Decision 165/2011. (XII. 20.) AB of the Hungarian Constitutional Court on the Media Regulation

At the end of 2010, the Hungarian Parliament adopted two Acts (Act CIV of 2010 on the freedom of the press and the fundamental rules on media content, [hereinafter: Press Freedom Act] and Act CLXXXV of 2010 on media services and mass media [hereinafter: Media Act]), thereby rearranging the landscape of media regulation. Under its decision No. 165/2011 (hereinafter: the decision), the Constitutional Court passed resolutions on a number of issues relating to media regulation and the constitutionality of regulations on the procedure in which the Act was passed, the official supervision of press media, the registration obligation of printed and online press products, the protection of information sources, the obligation of data provision, and the Media and Communications Commissioner.

Summary of the decision

1. Having entered into force in a rapid pace without an adequate period for preparation after their adoption, the Acts shall not be deemed as unconstitutional per se. Due heed shall be given to the extent the particular piece of legislation is beneficial or burdensome to parties affected, and the fact that the provisions setting forth new obligations may become applicable only after the effective date of such statutory regulations. Accordingly, the adoption and promulgation of the two new acts on media regulation is to be deemed to have taken place in accordance with the provisions of the Constitution.

2. New obligations may be imposed on printed and online press products as regards their content, and these may be supervised by the Authority, therefore this solution is not unconstitutional in itself. Constitutionality is conditional on the limitation being narrow and justified (necessary and proportional) and the availability of the option to resort to Court to challenge the decision of the Authority. The latter obligation is fulfilled by the Hungarian regulation, with particular obligations pertaining to press products deemed unconstitutional on account of the requirement relating to necessity and proportionality, while other obligations are deemed constitutional.

3. The obligation to have printed and online press products registered shall not be deemed to limit the freedom of press, provided proper guarantees are in place. The Hungarian regulation at issue does include such guarantees and shall therefore be deemed constitutional.

4. As for the rule relating to the protection of information sources, appropriate and detailed legal guarantees shall be in place. The regulations shall be deemed constitutional when the opportunity to resort to Court is available, the identity of information sources may only be revealed in justified cases, and when the principle of proportionality and subsidiarity is respected under the regulations. Protection of information sources in current regulations constitutes a significant yet still insufficient development in contrast to the former regulation.

5. The rule under which the Authority has the right to learn and handle personal data of Clients and information qualifying as business secrets is deemed constitutional. Protection of data falling within the scope of attorney's secrets shall be ensured on Client's side in addition to the protection provided by the attorney.

6. The obligation of data provision – for general and unspecified reasons – beyond the scope of official procedures is deemed unconstitutional.

7. The existence of an institution or Commissioner entitled to act – albeit without real official powers – but under "quasi official powers" in relation to content affecting the freedom of press and editorial freedom is prejudicial to the freedom of press and therefore unconstitutional.

No. 1. The issue of unconstitutionality concerning the way the Media Act was enacted and announced

Under its decision, the Constitutional Court – by concurrently rejecting motions under Article 2 (1) of the Constitution - has established - in relation to the shortness of time between the adoption of the Media Act by the Parliament and the effective date thereof, that is, the issue of invalidity of the regulations under public law – that invalidity of the regulations under public law is not in place.

Under its decision, the Constitutional Court has established that the legislator failed to allow sufficient time for familiarisation with the new regulations and for taking necessary measures. At the same time, it is to be established that, under its „Transitional measures", the Media Act stipulates the applicability of certain regulations with a date other than its effective date of 1 January 2011 Under its decision, the Constitutional Court held these provisions sufficient (covering the transformation of broadcasting agreements on terrestrial broadcasting licence into administrative agreements, sanctions applicable in on-going procedures and regulations relating to printed and online media products).

Under its decision, the Constitutional Court emphasised that the Media Act stipulates a range of new regulations beneficial to media market actors, citing as examples the new method for calculating advertising airtime, new advertising methods and the regulations on market concentration.

No.2 Regulations on the press

Under its decision, the Constitutional Court has established that the obligation relating to human dignity (Article 14 (1) of the Press Freedom Act), the rights of persons interviewed (Article 15 of the same Act), human rights (sentence two of Article 16 of the same Act) and the protection of privacy (Article 18 of the same Act) constitute an unnecessary and disproportionate limitation on the freedom of press. The other obligations (namely, prohibition of hate speech, protection of constitutional order, the prohibition of coverage of persons under humiliating and defenceless conditions, protection of minors, limitations on commercial announcements) may be imposed in their current version as a constitutional obligation on the press.

The Constitutional Court paid particular attention to ensure that the legal consequences of its decision do not affect the regulations on media services, therefore the Court resolved to define the consequences of unconstitutionality in the context of the provisions of the personal scope of the Press Freedom Act and annulled the expression "and relating to published press

products" as set forth in Article 2 (1) of the Freedom of Press Act, effective 31 May 2012. In so doing, the Court – in view of the fact that it declared a number of provisions on press products constitutional – has imposed the obligation to enact legislation.

In its decision, the Constitutional Court has established that the new media regulation allows for media content to be brought under the control of an authority. Follow-up audits instituted *ex officio* – and the imposition of sanctions, if any – constitute a limitation of the freedom of press, which may not be deemed unconstitutional provided that effective and essential control by the Courts is available and the limitation passes the test of necessity and proportionality.

Examination of the Press Freedom Act and the Media Act reveals that the Authority has powers to check compliance with the provisions laid down in Articles 14 – 20 in cases of printed and online press products. The Constitutional Court therefore examined in detail whether the limitations set forth in Articles 14-20 of the Press Freedom Act may be deemed necessary and proportionate when applied to the press.

The Constitutional Court – in examining sentence one in Article 16 of the Press Freedom Act and Article 17 (1) of the same Act on the prohibition of inciting hatred – cited the provisions of its former decision, where the issue of inciting hatred was held to constitute a constitutional limitation on the freedom of press. It is based on the fact that "*it is ipso facto impossible to have media content that rejects the core values of institutional democratic rights as a means to formulate and elaborate democratic public opinion*".

Action taken in pursuance of Article 14 (1) of the Press Freedom Act and sentence two of Article 16 of the same Act (protection of human rights and human dignity) is to be deemed as special proceedings by the Media Authority which aim at the protection of the "institutional content" of human rights. Under its decision, the Constitutional Court makes a reference to its former decision also in this case (Constitutional Court decision No. 46/2007), according to which the Media Authority - in proceedings instituted for the protection of human rights – will resolve on matters other than individual rights. In comparison with the impact audiovisual media may exert, printed and online press may have a sharply different impact, therefore "*this powers to act – in this form covering human rights in general – is to be deemed as a disproportionate limitation*", that is, its application to the press is unconstitutional.

In contrast to the above, the statement of facts as laid down in Article 14 (2) of the Press Freedom Act (the prohibition of coverage of persons under humiliating or defenceless conditions) is suitably narrow – as held by the Constitutional Court – to allow Authorities to act also in relation to the press. The absence or limitation of capability to protect individual rights covers cases where the Authorities have the rightful powers to act, therefore in this context the regulation is not to be deemed to constitute disproportionate limitation on the press.

Under its decision and in line with its former practice, the Constitutional Court gave no separate examination as to the content and soundness of the provisions of the Freedom of Press Act and accepts their limiting properties. *„Protection of minors after all is based on public morals, the scope and content of which is subject to locations and times"*. Under its decision, the Constitutional Court has established that the provisions on the protection of

minors are not to be deemed as disproportionately limiting in its properties even in case of printed and online press products.

In examining Article 15 (withdrawal of statement made to the press) and Article 18 (protection of privacy) of the Press Freedom Act, the Constitutional Court held under its decision that in such cases an identifiable person is in place vis-a-vis the publisher of the press product, with his definite and enforceable civil rights. Therefore, limitations allowing action by public administrative bodies (Authorities) to intervene in case of violation and enforcement of individuals' rights should not be in place.

In examining Article 20 (restrictions on commercial announcements) of the Press Freedom Act, the Constitutional Court held under its decision that commercial announcements are intended primarily to attain financial objectives, therefore their publication – in contrast to opinions regarding public life – will entail a much lower protection of the freedom of press, resulting in a justified need for a wider scope of protection by the state. The limitation is justified by the interests of the group being targeted with commercial announcements. In its decision, the Constitutional Court referred to one of its former decisions that held such limitation to be directly affecting the advertiser's freedom of commercial announcement while only having an indirect effect on the publisher of the announcement – in this case the media content provider – rendering the difference between various media outlets irrelevant. Therefore, under its decision, the Constitutional Court held the regulations to be constitutional.

No.3 Registration of press products

In its decision, the Constitutional Court held in relation to the obligation to register press products that the provisions of Article 5 (1) of the Freedom of Press Act and Articles 41 (2) and 46 of the Media Act as constitutional.

Pursuant to the position of the Constitutional Court as laid down in its decision No. 20/1997. (III. 19.) AB: „*the mandatory reporting and registration of temporary periodicals and the public communication thereof are to be deemed as traditional and necessary means of press administration*".

The Media Act imposes the obligation on the Authority to have all press products registered. When the necessary conditions are subsequently held unfulfilled <as at the time of registration>, registration shall be reversed. In its decision, the Constitutional Court has established that the obligation of reporting imposes no burden or limitation on the publication of press products, registration brings about a clear-cut and transparent situation in the settlement of legal disputes between market actors and disputes involving the press product and private individuals.

The Constitutional Court held in its decision that: *„[a] in assessing the regulation we can come to the clear conclusion that fulfilment of the reporting obligation, the mere fact of registration – beyond its official nature – will not impose a limit and in particular will not hinder the publication of press products. In addition, it will allow clear identification of the publisher and founder of the press product and the person in charge of the particular press product, rendering it easier to settle any legal dispute between market actors and disputes*

involving the press product and private individuals. At the same time, any legal dispute concerning the title and content of the press products will be subject to the determination of the Courts, which – excepting the case when infringement is established by the Court with final force – may not be sanctioned by deletion from the registry in accordance with the Media Act. The registration of press products therefore is to be deemed a necessary and proportionate limitation of the freedom of press.

No. 4 Protection of information sources

A regulation imposing the obligation on journalists of revealing their information sources is to be deemed as a significant limitation of the freedom of press. For this reason, it is of crucial importance that such limitations are regulated in legislation and that appropriate procedural guarantees are in place for the protection of the journalists and their information sources.

In the context of protection of information sources, the relationship of trust between the person delivering information and the information source deserves protection. Pertaining provisions of the Press Freedom Act are to be deemed in line with the Constitution when they provide for the right of protecting information sources of journalists to be exercised even in their relations with the Authorities, however, the absence of relevant guarantees renders Article 6 of the Press Freedom Act and the entire legal system in violation of the Constitution by way of omission. In its decision, the Constitutional Court held that the protection of information sources was formerly absent in criminal proceedings, therefore the new regulation should be deemed as a significant development, albeit one without sufficient guarantees.

The Constitutional Court held in its decision that regulations relating to civil proceedings and the general public administration procedures are also marred by omissions, failing to provide for the protection of information sources, therefore the Constitutional Court has established *"regulatory failure concerning procedural guarantees of protecting information sources to be existing in general, in the entire legal system"* and not in connection with the Freedom of Press Act alone.

Article 6 (2) of the Press Freedom Act provides for exercising the right of information source protection as a civil right in Court or official procedures on condition of fulfilment of the obligation to prove the grounds thereof. In other words, the media provides may resort to the protection of the identity of the information source, when capable of proving that the information was released in the public interest. Therefore, the Authority does not have to substantiate the need to reveal the identity of the information source as the media provider's failure to prove that the information was released in the public interest will suffice. The burden of proof allows quite a wide opportunity for limitation and no constitutional objective substantiating the obligation to ensure protection of information sources subject to burden of proof may be defined, therefore the Constitutional Court has annulled the last sentence of Article 6 (2) of the Press Freedom Act.

In its decision, the Constitutional Court has revealed the failures in the new regulation, and in view of the practice of the European Court of Human Rights has defined the requirements under which the violation of the Constitution by legislative omission may be remedied.
These criteria include:

a) opportunity to resort to preliminary Court revision against the first decision;
b) the statutory limitation shall be in accordance with the provisions of Article 10 (2) of the European Convention on Human Rights, that is, limitation shall be properly substantiated;
c) limitation is possible only when the Authorities do not have alternative ways to obtain the particular information;
d) the limitation should be proportionate, that is, revealing the identity of information sources should take place in exceptional cases only, when so justified by threat to human life or health or particularly significant public interest;
e) in the context of protecting information sources, the opportunity to reject delivery of documents, deeds and data media shall also be provided for;
f) no burden of proof may be required for the exercise of the right of information source protection.

In the position of the Constitutional Court, protection of information sources may be deemed genuine when the journalist is in the position to reject delivery of information <on his information source> and the various procedural legislative acts clearly provide for the exceptional cases when the journalist is nevertheless obliged to cooperate with the Authorities, with the opportunity to resort to revision by the Court. Based on the above, the Constitutional Court has not established the unconstitutionality of Article 6 (3) of the Press Freedom Act either.

No. 5. Obligation of data provision

In conducting its procedures, the Authority necessarily collects and handles personal data, such data however may be limited to data necessary for the identification of the person subject to the procedure. As long as the constitutional objective of data handling is in place, the need to limit the right to self-determination relating to personal information may also be deemed as constitutional. Under the obligation of data provision, those involved are obliged to provide data as defined in Article 155 (2) of the Media Act, rather than their personal data. Data collected and handled by the Authority in conducting its procedure are necessary for the „success" of the particular procedure, therefore they are linked to the objective of such data handling, namely for the Authority to pass its resolution. In its decision, the Constitutional Court deemed motions challenging the provisions of Article 155 of the Media Act on the grounds of lack of link between personal data handling and a particular objective as unsubstantiated.

The obligation of data provision - and in conjunction therewith, the obligation of data provision relating to business secrets – are the means to apply particular rules of substance and the limitations in place regarding the free operation of the media, therefore the Authority has vested interests in obtaining the relevant data in pursuance of constitutional objectives. A significant component of statutory legislation is to ensure that business secrets learned by the Authority are protected from disclosure to other market actors, which is duly available under Article 153 of the Media Act. Based on the foregoing, the Constitutional Court – under its decision – rejected the particular motions.

In one of its former decisions (Decision No. 192/2010. (XI. 18.) AB), the Constitutional Court already put forth its position in relation to the protection of attorney's secrets that „*the*

protected documents containing communication between the party subject to the procedure and his attorney may not automatically become part of the procedure, and in case of their seizure, the client shall have an opportunity to seek remedy with suspensory effect against this mode of evidencing". Pursuant to the provisions of the Media Act, as held by the Constitutional Court under its decision, the Authority may oblige the Client to furnish the Authority with the documents containing communication between the Client and his attorney or legal representative. When the document containing also protected secrets may become part of the procedure, the Client shall have the opportunity to seek legal remedy. Should the Authority order that the confidential information be disclosed, the Client shall have the subsequent right to seek legal remedy by the Court, in other words, the party obliged to furnish data will have the right to seek legal remedy only after the attorney's secret shall have been known by the Authority.

As stipulated in the decision of the Court, the absence of relevant regulations – similarly to regulations relating to data subject to protection of information sources – will give rise to unconstitutionality arising from omission in legislation in violation of the provisions on the constitutional rights to seek legal remedy.

No. 6. Obligation of data provision beyond official procedures

Under its decision, the Constitutional Court has established that the data provision procedure laid down in Article 175 of the Media Act is not an independent official procedure, but is intended to serve as a preparation for the particular official procedure. Since data furnished under Article 175 of the Media Act may be obtained by the Authority also in the framework of its other procedures, no grounds for continuous presence of the Authority may be found. Data provision required as in the foregoing assumes a general and uncertain objective that may be attained by the Authority in the framework of other procedures conducted by it. At the same time, in procedures instituted in line with Article 175 of the Act, the Clients may not know for absolute certainty whether they became subject to an official audit or a procedure for the preparation of a supervisory procedure by way of the data provision on their part, therefore Article 175 is held unconstitutional.

No. 7. The Commissioner for Media and Communications

In its decision, the Constitutional Court – in examining constitutionality of the regulations relating to the Commissioner for Media and Communications – held the provisions of Articles 139 – 143 of the Media Act as an unnecessary limitation on the freedom of press, and without examining the requirement of proportionality it annulled the same Articles with effect of 31 May 2012.

As the Commissioner for Media and Communications has powers to assess issued falling within editorial freedom, under its "quasi official powers" will have powers to intervene in the operation of the press. In addition, legal acts concluding its procedures may have substantial impact on the operation of media providers, besides its opportunity to officially intervene under any of its powers. Based on the foregoing, the Constitutional Court held under its decision that the institution of the Commissioner is deemed as a limitation of the freedom of the press on account of its powers vested with it under the Media Act.

The Constitutional Court furthermore held under its decision that *„it is not constitutionally justifiable for the Commissioner to act against media providers and the publishers of press products in case of violation of unspecified „equitable interests" or the threat thereof – even in ways affecting editorial freedom"*. The regulation is therefore deemed an unnecessary limitation on the freedom of press without any constitutional objective.

This summary has been prepared by: The Media Council of the National Media and Infocommunications Authority