has not been transformed substantially, the institution of the licence fee (paid from the state budget since 2002) also remains in place. The greatest part of the financing of public service media in Hungary is actually derived from the central budget, with only a small part coming from the business revenue of individual broadcasters (including possible advertising and sponsorship revenue).

The Media Council will be free to manage the assets taken from the media corporations, but also to re-allocate the funds designated by Parliament for individual purposes, regardless of the original budgetary intention at any time.

The Act breaks with the previous rule that determined fixed percentages of the licence fee to be allocated to broadcasters. It determines the minimum amounts <u>at lower levels</u>, while allocation of the remainder is delegated to the Media Council. In the case of Magyar Televízió, the previous figure of 40% is reduced to 35%, in the case of Magyar Rádió, the percentage is removed from 28% to 23% while in the case of Duna Televízió, it is reduced from 24% to 19% – these are the minimum percentages of the licence fee that must be allocated to the broadcasters under the Act , although they may also receive a part of the remainder. This implies that the Media Council shall be free to allocate 15% of the total amount (in 2010, this is expected to amount to HUF 3.6 billion, approximately 13 million euros) to the broadcasters, but it may also decide not to allocate that amount to any of them but to use it for some other purpose.

In Resolution No. 1 "The Future of Public Service Broadcasting", the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), participating states undertook "*to maintain and, where necessary, establish <u>an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions</u>".*

Then, the CoE "Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting" laid down in its Appendix rules on the matter that include the following:

- *member states undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.*
- *the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation;*
- *the level of the contribution or licence fee should be fixed after consultation with the public service broadcasting organisation concerned, taking account of trends in the costs of its activities;*
- *payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning;*
- *where the contribution or licence fee revenue has to be shared among several public service broadcasting organisations, this should be done in a way which satisfies in an equitable manner the needs of each organisation.*

CONCLUSION ON ASSETS AND FUNDING

The system of asset management and funding has not been created in full. It is also difficult to assess the effects of its introduction, given that **so many opportunities for discretionary decision-making have been left open**. It can be said, however, that **it does not meet a single of the CoE standards cited above.**
The financial independence of PSM organizations is seriously undercut by the Broadcast Support and Asset Management Fund, which is totally controlled by the chairperson of the Media Council. The assets of the public service broadcasters are collected into this Fund and the conditions under which the broadcasters may use the assets are defined by the Media Council. The whole system appears to be designed to hamper PSM corporations's finances as much as possible and to deprive them of any security in this matter.

RECOMMENDATION ABOUT ASSETS AND FUNDING

- The legal fiction of maintaining the licence fee system should be ended. This should be replaced by regulations stating that it is the obligation of the State budget to fund PSM, best by allocating a fixed percentage of GDP for the purpose, with the possibility of providing extra funding if the cost of delivering the remit is higher than the allocated sum;
- There is no real need for the Broadcast Support and Asset Management Fund. The law should be changed. Assets of the broadcasters should be allocated to the broadcasters themselves or to the Public Broadcasting Foundation, so that the broadcasters can manage

their assets and finances independently. The Media Council and the Public Service Foundation should receive budgetary allocations directly from the State budget;

- A separate fund may be created for the sole purpose of providing subsidies for the production and transmission of public service content by independent producers and commercial broadcasters. The monies used for that purpose should not be taken out of the funds earmarked for the financing of the (greviously underfunded) PSM corporations;
- When the Public Service Guidelines are prepared, the cost of meeting the requirements they lay down should be calculated and that amount of money should be made available to the PSM organizations for that purpose. The law should provide for the preparation of an expenditure budget, based on cost of fulfilling the public service programming remit, as developed in the Public Service Guidelines;
- The law should put the State under an obligation actually to allocate funds necessary to cover the approved budget.

A NOTE ON THE AUTHOR

Dr. Karol Jakubowicz worked as a journalist and executive in the Polish press, radio and television for many years. He has been Vice-President, Television, Polish Radio and Television; Chairman, Supervisory Board, Polish Television and Head of Strategic Planning and Development at Polish Television, and then Director, Strategy and Analysis Department, the National Broadcasting Council of Poland, the broadcasting regulatory authority (2004-2006). He has also taught at universities in Poland and abroad.

In 2008-2010 he was Chairman, Intergovernmental Council of the Information for All Programme, UNESCO. In 2007-2008 he was member of the Council of the Independent Media Commission of Kosovo.

He has been active in the Council of Europe, in part as former Chairman of the Committee of Experts on Media Concentrations and Pluralism (1995-1996), Vice-Chairman and Chairman of the Standing Committee on Transfrontier Television (1995-2002), and as Chairman of the Steering Committee on the Media and New Communication Services (2005-2006).

He has been involved in policy-making and regulation in the field of broadcasting in Poland and internationally, through his contribution to writing Poland's Broadcasting Act of 1992, and its subsequent revisions, and to the revision of the European Convention on Transfrontier Television in 1998, as well as of the "Television Without Frontiers" directive (in part as a member of two focus groups appointed by the European Commission).

He has been a member of the Digital Strategy Group of the European Broadcasting Union and contributed to writing its report "Media with a purpose. Public Service Broadcasting in the digital era". He helped write the report "Public Service Broadcasting in Europe" which was adopted by the Parliamentary Assembly of the Council of Europe on Jan. 27, 2004.

He wrote the background report "A new notion of media? Media and media-like content and activities on new communication services" for the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, Reykjavik 2009. In 2010, he published „The Right to Public Expression. A Modest Proposal for an Important Human Right" on the Media Policy website of the Open Society Institute Media Program and the Open Society Institute's EU Monitoring and Advocacy Program. .

As a Council of Europe, European Union and OSCE expert, he has taken part in many missions to advise on the development of broadcasting legislation in a number of countries and has written (sometimes with other authors) analyses of drafts or existing broadcasting laws in a number of post-Communist countries (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Kazakhstan, Italy, Lithuania, Macedonia, Former Yugoslav Republic of, Moldova, Montenegro, Republika Srpska (Bosnia and Herzegovina), Russia, Serbia, Slovenia, Ukraine). He has also been a member of a team of experts which performed monitoring missions for the CoE Secretary General concerning compliance of CoE member States with their commitments in the area of freedom of expression and information (Georgia, Romania, Russia, Ukraine).

His scholarly and other publications have been published widely in Poland and internationally. They include the books Rude Awakening: Social And Media Change in Central and Eastern Europe. Cresskill, N.J.: Hampton Press, Inc., 2007; Public Service Broadcasting: The Beginning of the End, or a New Beginning? (2007; in Polish); Media Policy and the Electronic Media (2008; in Polish); and The EU and the Media: Between Culture and the Economy (2010; in Polish).