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LEGAL ANALYSIS OF THE 2010 HUNGARIAN MEDIA LAWS

February 9, 2011

I. EXECUTIVE SUMMARY¹

This memo assesses the extent to which the Republic of Hungary's recently enacted media laws -- Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content (the "Press and Media Act")² and Act CLXXXV of 2010 on Media Services and Mass Media (the "Media Act")³, which generally entered into force on January 1, 2011 (collectively, the "Acts") -- are consistent with applicable European law.⁴ In sum, we conclude that these Acts violate the fundamental rights and freedoms enshrined in the European Convention on Human Rights ("ECHR") and are inconsistent with European Union law, particularly the Audiovisual Media Services Directive (the "AVMS Directive").

The Acts are an exercise of state regulation and media censorship whose implementation and enforcement violate the fundamental rights and freedoms guaranteed by enshrined in the ECHR. The Acts also fail to correctly transpose the AVMS Directive and thus are inconsistent with Hungary's obligations to the European Union. The most troublesome provisions fall into three general categories of concern:

- **Jurisdictional Scope.** Both the Press and Media Act and the Media Act contain overbroad definitions of their jurisdictional scope. Chief amongst these is an "aimed at or disseminated in" clause which opens the door for world-wide assertions of jurisdiction, a violation of the country of origin principle that lies at the heart of the AVMS Directive. This is a particularly disturbing development for online media service providers who are potentially subject to the Acts' various burdensome and chilling provisions regarding content regulation, registration, and enforcement.

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² Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content [hereinafter "Press and Media Act"]

³ Act CLXXXV of 2010 on Media Services and Mass Media [hereinafter "Media Act"]

⁴ For our textual analysis, we relied on the English-language translations of these laws provided by the Republic of Hungary's Ministry of Public Administration and Justice. The English-language translation of the Press and Media Act is *available at* http://www.kim.gov.hu/misc/letoltheto/act_civ_media_content.pdf. The English-language translation of the Media Act is *available at* http://www.kim.gov.hu/misc/letoltheto/media_law.pdf.

- **Regulatory regime.** The Media Act creates an extensive, complex, and overlapping bureaucratic web of administrative authorities, ultimately answerable to the Prime Minister, with far-reaching, and in some cases apparently unconstitutional, powers. The attempt to exempt several of these authorities from compliance with international law is a violation of Hungary’s international obligations. Moreover, the Act grants these authorities with the power to impose massive fines on, suspend the activities of, or even delete the public’s access to media providers worldwide. Finally, the nomination and election process for at least one of these authorities is susceptible to undue political influence that could result in the constitutional rights of free expression and public information being subject to political control.
- **Content regulation.** The Press and Media Act and the Media Act lay out general and specific content regulations that authorize restrictions on freedom of expression and the press. The content regulations imposed on both political and journalistic speech and commercial speech are impermissibly vague under Article 10 of the ECHR. Additional content regulations demanding “balanced” news coverage and mandating specific coverage of crisis situations also violate Article 10 of the ECHR.

This analysis focuses on the most glaring failings of the new Acts, but several other provisions in the Acts raise serious concerns as well.

II. LEGAL BACKGROUND

A. Hungarian Constitutional Law

The 1949 Constitution of the Republic of Hungary (the “Hungarian Constitution”) is, according to its terms, the supreme law of the Republic of Hungary.⁵ Pursuant to the Constitution, Hungary “recognizes inviolable and inalienable fundamental human rights” and affirms that “respect and protection of these rights is a primary obligation of the State.”⁶ These fundamental human rights include:

- Freedom of thought;⁷
- Freedom to express one’s opinion;⁸
- Freedom “to access and distribute information of public interest;”⁹
- Freedom of the press;¹⁰ and

⁵ HUNG. CONST. art. 77(1)

⁶ *Id.* art. 8(1)

⁷ *Id.* art. 60(1)

⁸ *Id.* art. 61(1)

⁹ *Id.*

- Freedom of “scientific and artistic expression, the freedom to learn and to teach.”¹¹

Under the Hungarian Constitution, an individual who alleges infringement of any of these fundamental rights may assert the claim before a court of law.¹²

The Hungarian Constitution also contains important separation of powers provisions:

- Judicial functions are the purview of the courts;¹³
- Legal proceedings “are to be judged in a just, public trial by an independent and impartial court established by law;”¹⁴
- There is a general right to seek legal remedy “to judicial, administrative or other official decisions, which infringe on his rights or justified interests;” and¹⁵
- Parliament is “the supreme body of State power.”¹⁶

As set forth below, we believe the Acts infringe on these Constitutional guarantees and provisions in numerous respects.

B. Standards of International Law

The Hungarian Constitution mandates that the State “harmonize the country’s domestic law with the obligations assumed under international law.”¹⁷ By virtue of this provision, and Hungary’s capacity as a Member State of the European Union,¹⁸ Hungary is required to comply with European Union law such as the AVMS Directive. In addition, Hungary is a signatory to the European Convention on Human Rights.

1. European Convention on Human Rights (the “ECHR”)

Article 10 of the ECHR provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart ideas without interference from by

¹⁰ *Id.* art. 61(2)

¹¹ *Id.* art. 70/G

¹² *Id.* art. 70/K

¹³ *Id.* art. 45; *Id.* art. 50

¹⁴ *Id.* art. 57(1)

¹⁵ *Id.* art. 57(5)

¹⁶ *Id.* art. 19(1)

¹⁷ *Id.* art. 7(1)

¹⁸ *Id.* art. 2/A(1); Treaty of Accession, Sept. 23, 2003, 2003 O.J. (L 236)

public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are 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 European Court of Human Rights consistently has held that the potential exceptions of Article 10(2) are to be construed very narrowly by member states.¹⁹

The European Court of Human Rights has held that Article 10 of the ECHR imposes a high burden on governments wishing to interfere with the right to free expression. That Court has held that any such interference must meet the following three criteria: (1) it must be prescribed by law; (2) it must have as its aim a goal that is legitimate under Article 10(2); and (3) the specific restriction must be “necessary in a democratic society” in order to achieve that goal.²⁰

The European Court has interpreted the first criterion – that any interference be prescribed by law – to mean that legal requirements must be accessible and that legal consequences must be reasonably foreseeable to enable citizens to manage their activities.²¹ Thus, a law will infringe Article 10 if it is so vague as to provide insufficient guidance to citizens as to the bounds of legal conduct.

The European Court has held that any measures infringing on the right of free expression must be “necessary in a democratic society.”²² Furthermore, the measures are to be “narrowly interpreted and the necessity for any restrictions must be convincingly established.”²³ Thus, the European Court has held that for a restriction on speech to be “necessary in a democratic society” a government must demonstrate: (1) a pressing social need; (2) proportionality between the restriction, including legal penalties,

¹⁹ Nilsen and Johnson v. Norway, 1999-VIII Eur. Ct. H.R., para. 43 (1999); *The Sunday Times v. United Kingdom* (No. 1), 30 Eur. Ct. H.R. (ser. A) (1979)

²⁰ Nilsen and Johnson, *supra* note 19; *Hashman and Harrup v. United Kingdom*, 1999-VIII Eur. Ct. H.R., paras. 25-26 (1999); *The Sunday Times v. United Kingdom* (No. 2), 217 Eur. Ct. H.R. (ser. A) para. 45 (1991)

²¹ *Cox v. Turkey*, App. No. 2933/03, para. 33, *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=868142&portal=hbkmsource=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (5 May 2010); *The Sunday Times* (No. 2), *supra* note 20 at para. 49

²² Nilsen and Johnson, *supra* note 19; *Hashman and Harrup*, *supra* note 20; *Observer and Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) para. 59 (1991)

²³ *Observer and Guardian*, *supra* note 22

and the aim pursued; and (3) that the reasons for the restriction are relevant and sufficient under Article 10, section 2.²⁴

The Court has placed particular emphasis on the importance of a free and vigorous press, stating the principle that “freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance.”²⁵ It is also important to note that the Court has held that Article 10 applies to commercial speech, although states may be allowed a greater “margin of appreciation” in determining what regulation of commercial speech is “necessary in a democratic society.”²⁶

2. Audiovisual Media Services Directive (the “AVMS Directive”)

Enacted by the European Parliament and the Council of the European Union in 2007, the AVMS Directive amends and modernizes the older Television without Frontiers Directive. According to its own terms, the core of the AVMS Directive is the country of origin principle,²⁷ that “only one Member State should have jurisdiction over an audiovisual media service provider.”²⁸ The Directive makes clear that the principle is “essential for the creation of an internal market,” “[ensures] legal certainty for media service providers,” and “[ensures] the free flow of information and audiovisual programmes in the internal market.”²⁹

Pursuant to the AVMS Directive, a Member State has jurisdiction over a provider if the provider is “established” in that Member State.³⁰ “Established” is defined as:

- Both the head office is located and editorial decisions are taken in that Member State;³¹

²⁴ See *e.g.*, *The Sunday Times (No. 2)*, supra note 20 at para. 50; see also *Tolstoy Miloslavsky v. United Kingdom*, 323 Eur. Ct. H.R. (ser. A) para. 51 (1995) (excessive damage award for libel constituted violation of Article 10)

²⁵ *Flux v. Moldova (No. 6)*, App. No. 22824/04, para. 24, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=838678&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (29 July 2008); see also *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) para. 31 (1994); *The Sunday Times (No. 2)*, supra note 20 (stating similar principle)

²⁶ See *Casado Coca v. Spain*, 285 Eur. Ct. H.R. (ser. A) paras. 47-51 (1994)

²⁷ Directive 2010/13/EU, of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services, 2010 O.J. (L 95) 1, 4 at pmb., § 33 [hereinafter “AVMS Directive”]

²⁸ *Id.* at pmb., § 34

²⁹ *Id.* at pmb., § 33

³⁰ *Id.* at p. 13, art. 2(2)(a)

³¹ *Id.* at p. 13, art. 2(3)(a)

- A significant part of the workforce operates in that Member State and either the head office is located or editorial decisions are taken in that Member State;³² or
- Although editorial decisions are taken in a non-Member State, both the head office is located and a significant part of the workforce operates in that Member State.³³

The Directive also permits a Member State to exercise jurisdiction over providers who do not meet the foregoing definition but uses a satellite up-link located in the State or satellite capacity appertaining to the State.³⁴

The Directive also contains provisions, applicable to all audiovisual media services, pertaining to content regulation in the areas of hate speech³⁵ and commercial speech,³⁶ and provisions pertaining to protection of minors, which apply to television broadcasters,³⁷ on-demand audiovisual media services,³⁸ and, in the context of commercial speech, all audiovisual media service providers.³⁹

III. AREAS IN WHICH THE ACTS ARE INCONSISTENT WITH THE HUNGARIAN CONSTITUTION AND EUROPEAN LAW

A. Jurisdictional Scope of the Acts

Both the Press and Media Act and the Media Act contain excessively overbroad definitions of their jurisdictional scope. Beyond the grounds for jurisdiction laid out in the AVMS Directive, the Acts also apply to a media content provider if:

- “The distribution of the media service provided by it is carried out on a frequency owned by the Republic of Hungary”⁴⁰
- The provider’s “media product is accessible through an electronic communications identifier designated primarily for the users of the Republic of Hungary”⁴¹

³² *Id.* art. 2(3)(b)

³³ *Id.* art. 2(3)(c)

³⁴ *Id.* art. 2(4)

³⁵ *Id.* at p. 15, art. 6

³⁶ *Id.* at p. 15-16, art. 9

³⁷ *Id.* at p. 19, art. 27

³⁸ *Id.* at p. 17, art. 12

³⁹ *Id.* at p. 16, art. 9(1)(g)

⁴⁰ Media Act, art. 1(2); Press and Media Act, art. 2(2)

⁴¹ *Id.*

- The provider’s media services and/or products do not fall within the other grounds for jurisdiction but the services and/or products “are aimed at the territory of the Republic of Hungary or are disseminated or published within the territory of the Republic of Hungary”⁴²

This “aimed at or disseminated in” clause especially opens the door for the attempted exercise by the Hungarian government of world-wide jurisdiction over internet media service providers, which is particularly disturbing in light of the Acts’ various burdensome regulations in the areas of content regulation, registration, and enforcement.

1. The Acts introduce grounds of jurisdiction that may lead to dual jurisdiction, a consequence that is inconsistent with the AVMS Directive.

By introducing grounds for jurisdiction that extend beyond those provided for in the AVMS Directive, the Acts create the possibility of dual jurisdiction between Hungary and another Member State. This is in stark contrast to the “country of origin principle” that forms the core of the Directive and states that “only one Member State should have jurisdiction over an audiovisual media service provider.”⁴³

2. The Media Act provides for extraterritorial regulation of linear audiovisual media service providers beyond that which is permitted by the AVMS Directive.

The AVMS Directive limits the exercise of extraterritorial jurisdiction to television broadcasters, and only where (i) the broadcast is “wholly or mostly directed towards [the] territory” of another Member State; and (ii) the broadcaster established itself in another jurisdiction “in order to circumvent the stricter rules” of the receiving State. The Media Act contains these restrictions with respect to general applicability of the Act to a non-resident provider.⁴⁴ However, it contains no such restrictions where it is alleged that a provider “clearly and materially violates” either the hate speech provisions of the Press and Media Act or the protection of minors provisions of either the Media Act or the Press and Media Act.⁴⁵ In those situations, the Media Act authorizes the Media Council to apply its legal consequences to foreign providers as long as the services were “intended for use” in Hungary.

3. The procedure for extraterritorial regulation of linear audiovisual media service providers do not comply with the AVMS Directive.

The timing for interactions with the European Commission in those situations also is inconsistent with the procedure laid out in the AVMS Directive. The AVMS Directive permits a receiving Member State to apply its own measures only if it has notified the

⁴² Media Act, art. 1(5)-1(6)

⁴³ AVMS Directive at p. 4, pmb. (34)-(35)

⁴⁴ Media Act, art. 179

⁴⁵ *Id.* art. 176

Commission of the intended measures and received the Commission’s approval to apply the measures. The Directive gives the Commission *three months* to make this decision. In contrast, the Media Act instructs the Media Council to announce its decision to impose the measures concurrently with sending the decision to the Commission. (The Act does not explain the consequence or significance of announcing a decision.) The Media Council will withdraw its decision only if obliged by the Commission within *two months* of the notification.⁴⁶

4. The extraterritorial regulation allowed under the Media Act against on-demand visual media, radio media, and press media service providers resident in other Member States reaches far beyond that provided for by the AVMS Directive and has troubling implications with respect to the fundamental freedom to provide cross-border services.

As noted above, the AVMS Directive limits extraterritorial intervention to television broadcasters. The Media Act, however, authorizes the Media Council⁴⁷ to apply “legal consequences” to on-demand audiovisual media service providers “residing in another Member State” whose service is “intended for use, is broadcast or published” in Hungary.⁴⁸ (The nature of these legal consequences is discussed in part III.B of this memorandum). The Media Council may impose such “legal consequences” where the service “violates or presents a serious risk” to a long list of vaguely-stated public interests such as:⁴⁹

- “Protection of public order”
- “Prevention, investigation and prosecution of criminal acts”
- “Prohibition of inciting hatred against communities”
- “Protection of minors”
- “Protection of [...] public health”
- “Protection of [...] public security”
- “Protection of [...] national security”
- “Protection of [...] consumers and investors”

The Media Council is required to request that the Member State in which the provider resides “take appropriate measures” before the Media Council may institute

⁴⁶ *Id.*

⁴⁷ The Media Council is one of several administrative bodies established by the Act. Its powers and duties are addressed in part III.B of this memorandum.

⁴⁸ Media Act, art. 177(1)

⁴⁹ *Id.* art. 177(1)(a)-(b)

proceedings.⁵⁰ If the Member State “fails to take, or improperly takes the measures within the reasonable time set forth in the request lodged by the Media Council,” then the Media Council will inform the originating Member State and the European Commission of its decision to impose such “legal consequences” on the service provider.⁵¹ The Media Act fails to define what it means for another Member State to “improperly take” a measure. The Media Act also states that the Council will only withdraw the decision where it is obliged to do so by the European Commission, shifting the burden to act to the Commission.⁵² Moreover, the Act also allows the Media Council to make *unilateral temporary decisions that have immediate effect*. Although the Act requires the Council to inform the European Commission and originating Member State of such decisions, it is unclear whether the Council can decline to withdraw the temporary decision even if instructed to do so by the European Commission.⁵³

Similarly, the Media Act authorizes the Media Council to apply legal consequences to the radio media service or press media of non-resident media content providers whose service is “intended for use, is broadcast or published” in Hungary.⁵⁴ The Media Council may impose such measures where the service “violates or presents a serious risk” to the same long list of vaguely worded public interests.⁵⁵ Although the Media Act lays out procedures for consultations between Hungary and the resident State, it is silent as to the role of the European Commission.⁵⁶

These provisions of the Media Act seem to conflict with Article 180, which limits general applicability of the Act to non-resident radio media service providers where: (i) the providers’ service is intended “for use in the territory of the Republic of Hungary in its entirety or to a large extent”; and (ii) the provider established itself in another jurisdiction “with a view to avoiding” the stricter rules of the Act.⁵⁷

B. Extensive and bureaucratic regulatory regime with far-reaching powers

The Media Act creates an extensive, complex, and bureaucratic web of administrative authorities with far-reaching, and in some cases seemingly unconstitutional, powers. These newly established bodies include:

⁵⁰ *Id.* art. 177(2)

⁵¹ *Id.*

⁵² *Id.*

⁵³ The Act reads: “The Media Council shall resolve as to whether to uphold or withdraw the temporary decision as provided for in the decision of the European Commission.” *Id.* art. 177(3)

⁵⁴ *Id.* art. 178(1)

⁵⁵ *Id.* art. 178(1)(a)-(b)

⁵⁶ *Id.* art. 178(2)-(3)

⁵⁷ *Id.* art. 180(1)

- The National Media and Infocommunications Authority (the “Authority”) which “contributes to implementing the Government’s policy [...] in the area of frequency management and telecommunications”⁵⁸
- The Media Council, an independent body within the Authority that is instructed to, *inter alia*, “oversee and guarantee the freedom of press under [the Acts]” and “perform the supervisory tasks and controls prescribed by [the] Act”⁵⁹
- The National Council for Communication and Information Technology, which acts as “a counseling and advisory body to the Government on matters of information technology and telecommunications.”⁶⁰

1. The attempt to exempt several of these authorities from compliance with international law is a violation of Hungary’s domestic and international obligations.

Pursuant to the Media Act, several of the newly created administrative authorities -- namely, the Authority, the National Council for Communication and Information Technology, and the Media Council -- are “only subject to Hungarian law and its members may not be instructed with respect to the fulfilment of their official duties.”⁶¹ As noted above, by virtue of its Constitution and its capacity as a Member State of the European Union, Hungary is required to comply with European Union law. The attempt to exempt several of these newly-created authorities from compliance with that law is a violation of both domestic and international legal obligations.

2. In addition to the power to appoint the President of the Authority, the Prime Minister has de facto authority to select the President of the Media Council. The nomination and election process for the members of the Media Council similarly is susceptible to undue political influence. As a result, the interpretation of the Acts, and thus, the determination of the extent of the constitutional rights of free expression and public information are subject to political control.

The Presidency of the two main enforcement bodies created by the Media Act -- the Authority and the Media Council -- are both effectively appointed by the Prime Minister. The Media Act gives the Prime Minister express power to appoint the President of the Authority.⁶² Furthermore, although the Media Act claims that the President of the Media Council is elected by a two-thirds vote of Parliament,⁶³ it is clear that the Prime Minister’s

⁵⁸ *Id.* art. 109(2)

⁵⁹ *Id.* art. 132

⁶⁰ *Id.* art. 120(1)

⁶¹ *See, e.g. id.* art. 120(5)

⁶² *Id.* art. 111(3)

⁶³ *Id.* art. 124(1)

power to select the President of the Authority gives the Prime Minister *de facto* authority to select the President of the Media Council as well. Upon appointment to the Presidency of the Authority, that individual not only becomes an automatic candidate for President of the Media Council⁶⁴ but also has the power to convene and chair meetings of the Media Council.⁶⁵ (It should also be noted that there is no provision that provides for another means of nominating a President of the Media Council.) Parliament then is left with no real choice: It can elect the President of the Authority to the presidency of the Media Council, but if it chooses not to elect the President of the Authority to the presidency of the Media Council, then that individual retains the power to convene and chair meetings of the Media Council regardless.⁶⁶ In addition, the fact that the Prime Minister appoints the President of the Authority for a term of nine years entrenches this exercise of power over both the Authority and the Media Council.⁶⁷ Of even more concern is that the the President of the Authority is “entitled to appoint two Vice Presidents [to the Authority] for an indefinite term.”⁶⁸

Similarly, the nomination and election process for the members of the Media Council is susceptible to undue political influence. Pursuant to the Media Act, Media Council members are nominated by the unanimous vote of a nominating committee which is composed of one representative from each parliamentary faction.⁶⁹ The protections afforded by the one faction-one representative structure and the unanimous vote requirement are undermined by two later provisions. First, members of the nominating committee are “entitled to a number of votes in function of the headcount of the parliamentary faction making the nomination.”⁷⁰ Second, in the event the nominating committee fails to reach a unanimous vote on a candidate, then the committee “may propose a candidate with at least a two-third majority of votes.”⁷¹

These provisions empower any faction that enjoys a two-thirds majority in Parliament to usurp the nomination process for the Media Council.

- First, at the unanimous vote stage of nominations, the faction can refuse to provide the unanimous votes necessary and thereby block the nomination of a candidate who is not to its liking.

⁶⁴ *Id.* art. 125(1)

⁶⁵ *Id.* art. 125(4)

⁶⁶ *Id.* art. 125(4). Although the individual is not involved in the decision-making process, s/he does have consultative powers. *Id.*

⁶⁷ *Id.* art. 111(3)

⁶⁸ *Id.* art. 112(1)

⁶⁹ *Id.* art. 124(3)

⁷⁰ *Id.* art. 124(4)

⁷¹ *Id.* art. 124(8)

- Second, at the two-thirds majority vote stage of nominations, the faction can take advantage of the fact that it is “entitled to a number of votes in function of [its] headcount” in Parliament and thereby vote through all its nominees.
- Third, at the election, the faction unilaterally can elect all of its nominees.

The fact that members of the Media Council are elected for a term of nine years further entrenches this exercise of political control over the Media Council.⁷²

By allowing any faction that enjoys a two-thirds majority in Parliament to control the nomination and election process of the Media Council, the Media Act bestows on such party the power to interpret the Acts, and thus, the determination of the extent of the government’s control over the exercise of free expression and public information. The political nature of the nomination and election process for President of the Authority, and in turn President of the Media Council, is of even greater concern because it concentrates power over the two chief enforcement bodies in the Prime Minister regardless of the will of Parliament.

3. The Media Act grants to various authorities the power to impose massive fines on, suspend the activities of, or even delete the public’s access to media providers alleged to have infringed the Acts. Considering the purported scope of the Acts, this enforcement regime may be imposed on providers worldwide.

Under Article 187 of the Media Act, the Media Council may apply “legal consequences” to providers who they determine have infringed the Acts. These “legal consequences” include a draconian fines regime under which the Media Council may levy fines on both the provider -- in an amount as high as HUF 200,000,000 (€ 727, 876; \$ 993,803)⁷³ -- and the provider’s senior officer -- in an amount as high as HUF 2,000,000 (€ 7,268; \$ 9,936).⁷⁴ (As a point of reference, the 2009 annual average gross wage in Hungary was HUF 2,476,767.⁷⁵) In some cases, the Media Council may even go further and either: (i) suspend the activities of a provider; or (ii) delete the provider from the administrative register such that the provider’s service is no longer permitted to be made accessible to the public.⁷⁶

The Media Act also authorizes the Authority to apply any of the legal consequences discussed above as part of its “right to supervise within an official audit or official proceedings the enforcement and observance” of the Acts.⁷⁷ It is unclear whether and, if

⁷² *Id.* art. 124(1)

⁷³ *Id.* art. 187(3)(b)

⁷⁴ *Id.* art. 187(1)

⁷⁵ OECD, “Taxing Wages: Country note for Hungary,” *available at* http://www.oecd.org/document/9/0,3343,en_33873108_33873438_45142793_1_1_1_1,00.html

⁷⁶ Media Act, art. 187

⁷⁷ *Id.* art. 167

so, how the Authority's exercise of its right to apply legal consequences has any bearing on the Media Council's exercise of its right to apply legal consequences.

Considering the potentially world-wide jurisdictional scope of the Acts, this enforcement regime may be imposed on providers worldwide. In other words, an individual located anywhere in the world could face fines in the range of tens of thousands of Euros if deemed by the Media Council or the Authority to have violated any of a number of the Acts' vague restrictions, prohibitions or other regulations of content (discussed below). The potential impact of these Acts is a chilling of the freedom of expression by any media service provider who is located in Hungary or whose services or products are available in Hungary.

C. Provisions regarding content

The Acts lay out general and specific content regulations that chill and otherwise authorize restrictions on freedom of expression, speech, and the press. The combination of the overly broad jurisdictional scope of the Acts and the vagueness of many of these provisions nearly guarantees that a provider will be swept up in the enforcement regime discussed above.

1. The content regulations imposed on non-commercial speech are vague and restrictive in violation of the ECHR.

Although the Press and Media Act purports to “[give] due heed to ensuring the freedom of expression, speech, and the press,”⁷⁸ it imposes a wide variety of impermissible restrictions on all of these freedoms. These restrictive provisions are all the more disturbing because of their vagueness:

- Article 4 states that exercise of the freedom of the press “may not constitute or abet an act of crime, violate public morals or prejudice the inherent rights of others.”
- Article 14 obligates providers to “respect human dignity” and prohibits “self-gratifying and detrimental coverage of persons in humiliating or defenceless situations.”
- Article 16 requires providers to “respect the constitutional order” of Hungary.
- Article 17 prohibits content that incites hatred or may “offend or discriminate against - whether expressedly or by implication - persons, nations, communities, national, ethnic, linguistic and other minorities or any majority as well as any church or religious groups.”
- Article 19 prohibits content that “could materially damage the intellectual, spiritual, moral or physical development of minors.”

In addition, the Acts set forth content restrictions for “protection of minors.” These rules include: (i) a requirement that the providers assign “ratings” to content on the basis of

⁷⁸ Press and Media Act, pmbi.

whether it “may trigger fear in a viewer...or may not be comprehended or may be misunderstood by such viewer owing to his/her age”⁷⁹; and (ii) a special rating on content that “may impair the physical, mental or moral development of viewers.”⁸⁰ The Act also imposes temporal restrictions on when a provider may broadcast programs on the basis of these special content ratings, and blanket prohibitions on broadcasting of materials that involve “unnecessary scenes of violence.”⁸¹

These provisions are far too vague for providers to know what is necessary to conform their behavior to the law. Therefore, the restrictions do not satisfy the standard of “prescribed by law” within the meaning of Article 10 of the ECHR. To satisfy that criterion, a law must be “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁸² The Act provides no guidance as to what it means to “violate public morals,” “prejudice the inherent rights of others,” “respect human dignity,” “respect the constitutional order,” “may trigger fear in a viewer,” “incite hatred,” “offend or discriminate against - whether expressedly or by implication,” “materially damage the intellectual, spiritual, moral or physical development of minors.” Indeed, the European Court has specifically stated freedom of expression is applicable to information or ideas “that offend, shock or disturb.”⁸³

Although a state can prohibit the actual and demonstrable *incitement of violence*, the European Court has held that a government cannot prohibit the discussion of even controversial and offensive racist and nationalist issues.⁸⁴ The Press and Media Act, however, expressly prohibits content that “[incites] hatred against persons, nations, communities, national, ethnic, linguistic and other minorities or any majority as well as any church or religious groups.”⁸⁵ Similarly, it expressly prohibits content that “[offends] or discriminate[s] against - whether expressedly or by implication - persons, nations, communities, national, ethnic, linguistic and other minorities or any majority as well as any church or religious groups.”⁸⁶

⁷⁹ Media Act, art. 9(3)-(4)

⁸⁰ *Id.* art. 9(5)-(7)

⁸¹ *Id.* arts. 9-10

⁸² *See* The Sunday Times (No. 2), *supra* note 20

⁸³ *Myrskyy v. Ukraine*, App. No. 7877/03, para. 42, *available at* <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=54031785&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=82263&highlight=> (5 May 2010); *see also* *Pedersen and Baadsgaard v. Denmark*, 2004-XI, para. 71 (2004); *Wille v. Liechtenstein*, 1999-VII, para. 61 (1999) (stating same principle); *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) (1992) (infringement of Article 10 where state prosecuted a government critic under a statute for the prevention of disorder)

⁸⁴ *See, e.g.,* *Jersild v. Denmark*, *supra* note 25

⁸⁵ Press and Media Act, art. 17(1)

⁸⁶ *Id.*, art. 17(2)

2. The content regulations imposed on commercial speech similarly are impermissibly vague and restrictive under the ECHR and the AVMS Directive.

Both Acts impose extensive content regulations with respect to commercial communications. Article 20 of the Press and Media Act prohibits commercial content that “may offend religious or ideological convictions” or “encourage a conduct that could be harmful to health, safety or the environment.” The Media Act establishes even more prohibitions including communications that may:⁸⁷

- “Infringe upon human dignity”
- Contain or support “discrimination on grounds of gender, racial or ethnic origin, nationality, religion or philosophical conviction, physical or mental disability, age or sexual orientation”
- “Invite minors to purchase or rent a certain product or to use a service,” “call on minors to persuade their parents or others to purchase the advertised goods or to use the advertised services,” “exploit on the special trust minors [*sic*] towards their parents, teachers or other persons or the inexperience of and credulity of minors,” “unreasonably show minors in dangerous situations”
- “Express religious, conscientious or philosophical convictions” unless “broadcasted in thematic media services concerning a religious topic”
- “Infringe upon the dignity of a national symbol or a religious conviction”

The Media Act also contains extensive prohibitions on commercial speech pertaining to alcoholic beverages.⁸⁸

The restrictions on commercial speech similarly are impermissibly vague. While states are allowed a greater “margin of appreciation” in determining what regulation of commercial speech is “necessary in a democratic society,” the European Court has held that Article 10 of the ECHR does apply to commercial speech.⁸⁹ Although many of the commercial communications provisions in the Media Act mirror the categories of restriction permitted in the AVMS Directive, those restrictions are still subject to the “prescribed by law” standard of the ECHR. The Act falls short by merely restating the AVMS categories without providing any guidance as to the meaning of vague phrases such as “infringe upon human dignity,” “exploit on the special trust minors towards their parents, teachers or other persons or the inexperience of and credulity of minors,” or “unreasonably show minors in dangerous situations.” In addition, the Act introduces additional restrictions which similarly lack specificity such as “infringe upon the dignity of a national symbol or a religious conviction.” Such vague restrictions simply cannot be considered “prescribed by law” within the meaning of Article 10 of the ECHR.

⁸⁷ Media Act, art. 24

⁸⁸ *Id.*

⁸⁹ See Casado Coca, *supra* note 26

3. The news coverage provisions violate Article 10 of the ECHR.

The Acts impose a number of obligations regarding the “information provision activities of media services.”⁹⁰ For example, Article 13 of the Press and Media Act requires providers to provide “authentic, rapid and accurate information on local, national and EU affairs and on any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation.”⁹¹ In the case of linear and on-demand media content providers who supply news coverage, the Article further obligates these providers to provide “comprehensive, factual, up-to-date, objective and balanced coverage” in the above listed areas.⁹²

The European Court has held that Article 10 “protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.”⁹³ The Acts’ restrictions on news coverage violate Article 10 of the ECHR in several respects. First, the restrictions are impermissibly vague, purporting to apply to “the substance of the ideas and information expressed” and requiring coverage of “any event that bears relevance to the citizens of the Republic of Hungary and members of the Hungarian nation.”⁹⁴ Second, the news coverage restrictions use impermissibly vague words with respect to “the form in which [the ideas and information] are conveyed” by requiring that coverage be, *inter alia*, “rapid,” “comprehensive,” “up-to-date,” and “balanced.”⁹⁵ Third, the subjective requirement of objective and balanced reporting conflicts with the European Court’s holding that

“the methods of objective and balanced reporting may vary considerably depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists.”⁹⁶

4. The “coverage of crisis situations” provision is a potentially powerful, and dangerous tool, for government control of the news.

In the event of a “crisis situation” (defined as “a state of distress, state of emergency or state of extreme danger, or in the event of the unforeseen invasion of the territory of Hungary by foreign armed groups, or in connection with operations for the protection of the nation’s territory by air defence and air forces of the Hungarian Army”), the Media Act

⁹⁰ Media Act, art. 12; Press and Media Act, art. 13

⁹¹ Press and Media Act, art. 13(1)

⁹² *Id.* art. 13(2)

⁹³ Jersild, *supra* note 25, at para. 31

⁹⁴ Press and Media Act, art. 13

⁹⁵ *Id.*

⁹⁶ Jersild, *supra* note 25, at para. 31

authorizes certain members of the government to “prohibit the publication of certain announcements or programmes.”⁹⁷

The prohibition of the dissemination of other announcements or programmes in “crisis situations” empowers the government to suppress the communication of any views other than its own. The vagueness of the definition of “crisis situation,” in particular what it means for a country to be in “a state of distress,” which could range from economic distress to heavy flooding, could enable the government to invoke these obligations and powers almost at will.

5. The right to “press corrections” is impermissibly chilling, burdensome and inconsistent with the AVMS Directive, and the “prior approval” requirement compounds the possibility of suppression of free speech.

The Press and Media Act imposes a broad obligation on media service providers to make “corrections” on demand (phrased as the “right to press corrections”) where “false facts are stated or being disseminated about a person or facts related to this person are distorted.”⁹⁸ Newspapers, online content and news agencies must publish the correction within five days of receiving the request. On-demand and linear media services are given eight days to publish the correction.

This right to press corrections provision is inconsistent with Chapter IX of the AVMS Directive which, in the context of television broadcasting, lays out certain criterion for right of reply provisions:

- The AVMS Directive permits broadcasters to reject a reply that “would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency.”⁹⁹ By contrast, the right to press corrections provision in the Press and Media Act provides no grounds upon which a provider may refuse to publish a correction.
- The AVMS Directive states that “provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.”¹⁰⁰ The right to press corrections provision has no provision for judicial review.

In addition, the corrections provisions is impermissibly vague. The obligation to correct can be invoked whenever false facts are stated or facts related to the person are distorted, but the Act provides no definition of the term “distorted.” Almost any reporting could be considered distorted from one perspective of another. In the absence of clear standards and without prior judicial review, the provision has the potential to overwhelm

⁹⁷ Media Act, art. 15

⁹⁸ Press and Media Act, art. 12

⁹⁹ AVMS Directive, art. 28(4)

¹⁰⁰ AVMS Directive, art. 28(5)

a publication or broadcaster with the requirement to publish subjective “corrections” and to chill reporting.

Related, the prior approval provision contained in the Press and Media Act forces providers to subject their content to the approval of others and thereby cede control of their freedom of expression. The provision requires providers to obtain approval from a person who makes a public statement before the provider makes public disclosure of the statement. The person who made the statement may withhold approval if the provider “has modified [the statement] materially and such modification is detrimental to the person having made the statement.”¹⁰¹ Here again, the vagueness of the provision compounds the possibilities of suppression of free speech.

D. Other provisions

Although this analysis has focused on the most glaring failings of the new Acts, it should be noted that several other provisions in the Acts raise serious concerns as well.

- Article 7 of the Media Act requires providers to “cooperate with one another and the viewers, the listeners, the readers, the users and the subscribers.” This vague provision potentially empowers the government to impose arbitrary and burdensome obligations on providers.
- The Media Act lays out similarly vague and potentially burdensome objectives of public service broadcasting. These objectives include “national cohesion and social integration,” “foster [Hungarian expatriates] spiritual relations with their mother country,” and “provide unbiased, accurate, thorough, objective and responsible news service and reporting.”¹⁰²
- The provisions banning “parties or political movements” from sponsoring a media service or programme¹⁰³ and generally prohibiting political advertisements outside of election campaign periods¹⁰⁴ may be impermissible infringements on the freedom of expression and the freedom of access to information.
- The Media Act states that “persons participating in case management and employed by the Authority as civil servants or engaged in other relationship intended for the performance of work with such Authority shall have unlimited powers to familiarize themselves with secrets protected by law.”¹⁰⁵ This unfettered access to confidential, privileged, and other legally protected documents is an overbroad grant of authority that is ripe for state interference and government control.

¹⁰¹ Press and Media Act, art. 15

¹⁰² Media Act, art. 83

¹⁰³ *Id.* art. 27(1)

¹⁰⁴ *Id.* art. 32(3)

¹⁰⁵ *Id.* art. 153

- The Media Act requires providers to issue a “forewarning prior to broadcasting any image or sound effects that may potentially infringe a person’s religion, faith related or other philosophical convictions or which are violent or otherwise disturbing.”¹⁰⁶ This language is so subjective that it could be interpreted as applying to any broadcast.
- The Press and Media Act grants courts or authorities the power to require disclosure of a confidential source if such disclosure is in “the interest of protecting national security and public order or uncovering or preventing criminal acts.”¹⁰⁷ Moreover, the European Court of Human Rights has held that orders to disclose confidential sources must be subject to procedural safeguards and “first and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making.”¹⁰⁸ The Press and Media Act provides no such safeguard in the event that the authorities have ordered disclosure.

IV. CONCLUSION

Hungary’s recently enacted media laws impermissibly interfere with the exercise of the rights to free expression and access to information. The implementation and enforcement of these Acts would violate the fundamental rights and freedoms enshrined in the Hungarian Constitution as well as the ECHR and AVMS Directive. The scope of the Acts opens the door for an overly broad assertion of jurisdiction that is a particularly disturbing development for online media service providers. The content regulations in the Acts impose restrictions on freedom of expression and the press to a degree not permitted by the ECHR. Finally, the regulatory regime established by the Acts is an extensive, complex, and bureaucratic web of administrative authorities with far-reaching powers. Combined with the vagueness of so many of the provisions restricting content, imposing registration, and levying fines, the potential impact of these Acts is a chilling of the freedom of expression by media service providers inside and outside of Hungary.

¹⁰⁶ *Id.* art. 14

¹⁰⁷ Press and Media Act, art. 6(3)

¹⁰⁸ *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03, para. 89-90, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=873701&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (14 Sept. 2010)