



## MINISTRY OF PUBLIC ADMINISTRATION AND JUSTICE

Dr. Tibor Navracsics

Minister

Deputy Prime Minister

**Ms Neelie Kroes**

Vice-President of the European Commission  
European Commission

Brussels

**Dear Ms Vice-President,**

Thank you for your 21 January 2011 letter in which you set forth observations regarding national measures transposing Directive 2010/13/EU on audiovisual media services (AVMS Directive), such as Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content (Media Constitution, hereinafter MC) and Act CLXXXV of 2010 on Media Services and Mass Media (Media Act, hereinafter MA).

I would like to ensure you that the Hungarian Government is committed to guarantee that the national regulation of media and within that the regulation of audiovisual media services subject to the AVMS Directive are in full compliance with Union law requirements.

In response to the concerns expressed in your letter and based on our commitment mentioned above, please allow me to provide you with the following information.

### **Obligation of balanced coverage**

In your letter, first you express your concern that the Hungarian legislation (the MC and MA) set out an overly wide imposition of the obligation of balanced coverage when it extends that obligation to on-demand audiovisual media services including also “audiovisual blogs”.

The objective of the legislature by including the obligation of balanced coverage in the MA was to ensure the enforcement of citizens’ right to information through the provision of impartial and unbiased information. In our judgment, the relevant provisions of the MC and MA effectively serve this purpose. Regarding radio and television broadcasters, the obligation of balanced coverage has been part of the Hungarian legal system since 1996. The precise content of the obligation of balanced coverage was clarified by the extensive jurisprudence of the courts and Decision 1/2007 (I. 18.) AB of the Constitutional Court

regarding the relevant provisions of Act I of 1996 on Radio and Television Broadcasting. Considering all this, the concept of the obligation of balanced coverage has a clearly definable meaning in Hungarian law.

In the Decision mentioned above, the Constitutional Court emphasized the importance of balanced coverage in Hungarian law as follows: *“Preventing the development of information monopolies is a constitutional objective. By the dynamic development of broadcasting technologies, the primary threat posed by the information monopolies is the emergence of »opinion monopolies«, and therefore the Constitutional Court acknowledges the requirement of ensuring the pluralism of opinions as a legitimate objective. This is the objective for which the editing freedom of the broadcaster is restricted by the requirement of balanced information. As generally accepted, the opinion forming force of radio and television broadcasts and the convincing influence of motion pictures, voices and live coverages is the multiple of the thinking-inductive force of other services in the information society. Therefore, it is justified in the case of the electronic media to provide for special regulations on multi-sided information, in order to allow the members of the political community to develop their views after getting familiarised with the relevant opinions about the issues of public interest.”*

The extension of the regulation to the news and information programs of on-demand media services also is justified by the same condition, which made the regulation of on-demand media services by the European Union also necessary in 2007. In the future, a significant decline of traditional television can be predicted, and thus, the role of on-demand content will further increase also in the field of public information. The preservation of political pluralism and diversity of information justify the requirement of the obligation of balanced coverage regarding the relevant programmes of on-demand media services.

When considering the necessity and proportionality of including on-demand media services together with television and radio broadcasting within the scope of media subject to the obligation of balanced coverage, the Hungarian legislature took into account, among other things, the following:

- On-demand media services, because of their motion picture-like characteristics, have a much greater convincing force than press and online media, and, therefore, in their case, the establishment of higher-level requirements regarding information may be justified.
- Sanctions under Article 187 MA may not be applied to a medium infringing the obligation of balanced coverage. In such instances, legal consequences may be invoked only under Article 181 (5) MA, whose purpose is to alert the concerned public that the information provided had failed to meet the obligation of balanced coverage.
- The obligation of balanced coverage under Article 13(2) MC applies only to on-demand media services that provide information services based on their own editorial decisions.

- In line with paragraph (21) of the preamble of the AVMS Directive, the scope of the MC or MA does not apply to private communications. (*“For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope (...) should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.”*) Accordingly, the obligation of balanced coverage in case of “audiovisual blogs” that cannot be qualified as services of economic nature is not a requirement.
- During the debates surrounding the drafting of the AVMS Directive, the range of services, whose social and economic importance is absolutely relevant from a regulatory standpoint, has also crystallized at the level of European professional thinking. National legislators may safely use as a starting point such view on services covered by the Directive.

The Government of the Republic of Hungary, even in light of the considerations above, is ready, if the Commission still finds it necessary, to make the scope of on-demand audiovisual services more specific, in which cases it wishes to enforce balanced coverage in the Hungarian media regulatory regime, by amending the MC and MA. The specification may serve to clarify that the obligation of balanced coverage applies to media service providers, in the activities of whom the economic element is dominant; whose information activities are carried out on a broad scale, or who provide on-demand services primarily for information purposes; and who reach a significant portion of users, or whose social impact is appreciable.

During the preparatory phase of a possible amendment of the legislation for the purpose of refining its scope, the considerations identified by the Commission (size, market share, targeted audience etc.) could serve as a good basis to define exactly what criteria have to be defined to ensure that the obligation of balanced coverage regarding on-demand media services is exclusively confined to a range relevant from the aspect of the citizens’ right to information. The modification of the legislation could be considered also in such a way that would exclude the imposition of the obligation of balanced coverage in the case of on-demand media services. Although, in your letter you have not made such a reference, we also find it plausible to eliminate or moderate this obligation regarding certain linear media services (while with respect to public media service providers, media providers with significant influence, and community and local media services, we still find it extremely important to impose the obligation of balanced coverage.).

## **Country of origin principle**

The second objection raised in your letter was on the country of origin principle, namely that pursuant to Articles 176-177 MA fines could be imposed on media service providers established in other Member States.

During the drafting of the new media legislation, we paid special attention to ensure that the principle of proportionality prevails throughout the entire law, thus, also in the provisions implementing the AVMS Directive. Under certain conditions, European Union law permits taking action against foreign undertakings. Articles 176-177 MA contain almost word by word the rules regarding special measures under Article 3 of the AVMS Directive. However, while the AVMS Directive does not define what “measures” the Member States may take, the MA, in line with the requirement of legal certainty, precisely sets out the scope of possible measures. The requirement of proportionality in the course of administrative measures is also ensured in general in the MA, and when applying legal measures, the law explicitly requires that the authorities take into account this principle (Article 185(2)).

Proportionality is also guaranteed by the fact that as a main rule of the relevant provisions of the MA, the primary opportunity to take measures against an infringing media service provider, in two consecutive instances, lies with the sending state, and the host state may only apply legal sanctions, after notifying the European Commission, if the measures of the sending state were not satisfactory. In other words, the host state has the right to sanction only if the measures of the sending state are not proportionate in a sense that they fail to affect the behaviour of the media service provider. Deviation from this rule is only justified in exceptional cases permitted by the AVMS Directive. However, European Commission action against an unfavourable decision deemed inappropriate is always provided. The Hungarian authorities are obligated to proceed in accordance with European Commission decision without any further consideration. The infringing media service provider is entitled to file a complaint against the unfavourable decision with a Hungarian court, which may review the measures applied against the service provider from the aspect of proportionality, too.

According to the position of the Hungarian Government, it does not necessarily follow from the provisions of the AVMS Directive that measures endorsed by the Member States in accordance with Article 3 of the Directive could not amount to the imposition of fines in a given situation, for example, in case of exceptionally serious violations. However, having said that, if the Commission indeed finds that imposing fines on media service providers established in another Member State cannot be justified, the Hungarian Government is willing to consider the option to disregard the possibility of imposing fines in the case of these service providers and instead guarantee the protection of values recognized also in the Directive by other effective remedies.

Regarding the foregoing, we request that the Commission provide us with an opportunity in the form of expert consultation to clarify whether it regards imposing fines pursuant to Article 3 of the AVMS Directive on service providers established in other Member States as a measure incompatible with, and disproportionate under, Union law in every instance. According to our position, it does not necessarily follow from the provisions of the AVMS Directive. However, our firm intention is to implement a legal solution, which fully

complies with Union law and completely conforms with the legal interpretation of the Commission in this respect, too.

### **Notification and registration requirements**

The third concern in your letter relates to the notification requirement defined in Article 41 MA. In our opinion, the concern set forth in the Commission's letter is without basis, as the registration cannot constitute in any form a restriction of the freedom of the press. This is a simple, formal data reporting, whose purpose is that the Authority accurately recognize and identify the undertakings under its supervision. Article 5(1) MC expressly states, "the conditions set for registration may not restrict the freedom of the press." In case of press and online media, as well as on-demand media services, according to Article 41(2) MA, registration is not a condition to the commencement of activities but merely a related, ancillary obligation. The new legislation has fundamentally changed the previous, 1986 regulations of print media in this respect also, and ruled out the possibility of arbitrary, registration related decisions by the authorities, which thereby may have restricted the freedom of the press.

The notification requirement and registration in the case of products of the printed press and online media can be considered as a necessary measure also to ensure that regarding press law liability and content related claims (violation of moral rights and copyrights), the victim have a clear understanding as to against whom exactly the claim arising from the content published in the medium can be enforced.

The registration requirement does not extend to media service providers and publishers under non-Hungarian jurisdictions in any way, the distribution of these products are naturally permitted in the territory of the Republic of Hungary, and, thus, this rule does not constitute a restriction of the free movement of goods and services.

Apart from the foregoing, the Hungarian Government is also prepared to examine the possibility of finding other legal solutions if necessary, which could guarantee that basic information regarding the publication of online press is readily available to the authorities, the public at large, and business entities.

### **Dear Ms Vice-President,**

Please review our responses to the concerns you raised, and if you find it necessary, please make it possible for our experts to consult with Commission officials regarding the objected provisions of the MC and MA.

If the Commission, despite our arguments set forth in this letter, still deems it necessary to amend the Hungarian regulation with respect to the problems highlighted, we are prepared to commence drafting these modifications in the directions described above, and we will regularly update the Commission on the codification process.

Yours sincerely,

Dr. Tibor Navracsics  
Deputy Prime Minister  
Minister of Public Administration and Justice