

Tytti Tuppurainen

Minister for European affairs of Finland, Presidency of the European Union

Dear Minister,

In Hungary, the Act CLXXXV of 2010 on Media Services and Mass Communication (Media Act) regulates the mandate, the procedures for the appointment of the head and members of the Media Council, including the duration of the mandate.

According to the above rules, the Media Council is elected for a period of nine years. The first election of the Media Council took place in October 2010. Despite of the principle of media plurality and of the long-standing tradition (since 1996) of a balanced composition in the regulatory body the Fidesz-majority in the Parliament elected a single-party Media Council, which has operated without any members delegated by the opposition.

On 11th October 2019 the Media Council's nine-year term expired therefore, theoretically, new council members should have been elected. That has not happened, however. In accordance with the Media law, an ad hoc committee in the National Assembly was convened to nominate the members of the new Council. The opposition parties have put forward the names of their candidates. However, when the parliamentary committee in charge of electing the new Media Council met, Fidesz announced that it would not nominate any candidates. Since the committee members represent their political majority in the Parliament, this move has effectively stopped the parliamentary procedure, as no nomination became possible.

The Media Act created a legal possibility to that: there is a provisional paragraph in the law, which allows the Council, and its President to remain in office until the new Council and its President is elected:

216§ (8) "...the date of termination of the mandate of the President and members of the Media Council shall be the commencement date of the mandate of the recently elected President and members..."

Thus, despite the fact that the term of the current members expired on 11th October 2019, the Council members and the President can stay in office practically for life, which by itself is breaching European law¹.

¹ Art. 30 paragraph 5 of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

2nd December 2019, long after the local election Fidesz finally has announced that they will only put forward candidates to the Media Council, which are nominated only by them, despite the fact that the opposition parties jointly nominated two members to the Media Council, which normally consist of five members.

The reasons behind the delay of the election might remain unclear for the public forever, but the fact that government parties might play the nomination of an important institution for an indefinite time indicate that the governing authority considers itself somehow being above the law, as it has the power and the room for maneuver to execute law where they find it to be convenient.

As the actions of the government parties were not serving any reasonable public interest, it puts also the limelight to the Media Council itself and repeatedly brings up the question of its independence.

The Media Act was under heavy international criticism² by the Venice Commission from the very beginning, particularly regarding the rules of the Media Council:

“Given the Media Council’s considerable role in shaping media and potential impact on freedom of expression, it must be independent – and be seen to be independent – from all political influence. In this regard, there are aspects of the appointments procedure for the members and Chair of the Media Council which are not transparent and do not go far enough to preserve independence, as required by Council of Europe Recommendations.”

As a response, number of amendments were passed in 2013 including new rules on the Media Council: the mandate of the President of the Media Authority became non-renewable and the President of the Republic was involved in the appointment process.

Despite the changes, the Venice Commission warned in its opinion³ in 2015 that the amendments were not sufficient to guarantee genuine independence of the Media Council:

*“...the current Chairperson and the four members of the Media Council, in spite of their qualifications or otherwise, are perceived by the media community as forming **part of the same political texture**. Having examined the provisions governing appointment/replacement of the Chairperson of the Media Council and its members (...), the Venice Commission agrees that those **rules present a risk of media sector governance which is not impartial.**”*

*„...where the super-majority requirement is introduced at the initiative of a political group having that supermajority, this rule, **instead of ensuring pluralism** and political detachment of the regulatory body, **in fact ,cements’ the influence of this particular group**”*

² See amongst others the Expertise by Council Europe Experts on Hungarian Media Legislation, 11 May 2012
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048c26f>

³ Opinion no. 798 / 2015 of the Venice Commission:
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)015-e)

„Compared to many other European regulatory authorities, the Hungarian Media Council has very vast powers.”

Indeed, those worries were not unfounded. During its 9 years mandate of the Media Council it has shown its loyalty to the ruling party and to the government:

1. The Media Council during its mandate practically operated as a black box. Although, the outcomes of the decisions were accessible to the public, the reasons underlying them were not a matter of public record, nor were the general media policy principles supporting these decisions publicly revealed, despite the fact that the Media Act in its Article 132 (a) and (g) provides that it is the Media Council’s responsibility to: *“oversee and guarantee the freedom of press under this Act and the Press Freedom Act” and to “elaborate official positions and proposals with respect to the theoretical aspects of developing the Hungarian system of media services”*.

Despite the legal obligation, the Media Council did not speak out in public at all, while the media freedom was being liquidated. But in reality, the situation was far worse still because they were actually involved in this process as active participants.

2. It is in the Media Council’s remit to issue a position statement that either authorises or rejects media market mergers. The Media Council had no problem authorising all acquisitions and mergers involving pro-government players, thus allowing an unprecedented level of media ownership concentration to emerge. However, there were two cases when the Media Council intervened and rejected mergers, which it felt, would violate the diversity of media offerings in the market.

First, it stopped the mergers of two major foreign newspaper publishers, Axel Springer and Ringier, in 2011⁴. More specifically, it obliged the parties to sell off a substantial portion of their portfolios in order for the authority to approve their merger. This is how half the regional newspaper market and the largest opposition political daily, Népszabadság, ended up in the hands of investors with close ties to Fidesz. Today, we know well where all this ultimately led, with Népszabadság being shut down and the regional newspapers turned into Fidesz propaganda outlets.

A few years later, in 2017, the Media Council intervened in another case: it stopped the merger of the Magyar RTL Televízió Inc. and the Central Digital Média Ltd., with the very transparent objective of preventing RTL from boosting its digital portfolio⁵.

3. Another important decision of the Media Council was when it greenlit the continuous stream of government propaganda in response to a petition filed by Mérték Media Monitor. In a “landmark” decision⁶, the Council declared that spots of the

⁴ https://mertek.eu/wp-content/uploads/2016/12/nmhh_szakhatosagi_allasfoglalas_2011.pdf

⁵ http://www.gvh.hu/data/cms1035811/Vj087_2016_m.pdf?fbclid=IwAR1v3B42N9YUFoVDalwI5XXhfZ3SRBG9cFn9HpxLngxuLzqVb5hPWh1XkTY

⁶ https://mertek.eu/wp-content/uploads/2016/12/160-2016_reformok_dmsz.pdf

government, which were clearly instances of political advertising actually qualified as public service advertisements. Since the Media Act allows radios and television channels to broadcast political advertising only in the campaign period before elections and such restrictions do not apply to public service advertisements, thus, the decision has provided the legal background for the non-stop broadcasting of government propaganda since 2015.

This has not only distorted the democratic public discourse but has also allowed the government to funnel billions in publicly funded advertising revenue from these massive campaigns to pro-government media corporations⁷.

4. The Media Council has also loyally served Fidesz's media policy interests in the radio market. Over the past few years, pro-government oligarchs had a very high success rate in submitting winning applications for radio frequencies: for a while, Lajos Simicska was the constant winner of frequency tenders, and he was later followed by Andy Vajna. The Media Council availed itself of all instruments, lawful and unlawful, to serve Fidesz's interests to the utmost. The most memorable move in this regard was undoubtedly when it disqualified basically the only opposition radio station Klubrádió unlawfully from a tender merely because the company's representative had failed to sign and number the empty back pages in the frequency application.
5. The Media Council also extends a helping hand in allowing for the completely opaque and non-transparent operations of the public service media system. According to the Media Act, the Council should concern itself with the financial management of the Media Support and Asset Management Fund (abbreviated as MTVA in Hungarian since "[t]he Fund's support and subsidy policy, business plan and annual report shall be adopted by the Media Council" (Article 136 (10) of Act CLXXXV of 2010). Despite this legally enshrined obligation, the Media Council has never done anything at all to make the public media operate more transparently: The MTVA spends 93 billion HUF annually (approx. 282 million EUR) without any independent review of the institution's financial management. We have known that to be the case for some time now, of course, but European institutions can still be misled by the fact that a European-style public media and a European-type media authority exist here in Hungary.
6. Last but not least the Media Council remained silent when the Fidesz government all of a sudden intervened in the media market with the advertising tax and it was also quiet when Hungary became home to the European Union's most concentrated media market with the creation of the Central European Press and Media Foundation (abbreviated as KESMA in Hungarian).

⁷ In the subject Klubrádió Zrt jointly with the Mérték Média Monitor, Benedek Jávor MEP submitted an unlawful state aid complaint. (see for more details: <https://mertek.atlatszo.hu/state-advertising-spending-in-hungary-an-unlawful-form-of-state-aid/>)

The above examples show that even if de jure the Media Council may be independent but de facto the Media Council does not have the independence and the integrity. Therefore, we are of the opinion that an election of an only Fidesz nominated Media Council would seriously undermine the independence of this institution and interfere with the rule of law in the country for the following nine years as well.

We are also convinced that such an act therefore would clearly be the breach of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). Art 30. Paragraphs 1 and 2 clearly requires that the regulatory body have to be independent of the government:

1. Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.

2. Member States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

Of course, it is clear to us, that Member States still have almost one more year to implement the provisions of the revision of the AVMS Directive. However, the election of those Fidesz candidates to the Media Council would make an irretrievable damage to the independence of a national regulatory body and would ignore the conditions set out in the AVMS directive for almost a decade. Therefore, we are calling on the Presidency to act on this issue urgently and raise their concerns to the Hungarian government in order to prevent breaching European law and further undermining the Rule of Law in Hungary.

Brussels, 9th December 2019.

Yours sincerely,

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Philippe Lamberts
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Benedek Jávor

And

Miklós Hargitai – Magyar Újságírók Szövetsége (National Association of Hungarian Journalists)
Ricardo Gutierrez – European Federation of Journalists
Christophe Deloire – Reporters sans frontières
Scott Griffen – International Press Institute