



MINISTRY OF PUBLIC ADMINISTRATION
AND JUSTICE

DR. TIBOR NAVRACSICS
Minister
Deputy Prime Minister

Mr Thorbjorn Jagland
Secretary General
Council of Europe
Strasbourg

Budapest, 21 May 2012

Dear Secretary General,

I have received your letter of 15 May 2012 concerning the draft of the act seeking to implement Decision No. 165/2011 (XII. 20.) AB of the Constitutional Court. Thank you for your fundamentally positive opinion on the draft and for your valuable observations and recommendations aiming to improve the text even further.

I would like to inform you that the Hungarian Government presented a draft legislative proposal to the Parliament on the amendment of certain acts applicable to media services and press products on 10 May 2012, in order to ensure its entry into force by 31 May 2012 as required by the Constitutional Court.

In the following, I would like to present my position on the recommendations and observations expressed in your letter.

I. As indicated in your letter, you consider further guarantees of the protection of journalists' sources to be necessary, in order to ensure that journalists' sources may not be revealed unless there is a vital interest which clearly outweighs the interest in keeping such sources secret. The Hungarian Government accepted your recommendation, and it shall support in Parliament the adoption of a proposed amendment aiming to grant the presiding judge discretionary powers on this matter. According to this proposed amendment, the presiding judge may require the source to be revealed if the interest in investigating the crime – with regard especially to the gravity of the crime – clearly outweighs the interest in keeping the journalist' sources secret.

II. You note in your letter that the amendments proposed are an improvement, because they reduce regulation over print media and the extent of interference by the authorities. However, you still consider that the excessive generality of the statutory legal terms of the act give reason for concern.

It must be emphasised, in this context, that these legal terms were not found to be unconstitutional by the Constitutional Court. It is also my position that the judicial control exercised over any and all decisions of the Media Authority certainly ensures the uniform interpretation of these rules. As for the terms objected by the expertise, attached to your letter – which I consider to be an opinion providing more detail on the content of your letter –, I would like to inform you of the following.

After negotiations conducted with the European Commission, the Hungarian Parliament adopted Act XIX of 2011 on the amendment of Act CIV of 2010 on the freedom of the press and the fundamental rules on media content (“Press Freedom Act”). As such, several of the provisions challenged by the expertise (e.g. Articles 10 and 13 of the Press Freedom Act) have been adopted in full agreement with Neelie Kroes, Vice-President of the European Commission. For this reason, we are not in the position to change any of these provisions, as it would be in violation of our agreement with the Vice-President.

Furthermore, providing authentic, rapid, accurate, and balanced information on public affairs is a task for the entire media system under Article 10 of the Press Freedom Act. No specific obligation is imposed on individual media content providers under this provision. The rather general nature of the terms used therein therefore cannot result in the violation of any rights or interests.

The draft amendment seeks to modify Article 14(2) of the Press Freedom Act so that not even deceased persons may be presented in a self-gratifying and detrimental manner. As indicated in your letter, you find this prohibition and the official control thereof to be unjustified. In agreement with your observation, the Hungarian Government supports the adoption of an amendment already proposed to the Parliament, under which deceased persons would not fall within the scope of this provision. Consequently, the civil right to respect for the deceased and the rules pertaining to the crime of profanation would remain applicable to such matters, and no official control would interfere with the affairs of the press and the media.

In your position, Article 16 of the Press Freedom Act – stipulating the requirement to respect the constitutional order – is not sufficiently clear. In my view, this rule is an absolute necessity. The Constitutional Court held in its decision of December 2011 that, while the official control of respect for human dignity by press products is in violation of the Constitution, the regular publication by a service provider of content materially violating human dignity may be in violation of the constitutional order, and may be sanctioned by the authorities in a constitutional manner. For this reason, retaining this provision in the Press Freedom Act is absolutely necessary for the implementation of the ruling of the Constitutional Court. On the other hand, the judicial control of the decisions of the media authority ensures that the term “constitutional order” will be construed by the authority in line with the fundamental purpose of the provision and will be applied in the most extreme situations only.

In my view, the terms (incitement to hatred and exclusion) used in Article 17 of the Press Freedom Act do not give reason for any concern. The provision on the prohibition of incitement to hatred is based on Article 6 of the AYMS Directive, according to which

“Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.”

The Constitutional Court established the constitutionality of the cause of action (facts of the case) defining the prohibition of “exclusion” under its decision no. 1006/B/2001 adopted in 2007, in terms of the radio and television; and later, under its decision no. 165/2011. (XII. 2011.), adopted in December 2011, it established that the provisions on the prohibition of exclusion and incitement to hatred were constitutional not only with respect to media services, but also in terms of printed and online press products. I also note here that the commonly used Hungarian word for “exclusion” refers to a certain form of discrimination, and for this reason the use of this term refers to the prohibition of discrimination set forth in the Fundamental Law of Hungary and in numerous international documents. I must also add that the effective text of the Press Freedom Act contains the prohibition of exclusion due to our agreement reached with Vice-President Kroes in 2011.

This provision, in my view, is not “general”, and does not raise the danger of arbitrary and disproportionate decisions by the public authorities. The need for action against hate speech is a key issue under international law as well, and all European States have implemented appropriate restrictions in relation thereto.

III. You proposed in your letter that self-regulation should be preferred to co-regulation. On the one hand, it should be noted that co-regulation is a fundamental institution of the AVMS Directive of the EU, the application of which by the Member States is encouraged and promoted by the Directive. On the other hand, please note that, under the effective framework, co-regulation does not limit the possibilities for self-organisation and self-regulation by service providers, as – under Act CLXXXV of 2010 on media services and mass media (“Media Act”) – co-regulation means merely the partial transfer of certain official powers to the organisations of media service providers. Finally, I am personally convinced that any and all material statutory regulation of self-regulation would lead by definition to the limitation of self-regulation.

However, the Hungarian Government – in agreement with your position that the role of self-regulation should be promoted in the regulation of the media – is committed to the adoption of certain amendments by the Parliament that would oblige the media authority to promote, encourage, and respect the self-organisation and self-regulation of media service providers.

IV. According to your letter, the rules applicable to the Media and Communications Commissioner (“Commissioner”) meet the requirements laid down in the ruling of the Constitutional Court of December 2011, and establish the powers of the Commissioner concerning the media and the press in line with the ruling. However, you indicate your concerns because the Commissioner still retains considerable investigative powers regarding electronic communication service providers, against which no legal remedy is available.

While noting that the communications-related tasks of the Commissioner are completely separated from the issue of press freedom, and for this reason no violation of the Constitution was established by the Constitutional Court in this respect, the following must be emphasised in relation to your specific concern. The legislative proposal specifically provides that the proceedings of the Commissioner shall not be deemed to be a regulatory procedure, and the Commissioner shall not have the right to exercise regulatory powers (Article 141(1) of the

Media Act). Accordingly, the decisions of the Commissioner have no legal effect. Thus, the Commissioner may not adopt any formal act that could be challenged in court under the laws of Hungary. The Commissioner may certainly request information from electronic communication providers in the course of investigating individual complaints. In the event of failure to comply with such requests, the office of the media authority (“Office”) – acting upon request by the Commissioner – issues a mandatory order for data provision. The order for data provision issued by the Office may be challenged in court with suspensive effect, as this is the formal act which may be legally remedied under Hungarian law (Article 143(3) of the Media Act). In my position, this solution is in perfect harmony with the various requirements concerning legal remedy under constitutional and international law.

Upon consideration of your concerns and in order to impose further limitations on the procedural powers of the Commissioner, the Hungarian Government is committed to support an amendment proposal, which would allow the completion of a conciliation procedure between the Commissioner and the electronic communications provider before the Office issues such a mandatory order for information provision, thereby facilitating the promotion of mutual interests (Article 142(3) to be inserted into the Media Act). Furthermore, the Hungarian Government promotes a media and press-related amendment, under which the procedural powers of the Commissioner would be limited to situations where the complaint was filed repeatedly and relates to regular violations of interests; in other words, if it affects a significant group of media consumers, or relates to media practices significantly objected to by society.

V. As for the concerns expressed in your letter relating to the composition of the Media Council, you seem to be of the opinion that the proceedings allow for the adoption of politically motivated decisions, thereby questioning the independence of the Media Council.

I must recall in this respect that there are no EU provisions concerning the independence of media authorities or the appointment of their heads. These issues are addressed at European level only in certain documents of the Council of Europe. The first and most important source of European law on this field is Recommendation Rec(2000)23. of the CoE Committee of the Ministers, and the Declaration of the CoE Committee of Ministers of 2008 March 2000, issued after the assessment of the implementation of the Recommendation. The latter document also notes that the principles underlining Recommendation Rec(2000)23. are not fully respected in law and/or in practice in all European states. As noted by the Committee of Ministers in this document, the media regulatory authorities are established by law, as autonomous bodies, in most of the CoE member states.

Considering also that the Media Act (contrary to the previous media act) provides the opportunity of judicial review with respect to all decisions of the Media Council, the above referenced nomination and election process cannot provide in any way the opportunity to one or more political parties, the Government, or the Parliament to impose a controlling influence on the content of media services and press products. This fact was also confirmed by the Constitutional Court in its decision No. 1006/B/2011.AB. According to the Media Act, the Media Council and its members shall be solely subject to laws and may not be instructed with respect to their activities. The mandate of the members is free and they cannot be removed, the latter fact being important in terms of their independence. Extensive conflict of interest rules apply to the members of the Media Council. In my opinion, the above provisions

guarantee the independence and freedom from any political direction of the decision-making process.

I note here that we are continuously working on the analysis of the attached expertise. All other observations and recommendations will be duly considered after the Constitutional Court – acting on the basis of a motion recently submitted by the Commissioner for Fundamental Rights (ombudsman) – adopted another decision on the statutory provisions applicable to the Media Council.

I sincerely hope that the facts and the position of the Hungarian Government, as described above, will convince you that Hungarian media regulation is fundamentally in line with the applicable European requirements, that it does not materially deviate from the regulatory frameworks typically applied by other European states, and that the Hungarian Government is ready and willing to consider and accept any and all recommendations serving the improvement of the regulation of the media.

After the Parliament adopted them, I shall send to you the aforementioned amendments relating to your recommendations, if you deem it necessary. I also express our commitment to cooperate in the future.

Yours sincerely,

Tibor Navracsics
Deputy Prime Minister
Minister of Public Administration and Justice

