

Hungary's Media Law Package

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January 18, 2011

The aim of this note is to provide a brief, 12-point list of the main deficiencies of the new Hungarian media laws, at least with regard to the safeguards of media freedom and pluralism, laid down in Article 11 of the EU Charter of Basic Rights.

The note is based on my intervention at the Open Hearing "Freedom of Press in Hungary", organised by ALDE in Brussels, 11 January 2011.

I have added further crucial dimensions that I believe are necessary to look at when making recommendations on Hungary's media laws.

What laws is the debate about?

It is misleading to talk only about the last one or two acts of the "media law package" (this was its official name) introduced first by two individual Fidesz MPs on June 11, 2010 and later by three Fidesz MPs on November 22, 2010.

The Hungarian media laws consist of at least five crucial legislative acts since June 2010. All were passed in a hurry before the end of the year without any consultation with other parties and professional bodies, despite loud requests and protests by these.

These laws are built upon each other and are deeply interconnected. Each of them has its own stake in the restrictive character of the new system, while none of them would make sense in and of itself. This is why Dunja Mijatovic, the OSCE's media freedom representative, has asked the government, already after the Package was presented in June, to stop passing its parts and revert to a consultative way.

Here are the main pieces of law setting up the new system:

1/ **Changes to Article 61 of the Hungarian Constitution**, passed July 6, 2010. The amendment removed the tenet obliging Parliament to pass a law aimed to "preclude information monopolies", that is, the obligation of the state to uphold pluralism; it ominously added the anti-pluralistic tenet of a "citizen's right to be provided with 'proper' or 'adequate' (*'megfelelő'*) information about public life". (Amendment of the Constitution, 6 July 2010)

2/ **The law setting up the new Authorities**, the National Media and Infocommunications Authority (I will call it Telecom Authority) and the Media Council (MC). It was passed July 22, 2010. Already at this point, it was envisaged that from the autumn, the MC's power will be extended from the audiovisual to the print and the Internet-based media. (Act LXXXII of 2010 on the amendment of certain acts on media and telecommunications)

3/ **Prime Minister's and Parliamentary appointments** of the functionaries of the new system, August through October 2010. (Resolution No. 95/2010. (X. 15.) and 96/2010. (X.15.) of the Hungarian National Assembly)

4/ The law on the rights and "duties" of the press -- "**Act CIV of 2010 on the freedom of the press and the fundamental rules governing media content**". The official English shorthand is the "Press and Media Act"; in Hungary it is sometimes called "the Media Constitution" - passed November 9, 2010.

5/ The detailed sanctions, "**Act CLXXXV of 2010 on media services and mass media**" in official English shorthand "the Media Law", passed December 21, 2010.

Unprecedented restrictive features, violations of European standards in the media governance regime set up by the Media Law Package

The Hungarian Government claims that no part of the new laws/system is unprecedented in Europe. In fact, the main features that restrict freedom and pluralism of the media are unprecedented.

1) Unprecedented since the Communist times, **the Package, "based" on the text of the amended Constitution, obliges all media (including print and Internet) to provide 'proper' or 'adequate' ("megfelelő") news coverage:**

- a) "Media content providers shall provide authentic, rapid and accurate information on local, national and EU affairs and on any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation." (Article 13 (1), Press and Media Act);
- b) "Linear and on-demand media content providers engaged in news coverage operations shall provide comprehensive, factual, up-to-date, objective and balanced coverage on local, national and European issues that may be of interest for the general public and on any event bearing relevance to the citizens of the Republic of Hungary and members of the Hungarian nation." (Article 13 (2), Press and Media Act).

These tasks are incorporated in four legal acts: the amended Constitution; the mandate of the Media Council; the Press and Media Act; and the new Media Law.

A universal, homogenising task for the media regarding news coverage content is in direct opposition to the EU Charter of Basic Rights prescribing pluralism. Actually, any "tasking"

(except for the public-service media) is harming the watchdog function of the media in a democracy.

2) Unprecedented is the **single administrative media governance pyramid** set up by the new system. It would be unprecedented even if it were not operated by the ruling party alone. Whether filled by appointment or Parliamentary "election", all Boards and posts of command are **either fully occupied or mathematically dominated by the ruling party**, and made into a rubber-stamp machinery, protected by strict secrecy rules. The Boards are becoming but "departments" of the Authority that is practically a Media Ministry.

All chief functionaries of the new media system (the Dual President of the Telecom Authority and the Media Council; the four other members of MC; the eight members of the Public-Service Board) **are named for 9 (nine) years**, renewable.

Inside this pyramid, there is a "Dual Monarchy" between the Telecom Authority and the Media Authority (Media Council, or MC). Ms Annamaria Szalai is appointed to head both. After being appointed by the Prime Minister, she has the right, in one of her two capacities, to candidate or directly appoint all other decisive appointees in the system. (Amended Act C. of 2003. on Electronic Communication, Article 14 (2); Media Law, Article 102 (2)a, Article 136 (11)-(12)).

In Europe, only Russia's *Roskomnadzor* and the Belarus *Ministerstvo Informatsii* has the same dual-head feature (and the "pyramid").

The apology that her second job, heading the Media Council, is an independent decision by Parliament is not in line with the facts: the Parliament did not even have a choice, because the dual-head setup was outspokenly prescribed in the July 22 law setting up these institutions, and is also included as Article 125 (1) in the new Media Law:

"The President of the Authority, who is appointed by the Prime Minister, shall become the candidate for the presidency of the Media Council from the moment of appointment."

There is no other candidate envisaged in the law, neither is provided any other mechanism to candidate.

3) **The five members of the MC are all delegated by the ruling Fidesz party** (made possible by: Media Law, Article 124 (1), (4) and (6); decided: Resolution No. 95/2010. (X. 15.) of the Hungarian National Assembly). No explanation needed why this is contrary to everything that European media governance is about.

4) It is unprecedented that **the media regulator's power is extended to all media, including the privately owned and the public-service audiovisual media, the print and the Internet-based media, as well as on-demand media services** (Media Law Article 1 (1); Article 203, point 43.). This is happening in the historic moment when the digital convergence, and the abundance of channels coming with it, eliminates many of the previously still existed constitutional excuses for content control even in classic broadcasting.

5) In an unprecedented way, and contrary to all European standards, **all guarantees of the PSB's independence are systematically removed, amounting to a re-nationalisation of public-service broadcasting:**

- a) The head of the MC is the only person in the system who has the power to candidate the CEOs of the four PSB outlets: MTV, Hungarian Radio, Danube TV, Hungarian News Agency (Media Law, Article 102 (2)a);
- b) in doing so, she is not obliged by any criteria or public procedure;
- c) all the PSB newsmakers are now made the employees of a Fund set up under the MC, that is, the Head of the MC is also the indirect employer of all journalists of all PSB (Organizational and operational rules of the Fund, Chapter V. Divisions).

6) **Registration of all news providers (including the print and Internet-based ones) is made mandatory and a pre-requisite for starting the outlets' operations;** this is not only unprecedented inside the EU but specifically forbidden in Council of Europe guidelines (Media Law Article 46 (1)).

7) **The MC can oblige the Internet Service Providers to block any internet-based news outlet as a final punishment for noncompliance allegedly committed by the outlet.** Only Turkey has a similar law but there, this is a court-based, not authority-based measure. Even Turkey has decided in December to reform this provision that recently ended up in the scandalous blockage of big international sites like YouTube. (Media Law Article 189)

8) In an unprecedented way, through the services of a "Media Commissioner" (a direct employee of the head of the MC), **the two Authorities (Telecom and MC) have the right to request any information at any time from any media outlet in the country, without any violation of law committed by the media outlet.** The laws specifically state that no business secrets or otherwise protected data constitute an exception. Refusal to comply comes with very high fines, and finally with the withdrawal of the outlet's right to be distributed. (Media Law Article 111 (2) f, 140 (1), 142 (1))

9) **The journalists and the outlets lose their right to retain the identity of their confidential sources** if the information in question was a piece of classified data; the same goes "in exceptionally justified cases"(Article 6 (1) and (3), Press and Media Act). In fact, these two cases cover all cases relevant for any investigative journalism. Although such restrictions are not unprecedented in some post-Communist democracies, nevertheless all European and OSCE recommendations are clearly against them, and it is unprecedented to introduce them in fresh legislative acts.

10) Much has been told about the **high, practically annihilating fines** that that the Media Council can levy when enforcing the law. (Media Law, Article 187)

But equally unprecedented is the very fact that **the media authority is entitled to punish the media for coverage issues.** (Media Law, Article 181 (1), 182 c; Press and Media Act Article 13-20) Such intrusion by an authority is forbidden by the EU Charter of Basic Rights.

Also unprecedented is that **the MC constitutes, next to the civil courts and the criminal courts, a third layer in the country that has punitive power over the media.** In Europe, the expectation is to go to the opposite direction: to decriminalise the handling of journalistic mistakes and letting it over to civil courts alone.

In the debate, it has so far been neglected the unprecedented **violation of the principle of rule of law** that comes with the three-level sanctioning of the media.

- a) The Media Council is empowered to punish (and before that to freely interpret!) some **new, broadly defined transgressions, the sanctioning of which has hitherto been explicitly rejected by the Constitutional Court** as going too far, being too vague, and therefore "violating freedom of speech". Some examples: "insulting" any group, any minority and any majority; "hurting" public order, family values, religion; etc. (Media Law, Article 182 c; Press and Media Act, Article 17)
- b) **The news coverage requirements ("comprehensive, factual, up-to-date, objective and balanced ") valid for both linear and on-demand audiovisual media can by their very nature be only interpreted and sanctioned in a selective, arbitrary and politicised manner.** (Press and Media Act, Article 13) (This issue is not entirely independent from the fact that setting equal requirements for on-demand and linear media is also infringing on the Audiovisual Directives of the EU.)
- c) **Contrary to the claims there is no real judicial overview** provided over these decisions (and any other decision of the MC). This is also unprecedented in the EU. The sanctioned media can only appeal to an "Administrative College", that is, to a court that is unable to look into the merit of the issues. (Media Law Articles 70 (7); 163 (1); 165 (3); and many others.) In these courts, an appeal would be considered only if it claims that the MC has violated the Media Law itself, such as: non-compliance with deadlines; rules of procedure, etc. Not even the amount of the fines can be disputed, because the law grants the MC total liberty to define what constitutes a transgression, and whether it was a "light" or a "grave" transgression.
- d) **The third, new, administrative instance of punishing the media for "speech offences"** (Media Law, Article 182 c, Press and Media Act Article 13-20, incl. Article 17) **can be diverging from the judicial way;** it can be utilised by the authorities even if they lose a civil and a criminal case; the MC is not obliged by these; it can have a fully deviating opinion, punish the media, while its decision only can be appealed at an "administrative court".

12) To my mind, **the single greatest danger for the freedom and pluralism of the media in Hungary lies in the arbitrary licensing provisions, the parallels of which can only be found in some post-Soviet countries.** An example is Article 55 (1) c) and (2) of the Media Law; another is Article 187 (3) e). Based on these and many similar provisions, the authorities can shape the media ownership landscape as it pleases them. Also, by keeping the owners dependent on the unaccountable will of a politically homogenous regulatory body, these arbitrary rules also force the owners to hold their editors away from content that is critical of the government.

For example, Article 55 (1) c) says that the MC can exclude any company from participating in tenders for licences if in the last five years a media outlet owned by the company has been reprimanded -- by the same MC -- for a "gross" or "grave" ("*súlyos*") matter . Article 55 (2) adds

that the same fate is due to any company that has a stake in the above-mentioned company, or to any company in which the above company has a stake.

Obviously any media company or investor group in Europe that does not want to lose profits or markets in Hungary will request their editors to refrain from publishing investigative materials regarding the ruling party or the government. They would fear that, in response, the outlet could get a reprimand over seemingly unrelated matters -- say "child protection" or "advertisement rules" -- that the MC could at any time arbitrarily declare a "grave matter", which in turn could be used to arbitrarily exclude the whole group of the company from future licences. By the same token of arbitrariness, any program can be excluded from distribution in the country (Article 187 (3) e)).

The vagueness of these provisions, combined with the unrestricted "freedom" and the utterly partisan composition of the bodies that will apply them, would be a chill for free speech in any country. But the gravity of these features is further underscored by the crucial moment: **the licenses of the only two nationwide commercial analogue TV channels, RTL Klub and TV2, will be expiring in 2012.** In one of its last chapters -- Article 220 (15) --, **the Media Law surprisingly (and without any notification of the European Commission), postponed Hungary's digital switchover from December 31, 2011, which is the Europe-wide deadline, to December 31, 2014.** This manoeuvre has barred Hungary from the multiplication of channels and the enhanced pluralism that are the actual goals of the Europe-wide switch to digital distribution of TV signals. **RTL Klub and TV2 can retain their grip on the commercial TV markets; they can also remain the main source of information for the majority of Hungary's audiences.** (Thus the very law that officially was justified as the country's sole chance for innovation has pumped new life into a duopoly on the country's most important media market and into an outdated technology, while it effectively precluded the entry of new players.) Even more ominously, in the coming years, the arbitrary regulatory and licensing powers in the hands of the party-appointed MC will also provide the strongest incentives for self-censorship for RTL Klub and TV2, -- in fact, their editorial and programming adjustments are already described by all observers as attempts at pleasing the ruling party. **And in 2012, when RTL Klub and TV2 will be fighting for the renewal of their expiring analogue licenses, even their full self-censorship and compliance with the "new rules of the game" may not save them from either a re-assignment of their frequencies to other, government-friendly companies, or, alternatively, from having to let these companies take over a large share of their stakes.**

Add that, just like in the case of regulatory matters, **there is no real judicial oversight over licensing decisions either.** The rulings of MC cannot be appealed regarding their merit; only "administrative" or "procedural" complaints are possible (Media Law Article 62 (4) and similar ones).

Such rules in fact "outsource censorship" to the owners, and create a "perfect chilling effect" without any of the embarrassing public clashes typical for the punitive way. In their wake, content pluralism can fully disappear at least from television, despite their diversified ownership.

Exactly this, the quasi-total evaporation of independent political content, mixed with de-politicization, is what has happened in Russia and in several post-Soviet democracies. The reasons were exactly what we see in the new Hungarian laws: the regulatory and licensing bodies

are politically controlled; the rules are vague and can be arbitrarily applied; and the owners cannot rely on any meaningful judicial oversight.

Conclusions

Speaking out in favour of singular corrections, like "involve a few opposition figures in the Media Council" or "lower the severity of punishments", could be misleading and not producing the expected improvement in the overall quality of the package. A mere listing of problem articles could be misused. A better message could be provided by a list of problem fields and related recommendations.

The Hungarian Government should:

- give up the notion that the government's 2/3 legislative majority also provides it a right to decide alone in matters of press freedom;
 - start the legislation anew in parity-based drafting fora that include opposition and civil society;
 - remove the "dual monarchy" of the telecom and media regulator;
 - restore the media regulatory body's independence from government by allowing for a parity-based political composure and the participation of journalists' associations;
 - make the upholding of pluralism the sole aim of media governance; put that aim back to the constitution; do not reduce the meaning of "diversity" to ownership de-monopolization;
 - restrict media governance to the audiovisual field; fully remove its control over the print and internet press;
 - remove vagueness of any concept employed by the law;
 - restore true judicial overview with appeals adjudicated on merit of the arguments;
 - remove any news content prescriptions, any "tasking" for the nation's media;
 - let the courts do the punishing -- go even further and remove criminalization of journalists' mistakes; leave every debate over content to civil courts;
 - remove registration as a pre-requisite for operation;
 - restore independence of public-service broadcasting;
 - protect investigative journalism by protection of confidential sources
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