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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON

MEDIA LEGISLATION
(ACT CLXXXV ON MEDIA SERVICES AND ON THE MASS MEDIA, ACT CIV ON FREEDOM OF THE PRESS, AND THE LEGISLATION ON TAXATION OF ADVERTISMENT REVENUES OF MASS MEDIA)

OF HUNGARY

on the basis of comments by

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I. INTRODUCTION

1. On 29 January 2015 the Parliamentary Assembly of the Council of Europe adopted Resolution 2035(2015) where it invited the Venice Commission to "identify the provisions which pose a danger to the right to freedom of expression and information through the media, in the Hungarian Act CLXXXV of 2010 on Media Services and Mass Media, in the Hungarian Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content, and in the Hungarian tax laws on progressive tax on advertising revenue for media"[1].

2. Mr Nicos Alivizatos, Mr Michael Frendo, Mr Jan Velaers (members) and Ms Eve Salomon (DGI expert) acted as rapporteurs on behalf of the Venice Commission.

3. On 16-17 April 2014, a delegation of the Venice Commission visited Budapest and held meetings with representatives of the authorities, as well as with journalists, professional associations of media professionals and NGOs working in the media sphere. The Venice Commission is grateful to the Hungarian authorities and to other stakeholders for the excellent co-operation during the visit.

4. This opinion is based on the English translation of the relevant legislation law provided by the Hungarian authorities (CDL-REF(2015)011). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. *This Opinion was adopted by the Venice Commission at its …th Plenary Session (…)*

II. CONTEXT AND THE SCOPE OF THE OPINION

A. Background information

6. In 2010 the Hungarian Parliament passed two laws regulating the media sphere: the Media Act (Act CLXXXV of 2010 on Media Services and Mass Media, hereinafter "the Media Act"), restructuring the media regulatory system, and the Press Act (Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content, hereinafter the "Press Act"), concerning media content and press regulation. Those laws are often referred to as the "media package".

7. The adoption of the "media package" prompted strong criticism within the country and abroad. In particular, in 2011 the Commissioner for Human Rights of the Council of Europe expressed concerns over its effects on media pluralism and free speech.[2] In 2012 the Council of Europe issued an expert opinion[3] where it suggested numerous substantial changes to the "media package". Both the European Parliament and the European Commission raised concerns regarding the conformity of the Hungarian media laws with the Audiovisual Media Services Directive and the *acquis communautaire*.[4] The OSCE Representative on Freedom of the Media repeatedly expressed the view that the "media package" violated OSCE media freedom standards, was open to misuse and endangered editorial independence and media pluralism.[5] Certain criticism has been expressed in the opinions of the Venice Commission which, albeit not touching directly on the legislation at

[1] CommDH(2011)10, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21544&lang=en
[2] https://wcd.coe.int/ViewDoc.jsp?id=1751289
[3] http://www.coe.int/t/dghl/cooperation/media/publications/Hungary/Hungary%20Media%20Acts%20Analysis%20-%20Final%2014-05-2012%20(2).pdf
[4] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315#ref_1_2
[5] See, for example, http://www.osce.org/fom/90823. See also the OSCE expert reports on the Hungarian "media package" legislation: http://www.osce.org/fom/75990 and http://www.osce.org/fom/71218

issue, disapproved constitutional amendments related to the media sphere.[6]

8. International and domestic NGOs also heavily criticised the "media package". Thus, *Freedom House* observed 5 years' decline in the level of press freedom in Hungary.[7] *Article 19* and the Hungarian Civil Liberties Union[8] characterised the media laws as "infamous". Alleged lack of media freedom and pluralism was one of the main concerns of the *Human Rights Watch* report on Hungary of 2013.[9]

9. Key problems outlined by the international bodies and NGOs included the alleged lack of political independence of the Media Council (the regulatory agency), concentration of powers in the hands of the Media Council, unjustifiably high fines for journalists and media outlets, unclear requirements for content regulation, inadequate protection of journalists' sources, and the government's control over the public service media.

10. The Hungarian authorities responded to the criticism. First, the Constitutional Court struck down certain norms contained in the "media package" as anti-constitutional and required the Government to make changes to the provisions pertaining, in particular, to the regulation of media content and protection of journalists' sources. Second, in 2011-2012 the "media package" was subjected revision. Yet, many domestic[10] and international observers[11] were not satisfied with those reforms. The amendments were said to be fragmentary and not addressing the key problems detected earlier. The Hungarian Government, on their side, defended their positions referring to the examples of similar regulations in other European states. Even more so, in 2014 a new tax based on turnover was introduced which affected companies with big advertisement revenue (Act XXII, hereinafter the Advertisement Tax Act). Introduction of this new tax gave rise to an application of the RTL Group (a company heavily struck by this tax) to the European Court of Human Rights (ECtHR) and to the European Commission.[12] The present opinion seeks to further the process of amelioration of the Hungarian media laws started in the framework of the dialogue with the Secretary General of the Council of Europe.

B. Scope of the opinion

11. The 2015 PACE Resolution invited the Venice Commission to detect provisions of the media laws "which pose a danger to the right to freedom of expression and information through the media". The three legal texts under examination are extremely lengthy, complex and regulate virtually every aspect of the media sphere, and the Commission is commenting only on key elements of the two laws which, in its opinion, should be given priority for revision.

12. The absence of comments on other provisions of the law should not be seen as a tacit approval of them. First, those other provisions may have been sufficiently covered in the previous documents prepared by other Council of Europe bodies. To the extent that the laws remained unchanged, the observations made by other Council of Europe bodies remain valid and the Venice Commission calls the Hungarian authorities to address them effectively.

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[6] See, in particular, the position of the Venice Commission on the Fourth Amendment to the Hungarian Constitution, CDL-AD(2013)012, §§37 et seq.
[7] https://freedomhouse.org/report/freedom-press/2015/hungary
[8] http://tasz.hu/files/tasz/imce/information_note_hml.pdf
[9] http://www.hrw.org/sites/default/files/reports/hungary0513_ForUpload.pdf; see also an assessment by the Reporters Without Borders, http://en.rsf.org/hongrie-hungary-s-media-law-is-08-03-2011,39721.html
[10] http://tasz.hu/files/tasz/imce/2011/letter_hungarian_ngos_media_ce.pdf; see also http://mertek.eu/sites/default/files/reports/hungarian_media_law_0.pdf
[11] See, for example, point 12 of the PACE Resolution 2035 (2015), cited above; see also the 2014 report by the Commissioners for Human Rights of the Council of Europe, CommDH(2014)21 (https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2688595&SecMode=1&DocId=2218468&Usage=2)
[12] http://budapestbeacon.com/featured-articles/rtl-group-files-complaint-with-ec-over-hungary-ad-tax/; see also http://en.rsf.org/hungary-government-throttles-media-with-12-06-2014,46429.html

13. Second, certain provisions of the "media package", although in principle questionable, do not seem to raise particular issues in the Hungarian context, as currently applied. For example, almost total assimilation of electronic to print media, in particular in terms of registration requirements for the latter (Section 5 of the Press Act and Section 41 of the Media Act) may appear excessive and unnecessary, but during the country visit it became clear that those requirements are not considered by the media community as too burdensome. Similarly, provisions concerning exterritorial application of the media laws (Sections 2 and 3 of the Press Act, Sections 176-180 of the Media Act), it seems, have not given rise to any serious dispute. Consequently, such provisions were left outside the purview of the present opinion. Instead, the Commission focused on those elements of the law which have (or may have) important practical effect on the freedom of media in the country.

III. ANALYSIS

14. A preliminary general remark is called for. The essence of democratic governance does not stem only from the political will of the people as expressed in free and fair general elections providing a country with a legitimately elected government. It is also reflected in governance which provides democratic space for minorities and alternative points of view. There is no doubt that the government of Hungary is a democratically elected one and enjoys large popular support. Even more so, after the landslide victory of Fidesz in 2010 and until early 2015 the ruling Fidesz/KDNP coalition had a qualified majority of votes in the Parliament – a rare phenomenon for a modern democracy. Such dominant position gives the ruling coalition a broad mandate in various areas but not a *carte blanche*.[13]

15. Quite the opposite, where one particular political group has so much political influence, media pluralism and independence of the journalistic profession need special measures of protection. Indeed, as has been often emphasised by the Hungarian authorities, certain legal mechanisms and rules which exist in the Hungarian media law may also be found in the legislation of other European countries. However, it would be wrong to transpose them mechanically from those countries to Hungary. The specific political and economic context of the country must be taken into account (quasi-monopoly of the ruling coalition in the political sphere, powers and structure of the State regulatory bodies, size and the level of concentration of the media market etc.). Recommendations formulated in this opinion should therefore be read in the specific Hungarian context.

A. Structure of the law and the level of media regulation

16. The two laws which formed the "media package" are extremely lengthy (170 pages *in toto*) and create a labyrinth of detailed regulation covering the entire area of media services and the mass media. Although initially adopted before the entry into force of the Hungarian Constitution of 2011, the Acts under consideration fall within the ambit of § 3 of Article IX of the latter, which provides that "the detailed rules for the freedom of the press and the organ supervising media services, press products and the info-communications market shall be regulated by cardinal Act".

17. In its opinion on the new constitution of Hungary[14] the Venice Commission objected to the use of cardinal laws for issues that, in the normal course of affairs, should have been left to ordinary legislation: "The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country's legal order".

[13] See on this matter CDL-AD(2011)016, Opinion on the new Constitution of Hungary, §§11 and 12
[14] CDL-AD(2011)016, §24

18. As regards the media sphere, it may be justifiable to seek stability in the way the media regulatory authority is organised and functions, and to require a supermajority to fix or change those rules. However, the Commission sees no particular reason to use cardinal laws for other, especially "detailed" regulations in the media sphere. They should be left to ordinary legislation or even to soft-law instruments developed by the State regulatory body or even the bodies of self-regulation of the media community (for more specific recommendations on this topic see below).

B. Content-based regulations and sanctions for their infringement

19. Both the Press Act and the Media Act introduced content-based restrictions on freedom of expression. A number of these restrictions prohibit certain categories of speech (obscene, hate speech, etc.). Other provisions introduced positive obligations on the mass media, as they prescribe the way in which media outlets have to exercise their functions.

1. Provisions related to the seditious speech, hate speech, obscene publications, defamation etc.

20. In certain jurisdictions content-based restrictions on speech are impermissible, unless they create a clear and imminent danger of unlawful violent action. Thus, the US Supreme Court draws a distinction between a mere general advocacy of violence and calls for a specific violent act. The former class of speech is protected by the First Amendment to the US Constitution, while the latter may be punishable.[15]

21. The European approach is not so categorical. As such, content-based restrictions are not ruled out by Article 10 of the European Convention on Human Rights (ECHR) or Article 11 of the EU Charter of Fundamental Rights. Even more so, there are numerous international instruments which urge the States to take positive measures to combat hate speech[16] or protect children against sexually explicit or violent media content.[17] The Venice Commission in its 2008 Report on the relationship between Freedom of Expression and Freedom of Religion said that it "does not support absolute liberalism" and recognised that "while there is no doubt that in a democracy all ideas, even though shocking or disturbing, should in principle be protected (with the exception, as explained above, of those inciting hatred), it is equally true that not all ideas deserve to be circulated. Since the exercise of freedom of expression carries duties and responsibilities, it is legitimate to expect from every member of a democratic society to avoid as far as possible expressions that express scorn or are gratuitously offensive to others and infringe their rights".[18]

22. However, to be in compliance with Article 10 § 2 of the ECHR, content-based restrictions have to be "prescribed by law" and "necessary in a democratic society", "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". The requirement of "lawfulness" implicitly

[15] See *Brandenbourg v. Ohio*, 395 U.S. 444

[16] See, for example, Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe on hate speech; see also ECtHR judgment in the case of *Müslüm Gündüz v. Turkey*, 4 December 2003, §22. Finally, see the Opinion on the Fourth Amendment to the Fundamental Law of Hungary (CDL-AD(2013)013), § 52), where the Venice Commission already stated: "it may be considered necessary in democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance."

[17] See, for example, Recommendation CM/Rec(2009)5 of the Committee of Ministers on measures to protect children against harmful content and behavior and to promote their active participation in the new information and communications environment.

[18] CDL-AD(2008)026, Report on the relationship between Freedom of Expression and Freedom of Religion : the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, §73

refers to a certain quality of the law in question.[19] A limitation would not be "lawful" if the law is not sufficiently clear, accessible or if its application is unforeseeable. *In casu*, certain provisions of the Press Act which define illegal media content are not sufficiently precise.

23. For example, Section 16 of the Press Act prohibits media content which violates "constitutional order", but this term is too vague. Neither the Press Act itself nor any associated "soft law" clarifies what it means. Advocating for the amendment of the Constitution through legal means could be viewed, under this provision, as a violation of the constitutional order – yet, most often, it is an acceptable form of expression. In its opinion on the Romanian constitution the Venice Commission stressed that *"*in the absence of an element of 'violence', the prohibition on expression favouring territorial separatism (which may be seen as a legitimate expression of a person's views), may be considered as going further than is permissible under the ECHR".[20] In an opinion concerning the law of Azerbaijan on NGOs the Venice Commission held that "peaceful advocacy for a different constitutional structure […] are not considered to be criminal actions, and should on the contrary be seen as legitimate expressions".[21]

24. Other notions defining illegal media content are similarly vague. Thus, it is unclear what is meant by media content aiming at "disassociation of peoples, nations" etc. (Section 17 of the Press Act). A critical remark about infringement of the minority rights in Hungary may be regarded as an attempt to "disassociate the people".[22]

25. Section 20 (5) of the Press Act refers to commercial communications and includes a prohibition on offending religious or political beliefs.[23] Section 14 of the Media Act imposes limitations on "broadcasting [of] any image or sound effects that is likely to harm the religious convictions or beliefs, or other philosophical convictions, or which are violent or otherwise disturbing". However, it is not clear what this means, how widely "political beliefs" or "philosophical convictions" may be interpreted, and how "disturbing" images or sounds should be to trigger liability of the media outlet which broadcasted them.[24] The Venice Commission recalls in this respect that "freedom of expression is applicable not only to "information" or "ideas" that are […] regarded as inoffensive […], but also to those that offend, shock or disturb".[25]

26. Section 4 (3) of the Press Act states that exercising the freedom of the press shall not violate the rights of others relating to personality "under any circumstances". Section 14 obliges media service providers to respect human dignity and prohibits displaying "vulnerable persons" in a "degrading way". These provisions create an impression that the "personality rights" of individuals have always to prevail over the freedom of the press. However, this interpretation is incorrect: it is up to the court to balance competing interests and decide which of them prevails in the specific circumstance of the case: the freedom of speech or any private interest which that freedom may affect. So, it is wrong to categorically

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[19] See, among other authorities, ECtHR judgments in the cases of *Rotaru v. Romania* [GC], no. 28341/95, §52, ECHR 2000-V; *Gawęda v. Poland*, no. 26229/95, §39, ECHR 2002-II; and *Maestri v. Italy* [GC], no. 39748/98, §30, ECHR 2004-I

[20] CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, §73

[21] CDL-AD(2014)043, Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan, §49

[22] See, for the analysis of a similar situation, the Judgment of the ECtHR of 9 April 2002 in case *of Yazar, Karatas, Aksoy and People's Labour Party of Turkey, §§56 and 57*. Furthermore, in examining Russian anti-extremism law the Venice Commission expressed the view that in order to qualify "stirring up of social, racial, ethnic or religious discord" as criminally punishable act of "extremism", the legal definition should expressly require the element of violence – see CDL-AD(2012)016, Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation, §§36 and 39

[23] See also Section 24 of the Media Act which prohibits commercial communications which promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, physical or mental disability, age or sexual orientation.

[24] And, regrettably, no exceptions have been made for specialist media (e.g. advertisement for a Christian product could offend Muslims).

[25] ECtHR in the case *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §96, ECHR 2009, with further references

assert that such speech is inadmissible "under any circumstances". Thus, for example, a critical remark prejudicial to the reputation of a politician may be permissible: the European Court has often reiterated "that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion".[26] While criticising public figures journalists should be allowed to have recourse to a degree of exaggeration or even provocation,[27] or, in other words, they are entitled to make somewhat immoderate statements.[28]

27. The Commission is mindful that not all types of illegal media content may be precisely defined in law. It is an illusion that absolute legal certainty can be created through a legal text. Thus, for example, it may prove difficult to describe obscenity without using obscene language and/or images. In principle, the legislator may defer to the courts and let judges develop and clarify those concepts through case-law. Therefore, by itself, the reference in the Press Act to the "constitutional order", "morals" etc. is not contrary to European standards. It is legitimate for the State to combat seditious, inflammatory, obscene or defamatory speech. However, the law should be revisited in order to ensure that those vague concepts ("morals", "constitutional order" etc.) are not interpreted by the courts too broadly.

28. To reduce that risk, the Venice Commission recommends several measures. First, certain provisions are dangerously broad as such and should be removed. It concerns Sections 17 (2) and 20 (5) of the Press Act and Section 14 of the Media Act (which prohibit speech aimed at "disassociation of peoples" or offending "religious or political beliefs", establish warning obligation for "disturbing" images and sounds etc.). Section 4 (3) of the Press Act should not mention that rights of personality[29] cannot be violated "under any circumstances".

29. Second, as to other provisions of the Press Act and Media Act which define illegal media content (namely the clauses which prohibit speech affecting "public morality" and "personality" (Section 4 (2) of the Press Act), speech prejudicial to human dignity (Section 14 (1) thereof), speech violating constitutional order (Section 16), hate speech (Section 17 (1)), they may remain in the law, but the law should be amended in order to ensure that the courts interpret those provisions narrowly.

30. The Press Act, as it is formulated now, does not reflect sufficiently the idea of proportionality, which is the cornerstone of the ECtHR case-law under Article 10 of the Convention. The Venice Commission recalls that defending "constitutional order", "public morals" or "dignity" or individuals is a legitimate aim which the State may pursue; however, by itself it cannot justify an interference with the freedom of expression. The Press Act should make it clear that the limits of this freedom depend on the context and the freedom of expression may in certain circumstances outweigh other legitimate interests and prevail. Not every statement which may be seen as attacking constitutional order, dignity, or morals is illegal.[30] Even more so, where expression concerns matters of public interest or public figures - i.e. the "core" area of protection under Article 10 of the ECHR – journalists are *a fortiori* allowed to have recourse to a degree of exaggeration or even provocation and may

[26] ECtHR in the case *Yazar, Karatas, Aksoy and People's Labour Party of Turkey*, 9 April 2002, §59

[27] *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, ECHR 2004‑XI, §71

[28] For further details on this point, the Hungarian authorities are invited to consult the Venice Commission opinions which contain outline of the relevant case-law and comparative material, for example Amicus Curiae Opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact as requested by the Constitutional Court of Georgia (CDL-AD(2004)011), Opinion on the Legislation on Defamation in Italy (CDL-AD(2013)038) or Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan (CDL-AD(2013)024).

[29] Although the exact meaning of this word is not very clear

[30] The Venice Commission notes that Section 185 of the Media Act mentions proportionality in the context of the application of sanctions for illegal media content. This is correct; however, proportionality principle also plays its role at the earlier stage, when the court has to decide whether the media content is illegal or not.

express ideas which “offend, shock or disturb”.

31. In sum, the Venice Commission invites the Hungarian authorities to revisit the Press Act and introduce there the principle of proportionality, formulated in line with the time-honoured case-law of the ECtHR.[31]

32. Finally, the regulatory authority (the Media Council) should develop and publish clear policy guidelines, explaining how it interprets legal provisions on illegal media content. Those guidelines should be developed jointly with the self-regulatory bodies of the media sector and ensure predictable and coherent interpretation by the Media Council of the general principles contained in the law and help media operators fully exercise their freedom of expression without any chilling effect possibly resulting from vagueness of the concepts employed in the law.

2. Interviews

33. Section 15 of the Press Act contains an obligation to show an interview made for public presentation to the person interviewed or participating in media content upon his/her request before publication. If the person interviewed refuses consent the interview may not be broadcast or published. This provision seriously limits the freedom of the press. It is well known that interviews are seldom published entirely and verbatim. The edited version of an interview is very often a summary with the most interesting excerpts selected by the journalist for the purpose of informing the public. After all, the person interviewed is responsible for agreeing to be interviewed by the specific journalist. Furthermore, in live interviews there is always a risk of poorly chosen words being used, even by experienced people; live coverage would for sure lose its significance if such mistakes were deleted.

34. Section 15 implies that the person interviewed can prevent the publication of the interview each time the journalist “made changes in or distorted the interview as to substance, to the detriment of the person interviewed”. The criterion “to the detriment of the person interviewed” is a very wide one, and “distortion” is a concept subject to interpretation. The Commission recalls that in *Wizerkaniuk v. Poland*,[32] the European Court stated with regard to pre-approval of interviews that it is a normal obligation of professional diligence for a journalist to verify the accuracy of interview before its publication. However, in that case the Court criticised the law which gave interviewees *carte blanche* to prevent a journalist from publishing any interview they regarded as embarrassing or unflattering, regardless of how truthful or accurate it is. The Court held that other remedies existing in the Polish law – namely *ex post* civil remedies (publication of a rebuttal, payment of damages, etc.) – were sufficient to address the problem of inaccurate or even deliberately distorted interviews. By permitting the person interviewed to prevent the publication or broadcasting of the interview for the sole reason that the changes were made “to his detriment”, even when the selected excerpts give an overall accurate presentation of what the person declared, Section 15 of the Press Act disproportionately limits the freedom of the press.

35. This provision should therefore be deleted. The journalist must have the right to publish an interview if he/she believes that the text or footage to be published is accurate (without necessarily being “verbatim”), whereas the person interviewed must have the right of reply published with the same prominence or the right to sue the journalist *ex post facto* if he/she believes that the interview is substantially inaccurate and detrimental to his/her reputation, and it is up to the general reader (in the case of a right of reply) or to the court (in the case of legal action) to decide whether the journalist did his job professionally or not.

[31] The Media Act should be revised accordingly; however, most of the content regulations are contained in the Press Act.
[32] No. 18990/05, 5 October 2011

3. Sanctions for illegal media content

i. Proportionality of the fines and other measures

36. The legitimacy of restrictions on freedom of speech is to be assessed in the light of severity of the sanctions or other measures imposed by the Media Council (the media regulatory authority) for illegal media content. Section 187 of the Media Act foresees a wide variety of sanctions from warnings and fines to the suspension of operations of the media outlet, the deletion of the media service from the media register or the termination of the public contract on broadcasting services. It specifies the maximum amount of each fine, differentiating according to the type of media service and its influence on the media market. The maximum amount of the fine for a media service provider with significant market power is 200 million HUF (approximately 650,000 EUR) while the maximum amount of the fine for an online press product is 25 million HUF (approximately 80,000 EUR).

37. As regards financial sanctions actually imposed by the Media Council after the enactment of the Media Act, it was reported to the Commission that their amount remained relatively moderate. Such judicious policy of the Media Council deserves praise. Moreover, the delegates of the Commission were explained that the Constitutional Court of Hungary throughout its history had been committed to upholding freedom of expression and information through the media in Hungary. Therefore, practical application of Section 187 so far does not give rise to any serious concerns.

38. However, the mere threat of application of heavy sanctions may have a chilling effect on journalists and media outlets, especially where the sanctions are imposed for violations of such vague requirements as those set in the laws (see Chapter B (1) above on content restrictions).[33] Even if at the end of long legal proceedings the journalist might probably win the case, the incertitude remains, and the hassle related to such legal proceedings may have a deterrent effect and lead to self-censorship. As the Venice Commission put it in its Opinion on the Legislation on Defamation in Italy "excessively high fines pose a threat with almost as much chilling effect as imprisonment, albeit more insidious".[34] There is no doubt that the maximum amounts of fines provided by the Media Act are extremely high, even taking into account the size and the economic condition of the potential offender. And the "chilling effect" is greater in the current political context, where all members of the Media Council have been appointed to this body at a time when the ruling coalition had a super-majority in the Parliament and are therefore perceived, rightly or wrongly, as too close for comfort with the current Government.

39. To a certain extent this issue is addressed by Sections 185 and 187 (3) of the Media Act which proclaims the principle of "progressivity and proportionality". However, it remains a broad legal principle and does not create a clear and binding rule. Thus, the law does not describe how quickly the "progressive" (i.e. gradual) application of the fines may reach maximum amounts set in the law, what sort of illegal media content is considered to be a "grave" infringement, and what affects more the severity of the sanction – the gravity of the breach, the repetitive character of the breach, or the type/size and influence of the media at issue. Furthermore, the Media Act uses certain vague terms (such as "insignificant infringement", "repeat offenders", "repeated grave infringement" or "insignificant offenses") which are open to interpretation. Again, the Commission recommends the Media Council to develop policy guidelines which would make application of the fines more foreseeable. At the legislative level, the Hungarian authorities might consider lowering the upper limits of the fines.

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[33] It is understood that the "infringements" for which the Media Council may impose administrative sanctions (warnings, fines, withdrawal of license, etc.) under Section 187 of the Media Act comprise publications which contain illegal media content as defined by Sections 4, 14, 16, 17 and 20 of the Press Act.

[34] CDL-AD(2013)038, §62

40. The principle of "proportionate and progressive" application of sanctions is particularly important in respect of powers of the Media Council which may be considered as "censorship" powers: this is the power to interrupt activities of a media outlet for a certain period of time (Section 187 (3) (c) of the Media Act), the power to withdraw from the media outlet its broadcasting licence or registration (Section 187 (3) (e)) and the power to block access of users to illegal media content (see Sections 178 (3), 188 and 189 – as a sanction or as a preliminary measure). The Venice Commission recalls that although ECtHR does not exclude prior restraints on the freedom of speech, it regards such measures as the most serious threats to the free flow of information and public debate, and subjects them to the most stringent scrutiny, especially where such measures affect the functioning of the media outlet as a whole. For a detailed analysis of a somewhat similar prior restraint measures see the Venice Commission's opinion on the draft Amendments to the Media Law of Montenegro.[35]

41. In sum, it should be made clear in the law that the Media Council may use its powers to impose heavy sanctions (such as high fines or interruption of broadcasting, blocking of access etc.) only as a measure of last resort, where all other reasonable attempts to steer the media outlet on the right path have failed, and where its publications repeatedly and seriously (both conditions should be satisfied) endangered public peace and order (for example, where the media outlet has repeatedly made calls for unlawful violence in respect of minority groups or advocated a violent overthrow of a democratic public order). In addition, there is a need to develop policy guidelines on administrative sanctions which would explain how the Media Council exercises its discretion in this sphere.

ii. Judicial review proceedings

42. The Commission is also concerned with the procedure for applying sanctions. From Sections 163 and 189 of the Media Act it transpires that fines become collectible by the authorities regardless of whether the sanction has been challenged in court. Thus, court proceedings as such have no suspensive effect on the financial sanctions; the enforcement of such a sanction may be suspended only if the court so decides on the basis of a separate application by the claimant.

43. Furthermore, if the Media Council decides, in response to a breach of the media law, to strike the media provider out of the register or withdraw the frequency allocated to it under a public contract, its broadcasting must be terminated immediately.[36] As follows from Section 189 (8), where the Media Council orders termination of the broadcasting, the enforcement of such decision cannot be suspended.

44. If this reading of the law is correct, those provisions increase the chilling effect of the provisions on the sanctions. Court decisions may take some time and it is important to adequately safeguard valuable interests of the media outlet and its audience to impart and receive information during this lapse of time. Immediate enforcement of a heavy fine or termination/suspension of broadcasting, even if it lasts several days only, may destroy the media outlet, especially now when traditional media are so fragile economically. In the opinion of the Commission, decisions of the Media Council which interrupt the normal functioning of the media in any significant manner should not be enforceable immediately; the media outlets should be given a minimal time to react and the Hungarian courts should have the power to suspend enforcement of such measures pending the proceedings.

45. Next, as can be inferred from Section 163 of the Media Act, decisions of the Media Council can be appealed in the administrative court only on the grounds that the media authority's penalty decision infringed the media law. It is unclear whether the administrative courts are allowed to review the substance of the decision of the Media Council and rule on the proportionality of sanctions applied by the latter based on constitutional principles, any

[35] CDL-AD(2015)004
[36] Cf. Section 189 (8), taken in conjunction with Section 189 (8) and 187 (3) (e) of the Media Act

other laws, or legal precedents. This should be clarified in the law. Judicial review by the administrative courts of "lawfulness" of the decisions of the Media Council should include not only the verification of the formal compliance of the measure with the Media Act, but also questions of proportionality of the contested measures.[37]

46. Finally, Section 189 of the Media Act stipulates that the person affected by an administrative measure has only fifteen days to lodge an appeal to the administrative court. Section 163 (4) contains a similar provision. This time-limit may be appropriate in respect of smaller fines or warnings, but it appears to be too short when the appeal concerns complex matters, such as decisions relating to frequency tenders, non-compliance with public contracts, and such like.

47. In sum, heavy sanctions[38] should not be immediately enforceable; court proceedings in such cases should have a suspensive effect and the courts should have the power to review the substance of the decisions of the Media Council in the proceedings which offer basic fair trial guarantees.

4. Provisions related to the positive obligation to give balanced and diverse press coverage

48. Section 13 of the Press Act in its current form requires that linear media service providers (i.e. essentially radio and TV broadcasters) must provide "diverse"[39] and "balanced" information (see also Section 12 (2) of the Media Act). In addition, Section 12 (4) of the Media Act obliges the presenters of the news programs to distinguish clearly between "facts" and "opinions". These requirements concern information programs. Section 181 of the Media Act establishes an administrative procedure to handle the infringements of the obligation of balanced information. This procedure will be initiated on request of "the party subscribing to the unrepresented view, or any viewer or listener" and can lead to a decision of the Media Council to impose either the obligation to broadcast or publish the declaration of infringement or to provide an opportunity for the petitioner to make his viewpoint known. The Media Council's resolution in this respect is subject to judicial review.

49. It must be noted that Section 13 of the Press Act has already been amended, in response of the recommendations contained in the CoE expert examination of 2012. Namely, the requirement of the "diverse, comprehensive, factual, up-to-date, objective" coverage was removed from the law. Furthermore, Section 13 of the Press Act is now applicable only to linear media service providers. Those amendments are welcome. The question is whether the remaining requirements ("balanced" and "diverse" news coverage and the obligation to distinguish between "facts" and "opinions") are justified.

50. Balanced and neutral news reporting is, indeed, a commendable professional standard for every journalist. Furthermore, it is perfectly legitimate to require that "media system on the whole" is organised in such a manner as "to provide credible information, quickly and accurately" (see Section 10 of the Press Act).[40] After all, Article 11 of the EU Charter specifically guarantees "media pluralism", which is impossible without diverse and balanced media coverage of current events.[41] As the Venice Commission held in its opinion on laws

[37] Indeed, in exercising its power of review the competent administrative court should respect the discretion of the Media Council and review the substance of its decision only where it detects manifest errors or abuses.
[38] Rules concerning less severe sanctions may be different.
[39] The official translation of Section 13 of the Press Act reads as follows: "Linear media services engaged in the pursuit of information activities are required to ensure the diversity of their newscasts and news programs […] as well as on public debates, and to ensure that the information they provide is balanced." However, another translation of the text of the Press Act, available to the Commission, does not mention the "diversity" requirement (see http://hunmedialaw.org/dokumentum/152/Smtv_110803_EN_final.pdf). The Venice Commission's analysis is based on the official translation of the Press Act.
[40] See Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, Section I, p. 1.1 (https://wcd.coe.int/ViewDoc.jsp?id=1089699)
[41] Article 11 of the Charter thus refers to a concept which is absent from the text of Article 10 of the European Convention; the latter formulates the freedom of speech as a mostly "negative" freedom, even though the case-

"Gasparri" and "Frattini" of Italy, "media pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views"; further down it continued: "while external pluralism relates particularly to the private sector, internal pluralism has increasingly become associated with the public sector".[42] In the Hungarian context, measures aimed at limiting over-concentration of the media and provisions fixing minimal quotas for national and European independent content providers are supposed to ensure diversity of opinions on the media market as a whole (see, in particular, Part Two of the Media Act, Chapters I, IV, V and VI).

51. However, it is questionable whether "diversity" should become an enforceable legal obligation of every particular media taken alone. The norms under consideration create a very complex obligation on the media and lack precision. What is meant by "diversity" of news programmes? How can information be "balanced"? One can understand balance of opinion, but information (facts) needs to be thorough and accurate, not "balanced". How quickly has the "balance" to be achieved when the programme is a "series of programmes regularly shown"? Should the "diversity" and "balance" be assessed in quantitative or more in qualitative terms? In addition, "facts" cannot always be clearly distinguished from "opinions"; after all, it is difficult to imagine an anchor-man not using any adjective, while every adjective gives a flavour of an "opinion" to a statement of fact. In sum, the vagueness of the terms employed in two acts may turn those provisions into a tool of suppression of the free speech, even if originally it was supposed to promote non-opinionated news reporting.

52. It was reported during the visit that the above positive obligations of the media are not strictly enforced in respect of the public service media, and, at the same time, create additional burden for the private media. The Venice Commission understands the need to distinguish between facts and opinions and provide "balanced" and "diverse" news coverage, especially when those requirements are applied to public service media. However, given the vagueness of those concepts and the risk of abusive interpretation of Section 13 of the Press Act and Section 12 of the Media Act, the Venice Commission recommends the Media Council to issue clear policy guidelines on the application of those provisions. Such guidelines should be developed by the Media Council jointly with the self-regulatory bodies, and should be published.

C. Disclosure of sources of information

53. Section 6 (1) of the Press Act formulates a general rule which gives journalists the right not to disclose their sources of information. However, it protects only the sources of "media content providers and the persons they employ under contract of employment or some other form of employment relationship". The border between freelance and in-house journalism is blurred, and there is no particular reason why free-lance journalists should be excluded from the general rule. Appendix to Recommendation No. R(2000)7 by the Committee of Ministers of the Council of Europe on the right of journalists not to disclose their sources defines "journalists" as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication". Hence, although the employment relationship with a media outlet is the best proof that the person is a "journalist", it is not the only possible proof. The scope of Section 6 should be extended to clearly include freelance journalists, professional bloggers[43]

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law of the ECHR detected that effective enjoyment of this freedom is impossible without certain positive obligations of the State – see, in particular, the case of *Manole and others v. Moldova*, no. 13936/02, ECHR 2009 -... (extracts), where the ECtHR proclaimed that "the State must be the ultimate guarantor of pluralism" (§99).

[42] CDL-AD(2005)017, Opinion on the compatibility of the Laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§40 and 44. See also p. 14 of the Declaration of the Committee of Ministers on Public Service Media Governance of 15 February 2012 (https://wcd.coe.int/ViewDoc.jsp?id=1908241); see also the ECtHR judgment in *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, 21 September 2000; and the decision of the former European Commission on Human Rights in *X. SA v. the Netherlands*, no. 21472/93, 11 January 1994, DR 76-A, p. 129

[43] An important reservation is needed: indeed, protection of sources remains the privilege of professional journalists. Thus, as put by PACE, "the same relationship of trust does not exist with regard to non-journalists,

and alike.

54. Section 6 (2) of the Press Act defines situations where journalists may be required to disclose their sources. In 2012, following a judgment by the Hungarian Constitutional Court, this provision was amended, limiting the obligation for the journalists to reveal their sources only for the purposes of criminal proceedings and following a court order. The Commission observes that the English translation of Section 6 (2) of the Press Act says that the sources may be revealed "in justified cases specified by law" and only "in exceptional circumstances". It does not mention explicitly criminal cases. During the meeting at the Hungarian Constitutional Court the delegates of Commission learnt that this provision is interpreted as concerning only criminal cases. This development is positive: limiting the obligation of disclosure to criminal cases helps protect investigative journalism. However this limitation should follow clearly from the text of Section 6 (2). The analysis below is based on the assumption that disclosure of sources may be ordered only within criminal proceedings (and not civil or other proceedings).

55. The rule contained in Section 6 (2) needs to clarify what is meant by "justified [criminal] cases" and "exceptional circumstances". The delegates of the Commission were told that the Hungarian Code of Criminal Procedure contains additional guidance for the courts when deciding on disclosure requests. In particular, the criminal procedure law refers to the formal classification of the crime under the domestic law – in particular, crimes punishable with 3 years' imprisonment or more. This is an important criterion, but the 3 years' threshold appears to be quite low and, in any event, it should not automatically trigger the disclosure. According to the ECtHR "an order of source disclosure […] cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest".[44] Not every criminal investigation automatically satisfies the criterion of "overriding requirement". It should be open to the judge to refuse disclosure even if the investigation concerns a serious crime, or, where appropriate, to make a limited or qualified disclosure order so as to protect sources from being revealed to the maximum extent possible. After all, the social value of this journalistic privilege transcends the interests which might be at stake in a particular criminal case. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest in future cases. The national judge must have this greater picture in mind when conducting a balancing exercise in each particular case.

56. In addition, in its Recommendation No. R(2000)7 cited above the Committee of Ministers expresses the view that disclosure may be ordered only where reasonable alternative measures to the disclosure do not exist or have been exhausted, and where the legitimate interest in the disclosure "clearly outweighs the public interest".[45] Other relevant criteria for deciding whether the disclosure is justified may be discerned from the case-law of the ECtHR.[46]

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such as individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources" (see Recommendation 1950 (2011), p. 15, (http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1950.htm). Bloggers may or may not be considered as professional journalists enjoying this privilege; however, in the modern times the distinction between journalist and non-journalist is a fine one and may require further development in case-law and legislation.

[44] *Roemen and Schmit v. Luxembourg*, no. 51772/99, §46, ECHR 2003‑IV

[45] See Principle III contained in the Appendix to the Recommendation

[46] See, for example, *Nagla v. Latvia*, no. 73469/10, §§93 et seq., 16 July 2013, with further references; *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02; *Telegraaf Media Nederland Landelijke Media B.V. and Others v. Netherlands*, no. 39315/06, §§123 et seq., 22 November 2012.

57. It is the view of the Venice Commission that, as is, the existing regulation on disclosures poses a danger to freedom of expression of the press and media and needs to be addressed along the lines suggested in this Opinion. The Commission recommends specifying in Section 6 (2) of the Press Act that the judge may order disclosure only where alternative reasonable means of obtaining the information have been exhausted or are unavailable. The 3 years' threshold should be reconsidered and, in any event, the Press Act should make it clear that disclosure may be refused even in more serious cases.

D. Composition and powers of the Media Council

58. In response to international criticism, a number of amendments to the Media Act were passed in 2013. In particular, the mandate of the President of the Media Authority became non-renewable and the President of the Republic is now involved in the appointment process. Those amendments went in the right direction. However, in the opinion of many observers, they were not sufficient to guarantee genuine independence of the Media Council.[47] The procedure of appointment of the members of the Media Council, as it stands now, may be summarised as follows.[48]

1. A short outline of the current institutional framework

59. The Hungarian system of media regulation is dominated by the Media Authority, which is composed of three separate elements: the President of the Authority, the Media Council, and the Office of the Media Council (Section 109 of the Media Act).

60. The head of the Media Authority (the President) is appointed by the President of Hungary for the term of nine years (Section 111A of the Media Act).[49] The candidate is nominated by the Prime Minister[50] and, according to the authorities' explanations, the President's role in the appointment is essentially ceremonial as he/she may refuse the candidate nominated by the Prime Minister only on formal grounds (for example, incompatibility with the minimal qualification requirements) but not because of the personality of the candidate.

61. Certain very important powers are retained by the President of the Authority personally. Thus, he/she has the power to appoint the main decision-makers of the Authority: the Vice-Presidents, the Director General of the Office of the Authority, the Executive Director of the Authority, and, on the recommendation of the Executive Director, the Deputy Director of the Authority (Section 111 (1) (c), (d), and (e), Section 114 (1), Section 115 (1), 117 (1) of the Media Act).

62. The head of the Media Authority is nominated as the only candidate for the position of the Chairperson of the Media Council (Section 125 (1)). In the current political context this means that the President of the Media Authority becomes automatically the Chairperson of the Media Council. In this capacity the President of the Authority nominates two candidates for each position of the executive director of every public media services provider (Section 102 (2) (a)). In addition, the President/Chairperson appoints the executive director of the MTVA - the body which provides funding to the public service media and manages their assets (Section 136 (11)). These powers essentially put the President of the Authority/Chairperson of the Council in a very strong position within the Authority and vis-à-

[47] See p. 39 of the 2014 report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, cited above.

[48] The legal rules defining composition and various powers of the Media Council are extremely complex and detailed; for the sake of brevity the opinion only proposes a short outline of the main powers and appointment arrangements, without describing them in detail.

[49] As it became clear during the country visit, the translation of the Media Act submitted by the Hungarian Authorities contains a translation error in Section 111A: the President of the Media Authority is appointed by the President of the Republic on the recommendation by the Prime Minister.

[50] The Prime Minister has to consult various official and civil society bodies for nominees (Section 11A (4)), but those consultations have no binding force on the Prime Minister

vis public service media for a period of nine years. Under Section 216 (8) of the Media Act, after the expiry of the nine-years' term, the previously elected Chairperson may remain in office until the new one is elected. There are four other members of the Media Council; they are elected by the Parliament together with the Chairperson (Section 124 (1) of the Media Act)[51] following a "sequential procedure of voting by list" (Section 124 (1) thereof). The authorities explained that such procedure requires 2/3 majority voting in the Parliament.

63. Compared to many other European regulatory authorities, the Hungarian Media Council has very vast powers. In particular, the Media Council registers linear media service providers (through the Office of the Authority – see Section 41 (1) of the Media Act), approves candidates to be appointed as executive directors of the public media service providers and formulates special requirements to be included in their employment contracts (Section 102 (2) (b) and (d)); decides whether to maintain or supress radio- and TV-services provided by the public media providers (Section 98 (8) of the Media Act); appoints the Chairperson to the Board of Trustees and another member of this body (Section 86 (6) of the Act; see also Section 90 of the Act describing the powers of the Board of Trustees vis-à-vis public service media); distributes broadcasting frequencies through tenders (Section 48 (1) and Section 182 (h), (i), (j) of the Media Act); monitors compliance with the program quota requirements and "balanced coverage" requirement (Section 181 of the Media Act); imposes sanctions for illegal media content (Section 132, Sections 144 et seq., Section 187 of the Media Act); allocates, through MTVA,[52] funding to public media service broadcasters and national production companies (Section 136 of the Act); decides on the ratings of the programs (Section 182 of the Act), etc.

2. Securing pluralistic composition of the Media Council

64. As the delegates of the Commission learnt during the country visit, the current Chairperson and the four members of the Media Council are perceived by the media community as supporters of the ruling Fidesz-led coalition.[53] Having examined the provisions governing appointment/replacement of the Chairperson of the Media Council and its members (see Sections 111, 125 and 216 of the Media Act), the Venice Commission agrees that, in the particular Hungarian context, those rules create a risk of politically biased governance of the media sector.

65. Members of the Media Council must receive the support of a qualified majority in Parliament to be elected. In normal circumstances, the purpose of imposing an obligation for a qualified majority is to ensure cross-party support for significant measures or personalities. However, 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 within the regulatory body and protects this influence against changing political winds. The scheme of appointment and replacement of the members of the Media Council introduced in 2010 made any future change in the composition of this body very difficult without the support of Fidesz/KDNP coalition, and that remains for many years to come. This is particularly worrying in the light of the role played by the Media Council and its Chairperson in the media market.

[51] There is a complex nomination procedure, which, for the sake of brevity, is not reproduced here since it can be grossly reduced to the principle of a 2/3 majority voting.
[52] *Médiaszolgáltatás-támogató és Vagyonkezelo Alap*, the Media Service Support and Asset Management Fund
[53] See also the analysis of the Hungarian Media Legislation, Commissioned by the Office of the OSCE Representative on Freedom of the Media, prepared by Dr. Katrin Nyman-Metcalf, 28 February 2011, p. 12. See furthermore OSCE/ODIHR Limited Election Observation Mission Final Report, p. 17, http://www.osce.org/odihr/elections/hungary/121098?download=true

66. The Venice Commission recalls that Recommendation Rec(2000)23 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector[54] called the States to establish such rules which would protect regulatory authorities against any interference by political forces. In the 2008 Declaration on the independence and functions of regulatory authorities for the broadcasting sector[55] the Committee of Ministers called on member states to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political interference. Recommendation CM/Rec(2012)1 of the Committee of Ministers on public service media governance speaks of the system of appointments of the highest authority supervising public service media which "cannot be used to exert political or other influence over the operation of the public service media".[56]

67. As can be seen from the above, the idea of independence of the media regulatory authority is deeply enrooted in the documents of the Council of Europe.[57] That being said, Recommendation Rec(2000)23 does not suggest any particular method of nomination or appointment of its members, recognising that a great variety of models of organisation of media regulatory authorities exists in the Member-States.[58] The 2011 report by the OSCE expressed a similar point of view:[59] the States are free to define the principles of composition of the media regulatory body provided that those principles guarantee the autonomy of that body.

68. Turning back to the Hungarian law, the Venice Commission reiterates that the Media Council is a very powerful body responsible (directly or indirectly) for enforcing content regulations across all media sectors, managing public media, distributing frequencies, etc. Given the predominant role of the Media Council on the media and communications market, and personal powers of the Chairperson of the Council/President of the Authority, the procedure for the appointment of the Chairperson and the members should be changed in order to guarantee better their independence.

69. The Venice Commission notes that the independence of the Media Council is proclaimed in Section 123 (2) of the Media Act: it says that members of the Media Council cannot be instructed in their official capacity. Furthermore, as transpires from Section 129, the mandate of the members of the Media Council cannot be revoked in connection with the decisions they take in their official capacity but their appointment can be terminated only on very limited grounds. Finally, the Venice Commission is mindful of the extensive conflict of interest rules which apply to the members of the Media Council under Sections 118 and 127 of the Media Act. All these are important guarantees which protect members of the Media Council from external pressures. However, there is a risk that at the moment of appointment

[54] https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Site=COE&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[55] https://wcd.coe.int/ViewDoc.jsp?Ref=Decl(26.03.2008)&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[56] See p. 27 of the Appendix to the Recommendation/ This recommendation is applicable to the Media Council to the extent that it has large powers versus public service media and there can be regarded as a body supervising them. For more details see the chapter immediately below. On this point see also the ECtHR judgment in the case of *Manole and Others v. Romania* (no. 13936/02, ECHR 2009-... (extracts).

[57] A similar requirement of "independence" may be found in certain EU documents. Thus, Article 30 of the AMSD Directive (2010/13/EU) speaks of the "independent regulatory bodies" http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010L0013). EU Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services also speaks, in Article 3, of an "independent" regulatory body. The report of the High-Level Group on Media Freedom and Pluralism recommended to the EU countries to establish "independent media councils with a politically and culturally balanced and socially diverse membership. Nominations to them should be transparent, with built-in checks and balances". However, the report did not suggest any particular mechanism of "checks and balances" (https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf).

[58] The Recommendation No. R(96)10 on the guarantee of the independence of public service broadcasting is somehow more detailed on this point: it recommends appointment of the members of the supervisory body in an "an open and pluralistic manner", so that this body "represents collectively the interests of society in general". However, it still does not propose a method of appointment of such bodies.

[59] http://www.osce.org/fom/75990?download=true

candidates are selected essentially because of their political colour which may predetermine their stance for the whole term of their service.

70. There are different ways of reducing, if not removing completely, that risk. Ideally, all members should be selected in a manner divorced from the political process. If this is impossible, there are other mechanisms which might reduce the political element in the appointments.

71. First of all, a system reflecting political diversity in relation to the composition of the Media Council might be considered as an option, in order to ensure that all major political parties and social groups have fair representation there. Here the Hungarian legislator may draw inspiration from the models of judicial councils which were created in many European countries to ensure the independence of the judiciary. In order to make judicial councils politically neutral, the Venice Commission usually recommends that a significant number of its members are elected by the judges from their own ranks[60]. An element of self-governance should be introduced into the composition of the Media Council. If the media community and the telecommunication industry, through self-regulating bodies or otherwise, delegate representatives to the Media Council, it would make this body more politically neutral and would increase public trust in its independence. Civil society groups could also participate in this process.

72. The status, powers and the manner of appointment of the President of the Authority/Chairperson of the Media Council should also be reconsidered. Thus, it would be advisable to reduce his/her term of office[61] and remove some of his/her appointing powers in respect of the major decision-makers of the regulatory structures. The President of the Republic, before making the appointment of the President of the Authority, might be required to conduct mandatory formal consultations with the opposition and media community, and, in addition, might be given a real veto power on the candidate proposed by the Prime Minister (as opposed to the more ceremonial role the President of Hungary plays now). Or, even better, the Chairperson of the Media Council might be elected by other members of the Council from their own ranks.

73. More generally, the powers which are now concentrated within the Media Council or in the hands of its Chairperson might be divided amongst several autonomous bodies. In particular, it concerns the powers of the Media Council vis-à-vis public service broadcasters (for more details on this topic see the chapter below). Ideally, the President of the Media Authority should not be the same person as the Chairperson of the Media Council, not least because the work of the Media Authority is largely devoted to the telecommunications sector, whereas the Media Council is essentially related to broadcasting content matters.

74. In absence of a common European standard in this area it is difficult to give more precise recommendations on how to secure independence of the Media Council. It belongs primarily to the Hungarian legislator to consider, in consultations with all the groups and persons concerned, how to transform the Media Council into a politically neutral body with a diverse and balanced membership and how to open it to new personalities in the foreseeable future. However, such reforms are clearly needed, since, in the opinion of the Commission, a politically monolithic regulatory authority which concentrates in its hands huge powers across all media sectors is a threat for the freedom of speech and media pluralism in the country.

E. Public service media

1. Complexity of the structure of the supervising bodies

75. Provisions of the Media Act governing management of the public service media (PSM, also referred below as “public broadcasters”) are particularly complex and, at places, are difficult to understand.

[60] See CDL-AD(2007)028, the Venice Commission Report on judicial appointments, §29
[61] Although it should still not replicate the government cycle

76. Thus, according to Sections 85-89 of Media Act, the public service media sector is managed by the Board of Trustees (BoT).[62] Pursuant to Section 90, the BoT has vast powers in managing finances of the public broadcasters: it supervises their spending, borrowing, appoints auditors, verifies accounts of the PSM, etc.

77. At the same time, different public broadcasters are united under the aegis of the MTVA[63] – a body established pursuant to Section 136 (1) of the Media Act with a view to providing support and subsidies to PSM and content producers (Sections 137, 137A et seq.; see also Section 108 of the Media Act). The MTVA has responsibility for allocating funds, employing staff and managing assets of the public broadcasters (without the need to go through a procurement exercise – see Section 137B (5)), and also provides virtually all the content for public service media. In essence, the MTVA controls (through funding) most of the production of the media content which is then supplied to the public media broadcasters.

78. The exact relation between the MTVA and the BoT, and their respective roles in financial management of the public broadcasters are not entirely clear. It may appear that the BoT is hierarchically superior to the MTVA since it has controlling powers over the different institutions and media outlets that form the MTVA. At the same time, the Media Council is defined as a "managing body" of the MTVA (see Section 136 (6)). The Venice Commission also notes that the Media Act mentions other bodies which perform supervisory functions vis-à-vis public service media and monitor their performance (such as, for example, the Supervisory Board established according to Section 106 of the Media Act, or the Public Service Fiscal Council, established under Section 108).

79. Thus, it is recommended to revise the relevant chapters of the Media Act in order to clarify and, ideally, to simplify the rules which govern the powers of the BoT and the MTVA, and their relation to the PSM providers (public broadcasters).

2. Ensuring independence of the public service media

80. Whatever is the exact relation between the BoT and the MTVA, it is clear that both these bodies have strong institutional links to the Media Council. The MTVA is directly managed by the Media Council (see, for example, Section 136 (6), (10), (11), and (16) of the Media Act) and is run by a CEO appointed at the gift of the Chairperson of the Media Council (Section 136 (11)). As to BoT, two out of its eight members, including the Chairperson, are appointed by the Media Council. In essence, the Media Council plays a central role in managing State assets allocated to the public broadcasters, directly (through the MTVA) or indirectly (through its representatives in the BoT). In addition, the Chairperson of the Media Council, with the approval of the Council, nominates two candidates for the position of the executive directors of the public broadcasters (Section 102 (2) (a) and (b)). Thus, the Media Council controls not only the finances but also the appointments within the whole public service media sector.

81. The Venice Commission emphasises that the requirement of independence which is applicable to the media regulatory bodies in general is also applicable to the bodies supervising the public media sector. Thus, Appendix to the Recommendation of the Committee of Ministers No. R(96)10 recommends that members of the PSM supervisory bodies are appointed in an open and pluralistic manner and represent collectively the interests of society in general.[64]

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[62] To name only a few powers exercised by the BoT: it supervises PSM providers (Section 90 (1) (a)), appoints and terminates the employment of the directors of the PSM providers (Section 90 (1) (e) and (f)), appoints auditors for the PSM providers (Section 90 (1) (h)), approves budget and accounts of the Public Foundation (the body which manages the assets of the PSM providers) and of the PSM providers (Section 90 (i) and (m)), controls their expenditures and borrowing of the PSM providers (Section 90 (1) (k), (l), (o), (p), (q)) etc.

[63] *Médiaszolgáltatás-támogató és Vagyonkezelo Alap*, the Media Service Support and Asset Management Fund

[64] http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1996)010&ExpMem_en.asp

82. The independence of public broadcasters has been elevated to the status of a principle of European human rights law. Thus, in the case of *Manole and others v. Moldova,*[65] the ECtHR held as follows, in the context of the Moldovan public TV:

> *"109. In order to comply with this obligation [under Article 10 of the European Convention], it was […] essential to put in place a legal framework which ensured TRM's [("Teleradio-Moldova")] independence from political interference and control. […] However, the law did not provide the structure which would have made independence of this kind possible. Article 4 of Decision No. 502 provided that "The activity of the [TRM] shall be conducted by the State through the Audiovisual Coordinating Council". The ACC was composed of nine members, three appointed by each of the Parliament, the President of Moldova and the Government, with no guarantee against dismissal. TRM's President, Vice-Presidents and Board of Directors were appointed by Parliament on the proposal of the ACC. In these circumstances, during the period from February 2001 onwards, when one political party controlled the Parliament, Presidency and Government, domestic law did not provide any guarantee of political balance in the composition of TRM's senior management and supervisory body, for example by the inclusion of members appointed by the political opposition, nor any safeguard against interference from the ruling political party in these bodies' decision-making and functioning."*
>
> *110. [The new] Law No. 1320-XV did not sufficiently remedy these problems. In the place of the previous board of management, it created the Observers' Council, responsible inter alia for appointing TRM's senior management and monitoring its programming for accuracy and objectivity. However, […] the rules for appointing the members of the Observers' Council did not provide adequate safeguards against political bias. […] In particular, Article 13(2) of Law No. 1320-XV stipulated that only one member of the Observers' Council should be appointed by one of the parliamentary opposition parties; there was no safeguard to prevent all the other 14 members from being appointees loyal to the ruling party."*

83. Indeed, the Court's findings must be read in the light of the particular circumstances of the case.[66] In that case it was not the Court's task to propose an abstract model which would guarantee the independence of a body supervising a major public TV company. Nevertheless, it is clear that where an overwhelming majority of the members of such body are selected by the ruling party, such body cannot be considered as independent.

84. During the consultations in Budapest many media professionals expressed strong concerns about the independence of the PSM. In the preceding chapter of this opinion the Venice Commission explained why, in its view, in the current context the Media Council cannot be regarded as an independent body. As to the composition of the BoT, the Media Council is represented there by two members, including the Chairperson. Six other members of the BoT are not delegated by the Media Council directly. However, they also risk being political appointees loyal to the ruling party or coalition.

85. First, Section 86 of the Media Act does not contain competency requirements on nominees. This is ill-advised: given the duties of the BoT, nominees should be individuals with experience and understanding of public media, of management and of finance. The fact that nominations must be made within eight days of the opening of the procedure does not provide sufficient time for appropriately qualified individuals to be sought out, interviewed, and selected. The only reasonable conclusion can be that the nominees are chosen for political, rather than competency, reasons.

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[65] No. 13936/02, ECHR 2009‑... (extracts)).

[66] In this case the journalists of the TRM, a leading public TV station, complained of the furtive censorship exercised by the newly-appointed management obedient to the ruling majority. Therefore, the lack of independence of a supervisory body would lead to a violation of Article 10 of the Convention not as such, but only where it resulted in a specific interference with the journalistic freedom – such as censorship, for example.

86. Further, Section 86 establishes that Parliament shall elect those six members by voting for each member individually. Half of these members shall be nominated "by the governing faction" and the other half "by the opposition faction" and different factions should agree as to the persons nominated by each side. Thus, the opposition parties have a say at the stage of nomination of candidates. However, under Section 86 (8) in the event of any faction's failure to make a successful nomination, or if not all nominees receive the necessary majority during the election, the BoT comes into existence with the election of at least three members. Thus, at the end the ruling party/coalition may simply outvote the opposition and form the BoT which would be composed of "their" three candidates plus the two members appointed by the Media Council – a body whose political independence has been repeatedly called into question. Even if all six members of the BoT are elected by the Parliament, the ruling party/coalition would still have a built-in majority because of the two members delegated by the Media Council.

87. In sum, the Media Act does not secure pluralistic composition of the bodies supervising the PSM; its provisions enable the ruling party/coalition to ensure the loyalty of the Media Council, of the MTVA and of the BoT, and, through them, to control finances and personnel of the public broadcasters. This creates space for covert intrusion into the journalistic freedom in the public media sector – an intrusion which is not always possible to discern, because it does not manifest itself as formalised orders and sanctions, and which cannot therefore be prevented by means of judicial review.

88. The Venice Commission has already suggested reforming the Media Council as a general regulatory body. It is needed all the more so because the Media Council also plays a very important role in managing assets and human resources of the PSM. The powers of the Media Council vis-à-vis the MTVA and the BoT should be reconsidered. Those bodies must be given more autonomy and their composition must be made more pluralistic, in the same vein as the composition of the Media Council itself. In particular, membership in these bodies should be assigned in a manner which ensures fair representation of socially significant political and other groups and the representatives of the media community.[67] A certain decentralisation of the management of different PSM may also be required. The Chair of the MTVA should be appointed through an independent appointment process with no political overtones. If the Chairperson of the Media Council remains an appointee of the Prime Minister (which is not advisable), he/she should not participate in the nominations of the executive directors of the PSM and the director of the MTVA. There is, in any event, an inherent conflict between the Media Council's role as the regulator of the PSM and as appointer of the executive responsible for ensuring regulatory compliance.

89. The Venice Commission reiterates that there is no common European model of public media sector governance. Thus, it is up to the Hungarian authorities to develop a legislative framework which would secure pluralism within the PSM supervising bodies and sufficient independence of the public broadcasters. However, as a result of such reform the structure of bodies governing the PSM sector should be simplified, the influence of the ruling party in the process of appointment of members of the PSM supervising bodies and PSM executives should be reduced, and a fair representation of all important political, social and relevant professional groups within those bodies must be secured.

F. National news agency

90. News materials are delivered for all public media services by the National News Agency which is the only authorised provider for news for these media (Section 101 (4) of the Media Act). The director of Agency is nominated by the Chairperson of the Media Council. It was also reported that the Agency provides a free news service to commercial media providers.

[67] In its Opinion on the "Gasparri" and "Frattini" laws of Italy (CDL-AD(2005)017) the Venice Commission held that "a supervisory role of parliament on the national broadcaster is certainly acceptable and compatible with the democratic functions of parliament" (§151). However, involvement of the parliament in the oversight of the public broadcasters should not amount to quasi-total monopoly of the ruling majority in those matters.

This creates a strong disincentive for the private media to get news from independent sources. Paid-subscription news agencies cannot compete with the Agency, and the incentive to practice "copy-and-paste journalism" is high. This means that the main source of national news in Hungary is a news agency whose director is appointed through a politically-influenced procedure. There is a real risk, therefore, that the content of the news will be biased in favour of the appointing body.

91. The Venice Commission recommends amending the Media Act so as to permit individual public service media to choose its own news sources, or even set up its own newsroom. There should be no monopoly of news provision by a body with a politically-appointed director.

G. Advertisement revenues and taxation

92. Representatives of the media community explained to the delegation of the Venice Commission that since 2008 many independent media outlets have experienced a decline in public and private advertising revenue. They linked the cutting-off of government advertising to their critical stance towards the ruling coalition. Private advertising becomes scarce for the very same reason: businesses which are reliant on government spending are reluctant to support media outlets openly critical of the government. In addition, a significant part of advertising revenues was absorbed by foreign-based Internet giants, such as Google, Facebook etc. Finally, the general loss of popularity by traditional media, especially the printed press, is another factor which makes them economically fragile.

93. The Hungarian media market being relatively small, primarily for linguistic reasons, national media companies have to compete for fairly limited resources. In such circumstances the legislative provisions which affect advertising revenues of the mass media deserve particular attention. Three issues have been identified in this respect.

1. Distribution of State advertisement budgets

94. Representatives of civil society and media community told the delegates of the Commission that funds allocated by the State and State-owned companies were given disproportionately to those media services which favoured the government, with advertising removed from services which opposed the government line. This is, sadly, not a situation which is unique to Hungary. The disproportionate distribution of discretionary advertising revenue by the State goes against Council of Europe standards to promote plurality, as plurality suffers if services which question or oppose the government are starved of a significant source of funding.

95. Thus, Recommendation Rec(2007)2 on media pluralism and diversity of media content says in Section 4.2 that support measures for media "should be granted on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control. The conditions for granting support should be reconsidered periodically to avoid accidental encouragement for any media concentration process or the undue enrichment of enterprises benefiting from support." Indicator 8.19 of PACE's indicators for media in a democracy[68] says that "if media receive direct or indirect subsidies, states must treat those media fairly and with neutrality."

96. In the opinion of the Commission, the Hungarian legislator should consider introducing a transparent and reviewable system for allocating the State advertisement budgets amongst media providers based on verifiable audience and distribution data, and extend this system to the companies where the State has a major shareholding.

[68] http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/eres1636.htm

2. Limitations on political advertisement

97. Before 2013 political advertisement in mass-media was allowed only under certain conditions: during the electoral campaign, in the public service mass-media, and free of charge. In its opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted in June 2013,[69] the Venice Commission addressed this issue, concluding as follows: "The prohibition of any political advertising in commercial media services, which are more widely used in Hungary than the public service media, will deprive the opposition parties of an important chance to air their views effectively and thus to counterweigh the dominant position of the Government in the media coverage".

98. In September 2013 the Fifth Amendment to the Fundamental Law was passed. It allowed private mass-media to show political advertisement, but, again, only during the electoral campaign and free of charge. A provision to this end is contained in Section 32 (3) of the Media Act.

99. Following the adoption of this Fifth Amendment, fears were expressed that commercial media outlets would not or would rarely endeavour to publish political advertising, as they were simply not interested in giving air time for free. Those fears were confirmed during the electoral campaign for the parliamentary elections of April 2014: none of the Hungarian private broadcasters chose to provide free airtime to electoral contesting at that time. The OSCE/ODIHR Limited Election Observation Mission concluded in its final report on the Parliamentary elections of 6 April 2014 that "in the current media environment, the absence of other political advertisements on nationwide commercial television, combined with a significant amount of government advertisements, undermined the equal and unimpeded access of contestants to the media, which is at odds with paragraph 7.8 of the 1990 OSCE Copenhagen Document."[70]

100. Negative effects of such restriction are three-fold. First, it deprives audiences of private broadcasters from access to political messages. Second, it puts the opposition parties in a somewhat unequal position vis-à-vis the ruling majority. On this latter point the Venice Commission observes that the Government usually has a better chance of public appearances because the ruling parties' positions will already be promoted indirectly through media coverage of governmental activities and statements.[71] This constitutes a serious handicap for the opposition. The balance may be restored (at least to a certain extent) if the opposition parties are allowed to buy extra air time for political advertisement, but it is prohibited under the Hungarian law.

101. The Venice Commission is aware that there is no European consensus on how to regulate paid political advertising in broadcasting. In analysing limitations on political advertisement in the United Kingdom[72] the ECtHR paid particular attention to the domestic decision-making process. Thus, the Court noted that the complex regulatory regime governing political broadcasting in the UK had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. There was an extensive pre-legislative review of the rules, which were enacted "with cross-party support without any dissenting vote". The proportionality of that regime was also examined in detail in the High Court and the House of Lords. In the opinion of the Venice Commission, without such broad cross-party support and exacting review, the ban on paid political advertisement unjustly penalises the opposition, secures media domination of the ruling majority, and reduces chances of political change.

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[69] See CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, §§37 et seq.
[70] http://www.osce.org/odihr/elections/hungary/121098?download=true
[71] CDL-AD(2013)012, §45
[72] *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §107, 22 April 2013, §§ 113 et seq.

102. Finally, such restriction removes a source of advertising revenue from private broadcasters, which are already weakened by uneven distribution of the State advertisement budget (see above), as well as by the general crisis of the media industry in Hungary. Thus, this measure may have a negative effect, albeit indirectly, on the quality of the media content and the diversity of the media market.

103. Whilst there may be *bona fide* reasons to wish to limit the amount of political advertising (for example, to regulate the extent to which the amount of advertising is skewed towards the best-funded political parties[73]), there are a number of different models used throughout Council of Europe member states which Hungary could draw upon without interfering with both political advertisers right to impart and citizens' right to receive political information.

104. Therefore the Venice Commission suggests amending the Constitution, the Media Act and other relevant legislation in order to provide not only for free but also for paid political advertising in private broadcast media.

3. Advertisement tax

105. On 11 June 2014 the Parliament passed a law – Act XXII on Advertisement Tax - creating a new tax on media's advertising revenues, with taxation levels increasing according to the volume of net turnover (i.e. overall sales figure) and with the highest rate of 50% having been set for incomes exceeding 2 billion HUF (about 6,5 million EUR).

106. Hungarian media outlets have protested against the law by switching to a black screen or publishing blank newspaper front pages. The authorities constantly denied any targeting of specific media outlets, stressing that this tax equally affects all of them. In practice, however, one particular broadcaster alleged that it was disproportionately affected, since it was the only media company in Hungary with advertising revenues exceeding 2 billion HUF annually.[74]

107. On 12 March 2015 the European Commission opened an investigation in order to establish whether this tax complies with EU state aid rules.[75] The major concern of the European Commission was that the progressive tax rates could selectively favour certain companies and give them an unfair competitive advantage. A progressive tax based on turnover places larger players at a disadvantage, unlike a progressive tax based on profits, which can be justified by the higher burden-bearing capacity of very profitable companies. The Commission has also taken a separate interim decision prohibiting Hungary from applying progressive rates until the Commission has finished its assessment. In addition, an application by the company struck by this new tax is pending before the ECtHR.

108. The Venice Commission finds that whilst fiscal decisions belong to individual Member States (depending on the degree of EU harmonisation in the specific field), this particular tax may raise some questions. In particular, a 50% tax on turnover affecting one specific media outlet may be regarded as an individual confiscatory measure in disguise, which is more difficult for the Government to justify from the standpoint of Article 1 of Protocol No. 1 to the ECHR (which guarantees peaceful enjoyment of possessions) than any other regular measures adopted as a part of the country's fiscal policy.

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[73] See, in this respect, the ECtHR case of *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, judgment of 28 June 2001, §§ 63 et seq., where the Court found that the prohibition of political advertising served, inter alia, a legitimate interest to prevent financially powerful groups from obtaining a competitive political advantage and, in addition, to ensure the independence of broadcasters.

[74] For more details see the 2014 Report of the Commissioner for Human Rights of the Council of Europe, following his visit to Hungary from 1 to 4 July 2014, Strasbourg, 16 December 2014

[75] http://europa.eu/rapid/press-release_IP-15-4598_en.htm

109. However, the Venice Commission does not want to prejudge conclusions of the European Commission and of the ECtHR on this matter. During the consultations in April 2015 the delegates of the Venice Commission were comforted by the undertaking on the part of Government to shortly change this progressive tax with a fixed rate taxation which, additionally, has a threshold so as to protect the smaller media companies from carrying the burden. It was later reported that on 5 May 2015 the Hungarian government published a new bill which proposes a top rate of 5.3% tax with a low rate of 0% for companies with revenue under HUF 100 million (about €330,000).[76]

110. The Venice Commission considers that such significant lowering of the rate may remove some of the questions which appeared at the moment of the introduction of this new tax in 2014.The Commission welcomes the willingness of the Hungarian authorities to reform Act XXII and encourages them to adopt a scheme of taxation which would distribute the fiscal burden in a non-discriminatory manner and avoid excessive taxation of the media sector which is already in economic distress.[77]

IV. CONCLUSIONS

111. The Venice Commission acknowledges the efforts of the Hungarian government, over the years, to improve on the original text of the two Acts, in line with comments from various observers including the Council of Europe, and positively notes the willingness of the Hungarian authorities to continue the dialogue. That being said, the following issues require revision as a priority, if the Hungarian authorities wish not only to improve the situation with the media freedom in the country, but also change the public perception of media freedom:

- provisions of the Press Act defining illegal media content should integrate the principle of proportionality; the Act should make it clear that not every expression which may be seen as prejudicial to the constitutional order, public morals, dignity etc. is illegal; the Media Council should develop and publish clear policy guidelines on how it interprets the provisions in the Press Act on illegal content and applies its sanctioning powers under the Media Act, including the criteria the Council uses to determine whether a sanction should be applied, and, if so, the level of sanction, in order to reduce any chilling effect caused by uncertainty in the application of the two Acts;

- the Press Act should make it clear that disclosure of journalistic sources may be ordered by the court only where alternative reasonable means of obtaining the information have been exhausted or are unavailable, and that the disclosure may be refused even in more serious cases;

- the Media Act should specify that heavy sanctions seriously affecting normal functioning of a media outlet should be used as a measure of last resort (for example, for repeated calls for unlawful mass violence) and should not be immediately enforceable. Court proceedings in such cases should have a suspensive effect and the courts should have the power to review the substance of the decisions of the Media Council;

[76] http://www.reuters.com/article/2015/05/07/hungary-advertising-tax-idUSL5N0XY4M020150507

[77] See http://budapestbeacon.com/economics/proposed-changes-to-advertising-tax-in-hungary-a-burden-on-everyone/

- the rules governing election of the members of the Media Council should be changed to ensure fair representation of socially significant political and other groups and of the media community in this body. The method of appointment and the position of the Chairperson of the Media Council/the President of the Media Authority should be revisited in order to reduce concentration of powers and secure political neutrality of that figure;

- The Board of Trustees should also be reformed along those lines. Decentralisation of the governance of the public service media providers is advisable; the National News Agency should not be the exclusive provider of news for the public service media providers;

- the State advertisement budgets should be allocated according to objective and transparent rules, and private media should be allowed to publish paid political advertisements. Act XXII should be reconsidered in order to ensure that the tax burden is distributed in non-discriminatory manner.

112. The Venice Commission remains at the disposal of the authorities of Hungary for any further assistance they may need.