

International Partnership Mission on Press Freedom to Hungary

November 14-16, 2011

Report

In the light of intense concern and speculation over the future of press freedom in Hungary and deep uncertainties within the country's media professional community over the impact of media laws adopted in 2010 an international partnership mission of leading press freedom and media development organisations visited Budapest on November 14-16th 2011.

The delegation representing Article 19, Freedom House, Index on Censorship, Independent Journalism Centre Moldova, International Press Institute, International Media Support, European Federation of Journalists, Media Diversity Institute, Open Society Media Programme, the Network for Reporting on Eastern Europe, South East Europe Media Organisation and the South East European Network for Professionalisation of Media had on-depth discussions with the representatives of a wide range of media outlets and civil society groups. The mission also met with Ms. Annamária Szalai, President of the National Media and Infocommunications Authority and Dr. Zoltán Kovács, Minister of State for Government Communication. The findings of the Mission are that

1. The confluence of a restrictive regulatory environment, deteriorating economic conditions, technological change and convergence in media, and a lack of unity and solidarity within the professional community have created a perfect storm that threatens the future of independent journalism in Hungary;
2. Hungary's model of media regulation is broad, uncertain and inconsistent with European standards of media freedom and has created a chilling effect, which has strengthened self-censorship.
3. The regulatory regime provides excessive powers to the media authority having the ability to grant and suspend licenses, supervise media content, and issue disproportionately high fines in cases of content violation.
4. The independence of the regulatory Media Council can seriously be questioned, because all five members of the body are nominated by the ruling party.
5. The Hungarian legislation as a whole represents a substantial threat to media diversity and the ability of news organisations to play their essential role as a public watchdog.
6. The continuing controversy over the Hungarian media has opened up an important debate about the role of journalism and media in democratic life in Europe, but any transfer of the Hungarian media regulation to other countries would seriously undermine free expression.
7. The criticism of the media law earlier expressed by the Council of Europe, the European Parliament, the Organisation for Security and Cooperation in Europe, the UN Special Rapporteur on Freedom of Expression and international press freedom groups remains valid and a wholesale review of the laws is needed and should be the subject of further dialogue with the authorities.

In reaching these conclusions, the Mission focused on the following five issues:

1. The media regulation, particularly with regard to protection of sources, is incompatible with European and international law

A particularly worrying aspect of the new media legislation is the inadequate safeguards it provides for the protection of journalistic sources. Concerns are found both in terms of the expansive set of circumstances in which a journalist may be required to reveal sources, as well as in the procedural conditions for determining when a journalist should be compelled to do so.

According to the Article 6(3) of the Hungarian Act on the Freedom of the Press:

*In exceptionally justified cases, courts **or investigating authorities** [emphasis added] may, in order to protect national security and public order **or to uncover or prevent criminal acts** [emphasis added], oblige the media service provider and any person employed by or engaged in any other work-related legal relationship by the media content provider to reveal the identity of the journalists' sources.*

The European Court for Human Rights has consistently ruled that right to protect the confidentiality of journalistic sources is essential for press freedom and that exceptions to this right must be confined to cases in which the public interest in revealing sources outweighs that of maintaining their confidentiality:

*Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention **unless it is justified by an overriding requirement in the public interest.** [emphasis added]" (Goodwin v. The United Kingdom, 27 March 1996)*

The Council of Europe further provides guidelines to member states that they should only require disclosure of sources in the event that "*reasonable alternative measures to the disclosure do not exist*" and that "*the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure.*"

The permissible exceptions to the protection of sources in the Hungarian legislation in order to "*uncover or prevent criminal acts*" (in addition to the more common exceptions of protecting national security and public order) are overly broad and do not conform to the limited permissible exceptions as defined by the European Court for Human Rights or the Council of Europe.

The exception allowed for requiring journalists to reveal sources for the purposes of uncovering or preventing criminal acts presents an extremely low threshold that could apply to nearly any investigation of crime, regardless of either the severity or even the occurrence of an actual crime.

Moreover, the law excludes disclosure protections for sources that provide information illegally, which is frequently the case in investigative media reporting. This will likely result

in fewer sources being willing to come forward to provide information regarding official malfeasance or corruption.

This concern was echoed by several journalists who briefed members of the Mission, including the editor-in-chief of the Atlatzo.hu website, who is facing several lawsuits for refusing to reveal sources and whose hard drive was seized by police during a visit to his home without a search warrant.

An additional concern is the lack of judicial oversight in determining when journalists should be required to reveal sources. Hungarian law allows for the investigating authorities, including police, to directly order the disclosure of sources without prior review by an independent and impartial decision making body.

Because police and other investigating authorities have a vested interest in uncovering criminal activity, they are not in a position to fairly balance competing rights and therefore to determine whether the overriding public interest lies in the pursuit of a particular criminal case or in the need to defend the watchdog function of a free press.

This position is supported by a 2010 ruling of the European Court for Human Rights on a case in the Netherlands, which found that any interference with the right to protect journalistic sources must be determined by the review of a judge or other independent decision-making body prior to the collection of source material. (*Sanoma Uitgevers BV v Netherlands*, 14 September 2010).

It was noted in the case of the seizure of the hard drive of the editor-in-chief of Atlatzo.hu, no such prior review was sought or obtained by the police.

2. The limited possibilities for judicial review of the decisions of the media authority and the media council

The problem of proper judicial oversight of the decisions of the Media Council is a major concern. Contrary to claims made by representatives of the government and Media Authority, the Mission found that there is no meaningful judicial review of the decisions of the Media Council on licensing and other matters by media organisations who can only appeal to the administrative court system on administrative or procedural grounds. Any appeal to the administrative courts is therefore only possible if it is claimed that the Media Council has violated the provisions of the media legislation itself on such matters as rules of procedure. There can be no appeal on the merits of a case.

Moreover, the level of the fines set by the Media Council cannot be disputed because the legislation grants the Media Council full discretion to determine whether there has been a violation of the law and the degree of that violation.

The media legislation should be amended to restore genuine judicial oversight of the decisions of the Media Council through the possibility of appeals on the grounds of merit.

The Mission is also very concerned about the fact that, under the new law on applications to the Constitutional Court, individuals will no longer be entitled to initiate a "norm control procedure" (*action popularis*) unless their rights have been violated through an official

procedure. Previous submissions to the Constitutional Court will be considered invalid or ineffective from 1 January 2012.

3. Co-regulation is no substitute for self-regulation. It is effectively outsourcing censorship in co-operation with some national and international media owners.

One significant recent development in Hungary is the introduction of a form of co-regulation through agreements between the media authority and four professional media associations. Under these agreements some media outlets are protected from the imposition of punitive fines by the media council. In exchange for this privilege each association agrees to adopt a code of conduct and to set up systems to deal with complaints from the public. This will be paid for by the media authority.

The mission members met with the leaders of two groups – representing newspaper owners and online media – who supported this co-operation. They admitted that a key reason for entering into the agreements is to avoid exposing their members to the full force of the law. The mission recognized the good faith of the associations concerned, but finds these agreements unsatisfactory not least because they create a fragmented system of regulation.

While some media are now exempt from legal sanction, others remain exposed. There is a sense that in exchange for the withdrawal of threats of punishment, media are legitimizing the powerful political criticisms of journalism which gave rise to the law in the first place. By doing they may add to the law's chilling effect on journalism.

The mission believes these agreements are, in effect, outsourcing censorship, by reinforcing the tendency towards media self-censorship. It is additionally worrying some of the media involved are owned by international media companies which would normally reject such arrangements, particularly in their home countries.

The mission concludes that this form of co-regulation is no substitute for self-regulation. While in certain narrowly-defined circumstances self-regulation may be usefully underpinned by legal protections in Hungary this co-regulation has created an uneven regulatory framework with the potential to create further difficulties for media and journalism.

4. The licensing regime potentially undermines the promotion of diversity and pluralism which is an obligation under European and international treaties

The Mission finds that the licensing system can potentially undermine the promotion of diversity and pluralism. The recent tender for commercial frequencies raises particular concern as its programming requirements favor music and entertainment and are almost the same for all available frequencies. Some 80 per cent Budapest frequencies are currently given over to music stations. It is reasonable to conclude that such content is favored over news and current affairs programs. This may have impact in the long term over availability of diverse and plural sources of news and information.

The Council of Europe Recommendation 2007(2) highlights the importance of requiring in broadcasting licenses that broadcasters produce or commission original programs, particularly news and current affairs. The same document, referred to, states that member states should consider introducing measures to promote and monitor the production and

provision of diverse content by media organisations and since neither the market nor the preferences of media service providers can be trusted to diversify broadcasting content, states have a positive obligation to secure pluralism.

The new license requirements fall short in provision of clear terms, which is potentially a source of arbitrariness in decision making. The fear was voiced by the broadcasters that some elements of the points system used to evaluate tender applications are not based upon objective criteria, therefore leaving a space for subjective evaluation.

This adds to concerns expressed over the concentration of powers in one decision-making body whose members are appointed from one political group. The lack of consistency in the application of objective criteria over license requirements may have an impact on diversity and pluralism.

Finally, the system of temporary licenses that has applied in the interim period has already had a serious effect on the economic situation of some broadcasters seeking a license and suggests the state has failed to meet a positive obligation and is not acting in the spirit of the Council of Europe Recommendation.

In other words, the financial instability of the broadcasters caused by uncertainty over when and how temporary licenses will be replaced with permanent licenses has damaged the media in question and limited their ability to provide quality news and current affairs programs. As a result, the state has undertaken actions that have been a factor of limitation rather than a factor of promotion of content diversity and pluralism.

5. The reduced capacity of the reorganized system of public service media to provide pluralist, diverse and quality information as a public good

From 1 January 2011 all assets and most of the staff of the three public service media organisations (MTV, Duna TV, Hungarian Radio) and the National News Agency (MTI) were allocated to the Media Support and Asset Management Fund (MTVA). The fund is solely supervised by the Media Council which controls all incomes and properties of the broadcasters. The director of the fund and the supervisory board are appointed by the President of the media authority who in turn is appointed by the Prime Minister. Therefore this structure creates the possibility of direct governmental control and direct political influence over public service media.

The centralization of different editorial offices has a negative effect on the creation of competitive and independent channels that target different audiences. It is unclear what tasks remain with the broadcaster when a single fund orders, buys and produces the public service programs.

The public broadcasting directors are appointed, rather than recruited in an open process, by the Media Council, upon recommendation of the chairperson of the Council, and then confirmed by the board of trustees. As a result, Hungarian Television, Duna Television, Hungarian Radio and the Hungarian News Agency have become empty shells while the MTVA is now the real public media service provider.

The Hungarian News Agency (MTI) produces news for all public service TV and radio channels, and their websites. Public service media can use exclusively MTI news which is contrary to the principles of editorial freedom and balanced coverage. The national news agency provides its services for free to any other media outlet. This leads to an unprecedented market dominance and power of MTI, destroying the business model and viability of other agencies and is contrary to the European rules of fair competition.

Budapest, November 16th 2011