

The Klubrádió case

*The tender procedures related to the Budapest 95.3 and 92.9 MHz
frequencies*

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SUMMARY

Informed judgement on the events of the two frequency tenders related to Klubrádió requires familiarity with the provisions of both the currently effective Media Act and its previous version, prior to 1st January 2011. Besides describing the antecedents it is therefore necessary to recall, along with those of the Media Council, the decisions of its legal predecessor, the National Radio and Television Commission as well as the legal environments determining the proceedings of these bodies.

The legal foundations

One of the cardinal points of Hungarian media regulations, intended to aid the market entry of service providers, is that analogue linear rights using state-owned limited resources are granted on the basis of a strict tender procedure managed by the authority supervising the media. Besides the tender procedure, strict rules apply to the term of the right (with separate provisions on any "transitional" situations) in order to avoid that any enterprise is granted exclusivity in respect of any frequency and to ensure the dissemination opinions to the public. Also in order to prevent the formation of opinion monopolies, besides the temporal restriction of the rights, other restrictive provisions serve to ensure the prevalence of full media pluralism in Hungarian media regulations.

In this respect it should be stressed that the system of tender procedure called to life by the Media Act effective as of 1st January 2011, entirely governed by the rules of public administration procedure, provides a reliable and transparent regulatory framework containing the necessary guarantee elements. The prevalence of these principles may be noted both during the tender procedure and in the decision on the merits of the result of the procedure or the lack thereof, as well as in the regulation of the avenues of legal remedy against the regulatory decision.

It should be mentioned that public and private law elements were mixed in the tender regulations of Act I of 1996 On Radio and Television Broadcasting, as a result of which remedy against the decisions of the authority on tender procedures had only been available according to the general provisions of civil judicial process. Civil courts could not influence on the merits the decisions passed on the result of the tender procedures; this deficiency had been established in several decisions of the Constitutional Court [see, e.g., Constitutional Court Decision 46/2007 (VI. 27.).] Among else, this deficiency was remedied by the provisions of the Media Act by submitting the procedural norms to the regulatory framework of the Act on the General Rules of Administrative Proceedings and Services.

The antecedents

In August 1998, the National Radio and Television Commission (established by the Radio and Television Broadcasting Act), announced a call for tenders in respect of the utilisation of the media service provision rights related to the *Budapest 95.3 MHz* frequency. Following the arbitration procedure that annulled the broadcasting agreement concluded with the winning tenderer, the National Radio and Television Commission again announced Klubrádió Kft. as the winner, and the parties concluded a new contract (with retroactive effect to the date of the original contract).

The general rule of Hungarian media regulations, dating back to 1996, is that radio frequency rights may only be awarded via tendering for a term of maximum 7 years or a further 5 years upon renewal.

This 12-year period elapsed in February 2011 in respect of the right mentioned; therefore, the Media Council, the legal successor of the previous authority, had to decide upon the future of the right. In keeping with the relevant provisions of the law, during the interim term between the elapse of the period of the utilisation of the right and the establishment of the result of the tender with final effect, the Media Council ensures the operation of the media service provider on the basis of the conclusion of provisional public contracts.

The tender procedure for the utilisation of the media service provision right on the *Budapest 92.9 MHz* frequency had also been launched by the National Radio and Television Commission in 2009. In its decision of April 2010, the Commission also declared Klubrádió Zrt. as the winner of the procedure. However, for reasons beyond the control of the media authority, it was not possible to conclude the broadcasting agreement; therefore this task was "inherited" by the Media Council. Since the tenderer failed to comply with the legal provisions on the conflict of interest and did not clearly waive its right related to the Budapest 95.3 MHz frequency by the relevant deadline, the Media Council did not conclude the contract with the tenderer.

The result of the tender procedure for the Budapest 95.3 frequency and the application for legal remedy against the result

The Budapest 95.3 MHz regional media licence operated by Klubrádió Zrt. is a frequency with a reception area of close to 2 million people. Due to the statutory expiry of the 12-year period of its utilisation, the Media Council was required to pass a decision on its reallocation. The Media Council launched the tender procedure – together with other Budapest regional media licences – in May 2011 following a thorough survey of the situation of the capital's radio market. Observing the procedural deadlines provided for by the Media Act, the Media Council passed its decision on the merits in respect of the tender procedure on 20th December 2011. Besides establishing the fact that the procedure had been successful, the Media Council declared Autórádió Kft. as the winner, as this tenderer had received the highest score during the evaluation of the tenders. The assessment of the programme schedules awarded Klubrádió Zrt. a score identical to that of the tenderer later on declared as the winner in respect of the proportion of programmes on subjects related to facilitating local everyday life and Hungarian works of music. Furthermore, just as in the case of the score awarded in respect of media service provision experience, the Media Council also awarded the maximum score to the tender of Klubrádió Zrt. in respect of the subjective evaluation of the programme schedule; however, due to the score received in respect of the fee offered and the proportion of musical programmes, the overall score of Klubrádió Zrt. was 1 point less than the overall score of Autórádió Kft.

On the basis of the guarantee rules of the regulations that entered into force in 2011, making use of the avenue of legal remedy, the tenderer Klubrádió Zrt., which received the second highest score in the procedure, applied for a judicial review of the regulatory decision of the Media Council as administrative authority. In its judgement passed on 14th March 2012, the Budapest Court of Appeal annulled the provision of the regulatory decision on the winner of the procedure on the basis of a cause of formal invalidity. The judgement of the court was based on the strict interpretation of the formal requirements (page numbering, signature) provided for in the invitation to tender. The court stated that, although the authority itself is entitled to establish the formal requirements of the tender, these requirements are subsequently binding upon the authority, too. With respect to this, according to the position of the court, the tender submitted by the tenderer declared as the winner by the Media Council would have had to be declared formally invalid, as none of its pages bore the official signature of the company and certain pages bore no signature at all and were not numbered.

The regulatory decisions passed in the repeated procedure and their judicial review

In keeping with the judgement, during the course of the repeated procedure, the authority – taking into account the consequences of the formal invalidity of the tender of Autórádió Kft. – examined the formal validity of all tenders participating in the tender procedure in the light of the 'guidance' contained in the judgement of the court. On the basis of the strict formal requirements of the Court of Appeal, the formal invalidity of all tenders was established and separate court orders were issued on the rejection of the registration of each tender in the tender register.

Klubrádió Zrt. applied for a judicial review against the court order on its tender; during the course of this, the Budapest Court of Appeal repealed the decision of the authority in its order dated 18th July 2012 on the basis of formal reasons. According to the findings of the Court, the Media Council is required to pass a decision – rather than an order – on issues of formal and substantial compliance and the result and winner of the tender procedure.

The later decision of the Media Council establishing the success of the tender procedure and the court's 'assessment' of the decision

In compliance with the judgement, the Media Council revoked the aforementioned orders and established the frustration of the tender procedure in a decision passed on 15th August 2012, on the basis that all tenders were formally invalid. During the review of the decision – once again based on an application submitted by Klubrádió Zrt. – in its judgement dated 26th September the Budapest Court of Appeal revoked the provisions of the decision establishing the frustration of the tender procedure and the formal invalidity of the tender submitted by Klubrádió Zrt.

According to the statement of reasons of the judgement, the decision originally establishing the success of the tender was not irreversible simply because it had entered into force. In the absence of an *ex officio* review of the decision, however, there is no possibility of overriding the decision on the success of the tender procedure with a new decision establishing its frustration. It was on the basis of the assessment of this provision of the decision – rather than the examination of the tender submitted by Klubrádió Zrt. on the merits – that the court concluded that the authority's establishment of the formal invalidity of the offer made by the tenderer referred to had been illegitimate.

The standard practice of the Budapest Court of Appeal in other procedures

The consistent practice of the Media Council, based on the position of the Court of Appeal requiring the strict formal examination of the tenders, was followed by diverging court judgements. Judicial practice is still not homogeneous in respect of the numbering and signing of empty pages, although the decision of the authority establishing formal invalidity has been confirmed in all other cases. Moreover, a thorough examination of judicial practice shows that, in the proceedings, decisions were more often based on the strict interpretation of the law, i.e. that all pages – including empty pages – of the tenders have to be officially signed and numbered. At the same time, the lack of homogeneity in the positions of the courts may lead to uncertainties in official practice (and not only in respect of the practice of the media authority), and passing inconsistent decisions may result in the erosion of confidence in legal certainty and the prevalence of the requirement of predictability and reliability.

During the assessment of court decisions it should be taken into account that the Media Council could not have disregarded the regulatory practice of its legal predecessor, the National Radio and Television Commission, based on fifteen years of operation, which had, over the course of time, created an environment that was predictable for the market actors, too. Thus, the impact of inconsistent judicial practice is even more severe, since, due to the contradictory contents of the decisions mentioned, the authority whose task is to set up a predictable framework for the application of the law is unable to put in place such a framework that is indispensable for the operation of both the market and the authority.

The interpretation of the judgements of the Budapest Court of Appeal

The judgements lead to a controversial situation in respect of the issue of numbering and signing empty pages. In certain out-of-court proceedings related to tender procedures, the court of appeal did not find the absence of signed and numbered empty pages to constitute a cause of invalidity, while in other cases the court made it clear that all pages of the tender must be numbered and officially signed, including the empty ones.

Initiation of public prosecutor's notice, the reply of the Prosecutor's Office, the latest decision of the Media Council

In the interest of redressing the controversial situation that had ensued as a result of the judicial review of the above-mentioned decisions of the Media Council, in November 2012 the Media Council submitted a motion to the Chief Prosecutor's Office for prosecutorial action. In this motion, the authority proposed that the Prosecutor's Office launch an investigation *ex officio* and at its own discretion on the basis of the provisions of the Act on the Prosecution Service under its power of the judicial oversight of regulatory procedures against the provision of Point 1 of the operative part of Decision No. 1983/2011. (XII. 20.) of the Media Council not repealed by the court on the success of the tender procedure, and to issue a prosecutor's notice.

Referring to a previous judgement of the Budapest Court of Appeal, in its letter dated 17th December 2012, the Budapest Prosecutor General's Office established that, on the basis of Paragraphs (1)-(3) of Article 114 of the Act on the General Rules of Administrative Proceedings and Services, it was possible for the Media Council to reverse, at its own discretion, Point 1 of Decision no. 1983/2011. (XII. 20.), i.e. the point establishing the success of the tender procedure, via *ex officio* review, having regard to the fact that, in the given case, it was primarily the responsibility of the Media Council to repair the illegal situation that had ensued. The cause of the said illegal situation was that the Media Council had accepted tenders that had not met the necessary formal criteria (as interpreted according to the court decision of March 2012) as valid. Furthermore, on the basis of the general rules of administrative proceedings, the Media Council had the legal option of reversing the decision, and so, since the authority was in a position to repair the violation within its own cognizance, the Prosecutor General's Office held that the grounds for the submission of the public prosecutor's notice were insufficient.

With regard to the establishment of the formal invalidity of the tender of Klubrádió Zrt. and, consequently, the absence of valid tenders, the Media Council was not in a position to declare the tender procedure as successful. Since, according to the Budapest Prosecutor General's Office, the conditions for the reversal of Point 1 of Decision no. 1983/2011. (XII. 20.) were given, and the Media Council had declared all tenders to be formally invalid, the Media Council therefore reversed its decision establishing the success of the tender procedure, i.e. Point 1 of Decision no. 1983/2011. (XII. 20.), in the interest of the reparation of the illegal situation. [Media Council Decision no. 2295/2012. (XII. 19.)].

The closure of the tender procedure on the basis of the judgement of the Budapest Labour and Public Administration Tribunal

Once again, Klubrádió Zrt. applied for judicial review against the reversal, i.e. the above-mentioned Media Council Decision no. 2295/2012. (XII. 19.). In its judgement, the court still refrained from taking a position on the issue of the formal validity – or invalidity – of Klubrádió Zrt.'s tender. All that the decision established was that the Media Council had failed to pass a decision on the merits about the result of the tender procedure according to the 14th March 2012 judgement of the Budapest Court of Appeal, and this, in itself, constituted a substantial procedural violation with bearings on the

merits of the case, the gravity of which provided sufficient grounds for repealing the decision. Besides this, the court also established that – as opposed to the contents of the letter of the Budapest Prosecutor General’s Office described above – the authority had no legal means to revoke the decision establishing the success of the tender procedure.

Since, according to the position of the court, the above legal violations, in themselves, result in the annulment of the revoking decision, the court, similarly to the previous court judgements, did not dwell upon the legal assessment of the findings of the decision on the formal invalidity of the tender. As such, irrespective of the validity or invalidity of Klubrádió Zrt.’s tender, the Media Council could not proceed otherwise than to declare Klubrádió Zrt. as the winner of the tender procedure, the “last man standing” in the wake of the instructions incorporated in the decisions of the court. Accordingly, this is what the Media Council did by passing Decision no. 406/2013. (III.13.). The parties signed the public contract on 2nd May 2013 within the deadline of 45 days prescribed by law.

The decision and court judgements related to the Budapest 92.9 MHz licence

The tender procedure for the utilisation of the media licence had been announced by the legal predecessor of the Media Council, the National Radio and Television Commission for the provision of public service type broadcasting. As a result of the public service programme broadcaster status, the tenderers were required to undertake, among other items, to broadcast programmes serving public service objectives in over 50% of the total transmission time, in exchange for which their broadcasting fee payment liability would be waived.

As a result of the tender procedure, in April 2010 the National Radio and Television Commission announced Klubrádió Zrt. as the winner. According to the statements of the tenderer, however, the tenderer was not ready to remedy the resulting conflict of interest, i.e. that the tenderer would have held two licences in the same reception area. Accordingly, the broadcasting agreement was not concluded. The legal successor of the National Radio and Television Commission, the Media Council (which had become incapable of forming a quorum in the meantime), passed a decision on the case in December 2010 and declared the tender procedure to be unsuccessful due to the absence of a contract offer conformant to the relevant legal criteria, since, due to the persistence of the aforementioned conflict of interest, the broadcasting agreement had not been concluded within the 45-day deadline provided for in the invitation to tender.

At the time of the launch of the procedure, according to the provisions of the then-effective Radio and Television Broadcasting Act on tender procedures, legal remedy against the decisions of the Media Council was only available from civil courts. The winning tenderer applied to the court to establish the broadcasting agreement and the content thereof.

The first instance judgement of 28th February 2012 established the agreement on the basis of the principles of the contracting and cooperation obligation of the parties, despite the fact that the judgement also established that the broadcasting agreement would be contrary to the restriction that a service provider may only hold a single licence per reception area. The decision of the court, however, failed to take into account the changes that had occurred in the meantime due to legal amendments. Thus, for example, the court did not take into account the fact that the status of public service programme broadcaster had been "replaced" in the Media Act by that of community media service and that, according to the effective regulations, media service provision activities may only be pursued on the basis of public administration type public contracts rather than the former broadcasting agreements based on civil law.

In its judgement of 12th July, on the basis of the shortcomings of the first instance judgement, the court of second instance instructed the Metropolitan Court of Budapest to rehear the case and pass a new decision.

In the repeated first instance court procedure in respect of the Budapest 92.9 MHz regional broadcasting right, the Metropolitan Court of Budapest passed judgment on 14th November 2012. Conforming with the petition of Klubrádió Zrt, the Metropolitan Court of Budapest established the broadcasting agreement between the winner of the tender procedure (Klubrádió Zrt.) and the Media Council. In the judgment the Metropolitan Court of Budapest stressed that, on the basis of the effective Media Act, broadcasting rights may only be exercised on the basis of a public contract, the establishment of which is beyond the power of civil courts; however, the case subject to litigation was still governed by the provisions of the Radio and Television Broadcasting Act. In this respect, the Court referred to the fact that the obligation of the Media Council to contract with the winning tenderer had been subject to the Radio and Television Broadcasting Act and the contract should have been concluded prior to the entry into force of the Media Act.

In the second instance court procedure, initiated as a result of the appeal against the first instance judgement submitted by the Media Council, the Budapest Court of Appeal passed judgement on 25th April 2013 in which it upheld the decision of the first instance court. The Court of Appeal declared that the first instance court had established the facts of the case correctly and had established the broadcasting agreement between the parties according to the operative part of the judgement on the basis of solid legal reasoning and sound justification.

I. Preliminaries

The invitation to tender for the utilisation of the 95.3 MHz regional media service facility by commercial radio stations was published in August 1998 for the first time. A total of 10 tenders were submitted, including Klubrádió Kft's tender. The reception area of the 95.3 MHz media service facility in Budapest covers nearly the entire area of the capital. The number of supplied residents exceeds 1,800,000. As such, this is one of the frequencies with the most advantageous reception characteristics.

Klubládió Kft. was awarded the contract by virtue of Decision No. 516/1998 (XII. 14.) of the National Radio and Television Commission (hereinafter referred to as NRTC), the legal predecessor of the Media Council. A broadcasting agreement was concluded by and between the NRTC and Klubládió Kft. on 2nd February 1999. However, another participant in the tender procedure, tenderer Start-Média Kft, challenged the NRTC decision, and the broadcasting agreement concluded by and between the NRTC and Klubládió Kft. was cancelled by the permanent court of arbitration attached to the Hungarian Chamber of Commerce and Industry on 6th October 2000. With regard to the decision of the court of arbitration, the tender offers were re-evaluated by the NRTC, and Klubládió Kft. was awarded the contract in the new procedure by virtue of decision No. 982/2000 (XI. 30.). On 12th December 2000, a new agreement was concluded by and between the NRTC and Klubládió Kft. The parties agreed in a separate agreement that the new agreement should have retroactive effect for their legal relationship starting from the date of signing the previous agreement (2 February, 1999).

The first owner of Klubládió Kft. – at the time of submitting the tender – was Magyar Autóklub (Hungarian Auto Club) exclusively. In its tender, Klubládió Kft. agreed to operate the radio station primarily to provide information on public road traffic (a not quite irrelevant fact, considering that the station was owned by Hungarian Auto Club). Klubládió Kft. was awarded the contract by the NRTC with the themes and programme flow plan (also known as *programme schedule*) presented in this tender offer.

In October 2001, the ownership structure of Klubládió Kft. changed, and Monográf Zrt. – currently holding 100% of all shares – acquired majority ownership in the media service provider. The programme structure of the radio was fundamentally changed at the same time. By way of deviation from its original tender and with the approval of the NRTC, the former tenderer started to implement the talk & news format – by primarily providing information of general interest. In this way, the currently dominant catalogue of programmes of the radio station was developed.

In summary, therefore, we may conclude that the previous tender procedure for the utilisation of the Budapest 95.3 frequency in 1998 was basically directed at commercial objectives in the interest of the utilisation of the media licence, primarily on the basis of business considerations. With regard to the tendering of commercial media services (within the practice of the National Radio and Television Commission, too), the larger "proportion of musical programmes" is (and has always been) given greater emphasis in the invitations to tender in comparison to the tender procedures announced for the utilisation of frequencies for community media service purposes. The current owners of Klubládió Zrt. did not win the

media service provision directly via this earlier tender procedure; instead, they acquired the right via purchase in October 2001 (by buying up the enterprise that had been the winner of the earlier tender procedure), and established a different programme flow structure to that of the content requirements of the earlier invitation to tender, compliance with which had been undertaken in the tender submitted. Accordingly, the parties amended the previously concluded broadcasting agreement in this respect, resulting in a change of the image of the media service and the proportion of the various types of programmes, too.

II. Fundamental provisions on the periods of media licences

While the right to use analogue linear media facilities using state-owned limited resources is fully granted to the winning tenderer by the state – with the reservation that this right may not be transferred – a time limitation is imposed on such utilisation by Act CLXXXV of 2010 on media services and mass media (hereinafter referred to as the Media Act), or previously by Act I of 1996 on radio and television broadcasting (hereinafter referred to as the Radio and Television Broadcasting Act). For radio stations, the media licence remains valid for up to seven years. This period may be extended once for a period of five years without tendering.

The possible extension of the licence for an additional period of five years is subject to strict conditions. The Media Council may not extend the licence if the media service provider, during the period of the licence, repeatedly or seriously breaches the provisions laid down in the agreement or in the Media Act, or has any unpaid media service fees at the time of submitting the request for extension. Furthermore, the licence may not be renewed if the media service provider has previously been subject to the sanction specified in Article 112 Paragraph (1) Point (b) of the Radio and Television Broadcasting Act due to any violation of its agreement. For the purposes of this provision, the legislator also takes into consideration any serious violations committed or established before the effective date, of January 1 2011, of the Media Act. (The sanction imposed under Article 112 Paragraph (1) Point (b) of the Radio and Television Broadcasting Act was one of the most severe sanctions provided for under the Radio and Television Broadcasting Act. If this sanction were imposed for the second time, the agreement was to be terminated by law with immediate effect.)

The renewal procedure may be launched upon request by the media service provider. Any failure to meet the deadline (i.e. 14 months prior to expiry) for submitting the corresponding request cancels the right to submit the request later on. In such cases, the licence may not be renewed and no petition for excuse may be filed. According to the Media Act – and to the previously effective Radio and Television Broadcasting Act – renewal may be effected only once. Since this rule is set forth in the Media Act as a general provision, it is clearly applicable to licences established earlier under the Radio and Television Broadcasting Act. As such, the agreements entered into under the Radio and Television Broadcasting Act may not be renewed more than once with reference to the entry into force of the Media Act. There are various reasons for the time limitation of media services provided by using limited resources, including especially the right to free enterprise, the support of new undertakings to enter the market, and the need to prevent companies from monopolising the right to utilise limited resources.

In summary, in Hungary, the usage of exclusively state-owned radio frequencies is managed, through a tender procedure governed by law, by an independent, autonomous state agency, i.e. the Media Council, pursuant to the authorisation granted to it by law. The media service provider achieving the highest score in the tender, according to the evaluation criteria specified by law and published in the invitation to tender in advance, may enter into a seven-year media service agreement for the use of the desired frequency. This agreement may be extended once for an additional period of five years without tendering. Upon the expiry of the media licence, *jus disponendi* over the frequency is returned to the Media Council, which decides about further utilisation.

The 7 + 5 years licence awarded to Klubrádió Zrt. expired on 12th February 2011. Hence, for the reasons presented above, Klubrádió Zrt. could not raise any exclusive claim concerning the right to utilise the above radio frequency.

On the basis of the above statutory provisions, the NRTC and the Media Council renewed the media licence of numerous media service providers meeting the statutory provisions – including Klubrádió Zrt. in 2005 – for an additional period of 5 years.

In respect of the term of the media licence, it is important to note that, if the linear radio media service provision right expires after having been renewed on one occasion by the Media Council, and the tender procedure for the given media service facility has already been started, the Media Council shall have the right to conclude a provisional public contract with the media service provider formerly holding the right, even on several occasions, at the request of such media service provider, for a term of sixty days at most. The provisional public contract can only be concluded until the completion of the tender procedure or until the judicial review procedure is terminated in a final and binding manner, if a judicial review procedure was started against the decision adopted on the merits of the tender procedure or against the order terminating the tender procedure. That is, with regard to ongoing tender procedures, the Media Act allows, in exceptional cases and within narrow limits, the Media Council to proceed at its discretion and to permit, without conducting a tender procedure, the provision of media services in a provisional public contract for the media service provider that had previously held the media licence in respect of the given frequency. As of the expiration of Klubrádió Zrt's media licence on 12th February 2011, it is with respect to the ongoing tender procedure for the Budapest 95.3 MHz frequency that Klubrádió Zrt. provides media services on the basis of a provisional media service agreement concluded with the Media Council without having been awarded the media service provision rights in a tender procedure.

III. Overview of the radio market in Budapest, and the justification for the substance-related criteria of the invitations to tender

In Budapest, currently 15 radio media service providers are in possession of valid public contracts, of which 3 are commercial and 9 are community media service providers, of which three are commercial and nine community. One community and one commercial radio conduct their activities on the basis of 60-day provisional public contracts, while the qualification of one media service provider as community media service provider has been suspended due to an ongoing court procedure with the Media Council.

Klubrádió is not the only informational, public affairs focused radio registered and operating in Budapest. Inforádió, which is also a radio station with a regional reception area primarily broadcasting news, also operates in Budapest as do Gazdasági Rádió, which mainly broadcasts economic and news programmes, and Lánchíd Rádió, another radio station that broadcasts a significant amount of programmes dealing with public affairs. Similarly to Klubrádió Zrt., the media service provider of the latter also holds several frequencies outside of Budapest, too.

The experiences from previous years show that the inconsistent establishment of the fees and tendering terms and conditions led to disproportionate and unjust situations in the commercial market of Budapest, which resulted in unbearable conditions for various radio stations. For all these reasons, the Media Council – based on the rules laid down in the Media Act concerning the development of a transparent, proportionate, and consistent media system – decided to utilise five commercial frequencies in Budapest, under identical tendering terms and conditions – against media service provision basic fees that are proportionate to the size of the reception area (number of supplied residents), and the purchasing power of the residents of the respective area. By making use of the possibilities that arose from the expiry of the media service facilities provided for by law, the Media Council aimed to create a consolidated and balanced situation in the largest and most valuable radio market in Hungary. Of course, the Media Council – in compliance with the requirements concerning the efficient management of state assets – also aimed to utilise the available media service facilities under optimal terms and conditions.

In its decision, the Media Council also took into consideration that the primary goal of commercial radio stations is to realise profits. For profitable operation, it is a prerequisite to achieve a high audience share, which may primarily be realised by unrestricted programme editing and primarily by broadcasting musical/entertainment content that fits the profile of commercial radio stations. Having regard to the above requirements and realisation, the Media Council, in order to promote stable market operation and to ensure equal opportunity, decided to utilise the five available commercial media service facilities in Budapest – the utilisation of which was no longer assured due to the expiry of previous contracts or to unsuccessful previous tenders – by licensing under the terms and conditions most suitable for the purposes of commercial radio services. For the above reasons, the Media Council decided to favour tenderers offering programme flow plans with a high proportion of musical – especially Hungarian musical – content and undertaking to broadcast, in a significant proportion, programmes on subjects related to local public affairs or facilitating local everyday life.

A recurring component of invitations to tender for local and district radio frequencies is the evaluation of programmes on subjects related to local public affairs or facilitating local everyday life. Unlike when tendering for Budapest media service facilities (where the maximum points that can be granted is 25%), the maximum number of points may be collected in invitations to tender concerning frequencies outside the capital is from a 30% proportion for programmes about local public affairs. Irrespective of their status or profile, media service providers are to contribute to the information of residents living in their reception area, up to the extent seen fit by the tenderer. The invitations to tender stipulate that the tenderers may make any undertaking freely. It is also clear that the invitations encourage the tenderers to undertake higher amounts, while the freedom of choice of the tenderer remains intact.

All invitations to tender published by the Media Council allow any and all tenderers submitting a valid tender to participate, and even win the tender if they submit the most advantageous offer. On the other hand, it would clearly violate the principles of equal opportunity and equal treatment, as well as the prohibition of discrimination, if any explicit or implied provision of an invitation to tender imposed an evaluation framework serving the interest of one tenderer – even Klubrádió – and eliminating or limiting market competition. This is exactly what Klubrádió attempted to do during the public hearing on the draft invitation to tender and in its submission regarding the draft invitation, by recommending that the current service provider should be favoured by the Media Council in the course of the evaluation.

IV. Summary of the tender for the Budapest 92.9 MHz frequency

1. The invitation to tender and the tenders submitted

The tender for the Budapest 92.9 MHz frequency was launched by NRTC – the legal predecessor of the Media Council – in 2009. According to the tender invitation, the tender offers were to be submitted for public programmes only, and not for commercial services. Although Klubrádió Zrt. already had another – commercial – media licence in a district of Budapest (operated on the above-mentioned 95.3 MHz frequency in Budapest), it still submitted a tender during this procedure. According to the invitation to tender, Klubrádió Zrt. agreed – in the event that it was awarded the contract for the Budapest 92.9 MHz frequency by the NRTC – to terminate its statutory conflicting interests arising from the fact of winning, and to relinquish its already subsisting media licence and its right to utilise the Budapest 95.3 MHz frequency.

Ever since the Radio and Television Broadcasting Act entered into force in 1996, the utilisation and management of terrestrial radio frequencies – which are limited resources – is based on the provision that the same media service provider, and any owner thereof holding more than a 25% share in the service provider, may only hold a single media licence in the same reception area at the same time. The purpose of this provision is to prevent the emergence of local or regional opinion monopolies in media services.

In April 2010, the NRTC announced Klubrádió as the winner of the tender procedure held for the Budapest 92.9 MHz frequency. According to the invitation to tender, the agreement was to be concluded within 45 working days of the decision. For this reason, the NRTC invited Klubrádió Zrt. to eliminate the arising statutory conflict of interests, in line with the undertakings presented in the tender, in order to enable the conclusion of the agreement within the prescribed deadline. Until the deadline set in the invitation to tender for concluding the agreement, Klubrádió Zrt. – contrary to its statement made in its tender – continuously made various counteroffers to the media authority. These counteroffers aimed to achieve that Klubrádió Zrt. would not have to waive either of its frequencies in Budapest for a period of 180 days after entering into the agreement. In other words, Klubrádió Zrt. attempted to hold two licences within the reception area of Budapest at the same time.

2. The decision of the Media Council, avenues of legal remedy

As the quorum of the NRTC ceased to exist in the meantime – because the number of its members fell below the statutory minimum – it was up to the Media Council, established in October 2010 as the legal successor of the NRTC, to adopt a decision in the matter. As the conclusion of a contract with Klubrádió according to Klubrádió's terms would have been contrary to the Radio and Television Broadcasting Act as of that time, the Media Council decided in December, 2010 to declare the tender procedure unsuccessful due to the lack of any contract offer satisfying the statutory requirements. According to the invitation to tender, the media authority was obliged either to declare the tender unsuccessful or to award the contract to the second tenderer if the contract was not signed within the deadline of 45 working days. The Media Council decided to declare the procedure to be unsuccessful and to publish another tender for the respective frequency.

On the basis of the provisions of the Radio and Television Broadcasting Act governing tender procedures, during its decision-making process the Media Council did not proceed according to the rules of public administration and public law, but in its capacity as the owner of the limited frequencies constituting the basis of media service facilities, i.e. it passed its decisions on a civil law basis within the framework of its right of disposal as owner. Accordingly, the decision on the frustration of the tender procedure does not qualify as a public administrative, regulatory decision in respect of its content, type or form; therefore public administrative remedy against it is precluded as well. Legal remedy against decisions on tender procedures passed under the scope of the Radio and Television Broadcasting Act is, therefore, only available according to the general rules of civil judicial process before a civil court. In this respect, it is especially important to note that the decision of the civil court could not have resulted in striking down the decision passed on the basis of the Radio and Television Broadcasting Act; the court had no specific, on the merits power over the decision on the result of the tender process; this shortcoming has been noted by the Constitutional Court several times. That is, if a concerned party were to contest the decision in the tender procedure and the court found the application for judicial review well-founded, all the court could do was to establish that the tender procedure had been in breach, but could not strike down the decision nor prevent the conclusion of the contract with the illegitimate winner of the tender procedure and the commencement of the broadcasting service by that tenderer.

On the basis of the relevant provisions of the Media Act, however, a judicial review of the Media Council's decision on the success or frustration of a tender procedure and, in the event of a successful procedure, the establishment of the winner of the procedure, may be sought from the Budapest Court of Appeal. This legal remedy is a public administrative legal remedy which provides the court with a much broader purview of judicial review than previously, i.e. if the application for legal remedy is well-founded then the court may strike down the decision of the Media Council on the tender procedure. The court is thereby able to prevent the conclusion of the public contract with the winner of a tender procedure found to be in breach by the court and, consequently, to prevent the commencement of the media service. It is important to note that, within the framework of public administrative legal remedy, the court may review all elements of procedure, including the statement of the facts and all other legal issues related to the decision of the Media Council. Accordingly, this system provides a comprehensive set of guarantees ensuring the legality and regularity of the tender-related and other decisions of the Media Council.

3. The petition of Klubrádió for legal remedy

Klubrádió Zrt. submitted a petition for legal remedy against the above-mentioned December 2010 decision of the Media Council to the Public Administration Chamber of the Budapest Court of Appeal. The court rejected the petition by order no. 2.K.27.086/2011/4 without issuing any summons. The order of the Budapest Court of Appeal stressed that, during the tender procedure, the Media Council had applied the provisions of the Radio and Television Broadcasting Act and the decisions contested by Klubrádió Zrt. did not qualify as public administrative decisions according to the Act on the General Rules of Administrative Proceedings and Services, not only in respect of their form, but in respect of their substance, too; therefore, they could not be contested within the framework of a public administration lawsuit. Following this, Klubrádió Zrt. submitted a statement of claim against the decision passed by the Media Council during the course of the tender procedure to a civil court. *Inter*

alia, the statement of claim requested the establishment of the broadcasting agreement and the content thereof by the court.

Judgement No. 7.G.41.993/2011/14 of 28th February 2012 of the Metropolitan Court of Budapest rejected two and accepted one of the claims of Klubrádió Zrt. Although the Court stated in the verdict that the broadcasting agreement would be contrary to the restrictive provision mentioned above, it nevertheless established the broadcasting contract between the Media Council and Klubrádió Zrt. on the basis of the contracting and cooperation obligation of the Media Council.

The Media Council filed an appeal against the first instance verdict, requesting that the verdict be modified and the claim of Klubrádió Zrt. be rejected in its entirety. In the statement of reasons in the appeal, the Media Council stressed that the winner of the tender procedure refused to conclude the contract with the National Radio and Television Commission according to the conditions of the tender procedure known to and accepted by them, i.e. that Klubrádió Zrt. refused to relinquish their other broadcasting licence simultaneously with the conclusion of the contract within 45 days. In the light of this, the legal successor of the National Radio and Television Commission had two options: to reject Klubrádió Zrt's tender and to establish the frustration of the tender procedure, or to conclude a contract with the runner-up in the tender procedure. In its appeal, the Media Council stated that the verdict of the court of first instance failed to examine, assess and settle the legal status of Klubrádió Zrt., declared to be a public service programme broadcaster, following the entry into force of the Media Act (for, after 1st January 2011, on the basis of the conceptual and regulatory system of the Media Act, the status of public service programme broadcaster ceased to exist, whereby the public service broadcasting provided for in the contract to be established became legally impossible), and, furthermore, that the verdict failed to take into account the governing provisions resulting from the entry into force of the Media Act (as of the entry into force of the Media Act, no civil law broadcasting agreements may be concluded; therefore, according to the position of the Media Council, a court of law may not establish the media (broadcasting) licence and contract either, since, as of the entry into force of the Media Act, media service provision rights may only be exercised on the basis of a public media service contract). The Media Council also referred to the fact that, at the time of the adjudication of the trial, Klubrádió Zrt. was also subject to a restrictive provision as it possessed media service provision rights in respect of the Budapest 95.3 MHz frequency and had since been exercising this right on the basis of a provisional public contract. Given the fact that a single broadcaster may not legitimately use two frequencies simultaneously in the same reception area, according to the position of the Media Council, the verdict would result in an unlawful situation.

Decision no. 14.Gf.40.197/2010/8 of the Budapest Court of Appeal overturned the provision of the appealed-against verdict of the first instance court accepting the claim for the establishment of the contract, and ordered the first instance court to rehear the case and to pass a new decision.

In the statement of reasons in the decision, the Court of Appeal stated that the failure to conclude the contract had been attributable to the Media Council's non-compliance with the obligation to contract and the violation of the cooperation obligation. On the merits of the case, in respect of the contractual substance, the Court of Appeal established that the appeal of the Media Council was well-founded, for, with regard to its final conclusion, the

establishment of the contract by a court of law, the first instance court had, indeed, failed to comply with its duty to specify the reasons for its decision, had entirely failed to take into account the provisions of the Media Act (including the transitional provisions) as effective, and had failed to provide the grounds for such an omission. Accordingly, the verdict was deemed unfit for review on its merits.

According to the decision of the Court of Appeal, in the repeated procedure the court of first instance is required to examine the transitional provisions of the Media Act referred to by the Media Council. The decision of the Court of Appeal stated that, in the event of the establishment of the contract, the court of first instance is required to take into account that – with respect to its provisional broadcasting – Klubrádió Zrt. is currently subject to a restrictive measure too, which circumstance should necessitate the rejection of the claim in itself.

4. The decision passed in the repeated procedure

The court of first instance ordered to rehear the case held the first trial on 10th October 2012, but no on the merits procedural action was taken, as the Budapest Metropolitan Court postponed the trial to 14th November.

In the repeated first instance court procedure in respect of the Budapest 92.9 MHz regional broadcasting right, in its judgement no. 7.G.41.271/2012/9 of 14th November 2012, the Metropolitan Court of Budapest established the broadcasting agreement between the winner of the tender procedure (Klubrádió Zrt.) and the Media Council in conformity with the petition of Klubrádió Zrt. According to the Court *“in the interest of upholding the rights of the plaintiff against the defendant the establishment of the civil law contract had been justified. In the absence of this, the right of the plaintiff to the conclusion of the contract between the defendant and the plaintiff as the winning tenderer, as provided by the Radio and Television Broadcasting Act, would expire.”* In the delivery of the judgment the Metropolitan Court of Budapest stressed that on the basis of the effective Media Act, broadcasting rights may only be exercised on the basis of a public contract, the establishment of which is beyond the power of civil courts; however, on the basis of the transitional provisions of Paragraph (3) of Article 216 of the Media Act the case subject to litigation was still governed by the provisions of the Radio and Television Broadcasting Act and the underlying provisions of the Civil Code at the time of its adjudgement. In this respect the Court referred to the fact that the obligation of the Media Council to contract with the winning tenderer had been subject to the Radio and Television Broadcasting Act and the contract should have been concluded prior to the entry into force of the Media Act.

On the basis of this, according to the position of the civil court, the broadcasting agreement could be established between the parties, and since the case was not ongoing, but had been closed in 2010, therefore the civil court was in possession of the power to establish the broadcasting agreement.

At the same time, the judgement of the Metropolitan Court of Budapest emphasized that, in itself, the established broadcasting agreement had no public law legal effect, that is, as of the entry into force of the Media Act the broadcasting agreement did not entitle Klubrádió Zrt. to exercise media service provision rights. The conversion of the broadcasting agreement into a public contract falls under the scope of public law; the relevant procedures are to be conducted on the basis of the Media Act and public administration procedural law. The contract established by the judgement entailed the obligation of the authority to initiate the procedure of the conversion of the civil law contract into a public contract. Since the legal provisions effective prior to 31st December 2010 constitute the legal grounds for the contract established by the Court, the contract therefore also qualifies as having been concluded under the scope of the Radio and Television Broadcasting Act. Although, due to the change of the transitional provisions of the Media Act, the text of the Act effective at the time of the judgement did not contain the deadline – 31st December 2011 – for the conversion of the broadcasting agreements into public contracts, according to the position of the Court the contracts concluded under the scope of the Radio and Television Broadcasting Act were governed by the transitional provisions effective at the time of the entry into force of the Media Act. With respect to this, according to the reasoning of the judgement, the changes in the Media Act that had occurred during the meantime were irrelevant in the given case and so its text effective at the time of the judgement was passed had no impact on the execution of its content.

In its judgement of 25th April 2013 the Budapest Court of Appeal upheld the decision of the first instance court and fully agreed with the reasoning of that decision, too. The Court of Appeal pointed out that the first instance decision had offered a detailed statement of reasoning for why it held the establishment of a (broadcasting) agreement between the parties according to the Radio and Television Broadcasting Act to be possible; this was achieved via the application of the substantive law provisions of Paragraph (3) of Article 216 of the Media Act. Since, under the scope of the Radio and Television Broadcasting Act, the broadcasting agreement qualified as a civil law contract, its establishment falls under the competence of a civil court; the plea of lack of competence would therefore only be justified if the court had established a public contract between the parties which belongs to the domain of public administration law.

The Budapest Court of Appeal also agreed with the final conclusion of the first instance judgement, according to which the establishment of the civil law contract in the interest of the protection of the tenderers rights *vis-à-vis* the authority was justified. According to the judgement of the Court of Appeal, the acceptance of the position of the Media Council would entail that the tenderer is unable to seek legal protection and legal remedy against the unlawful conduct of the authority, as due to the legislative change the authority is no longer competent to establish the contract.

V. Overview of the tendering-related provisions of the Media Act

Under the Media Act, the Media Council is required to publish tenders for the state-owned limited analogue linear (audiovisual and radio) media service facilities exclusively. The obvious reason for this provision is that these media service facilities are limited, and the demand for their utilisation significantly exceeds the possibilities.

The Media Act – which entered into force in 2011 – lays down the provisions that are essential and necessary to ensure that the tendering procedures are completed in a lawful, transparent, and traceable manner.

Nevertheless, as opposed to the decision of the Media Council establishing the frustration of the tender procedure for the media service provision right for the Budapest 92.5 MHz frequency, it should be noted, as an important change, that an on the merits judicial review of the decisions on the result or frustration of tender procedures may be initiated within the framework of regulatory procedure. As a result of this, in future no situation similar to the frequency tender procedure discussed here may ensue in respect of the legal remedy against decisions on the merits in tender procedures.

(The Constitutional Court raised several objections against the system of the regulation of tender procedures established by the Radio and Television Broadcasting Act, especially because, with regard to external legal subjects, the National Radio and Television Commission did not proceed according to clear procedural rules; the public administrative type application of the law did not conform to the rules of public administration and public law. In several instances the Constitutional Court objected to the fact that the legal regulations for the tendering of broadcasting rights did not establish a transparent tendering system, for example, they did not adequately specify the evaluation criteria applicable during the tender procedures for the acquisition of broadcasting rights. Furthermore, the Radio and Television Broadcasting Act did not provide for the obligation to state the reasons for the decisions of the National Radio and Television Commission in tender procedures; therefore, in essence, the Act conferred discretionary powers on the National Radio and Television Commission.)

In respect of guarantees, the Media Act placed the entire tender procedure under the objective scope of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter as Act on Administrative Proceedings). As a general set of procedural rules, this Act ensures the objectivity, transparency and guarantees of the specific individual procedures. This solution is significant also in that regulatory procedural law settles the entire relationship system between the authority and the external legal subject (the client) as the underlying rule of the tender procedures in question in respect of the entire course of the procedure from start to closure, the institutions providing the clients with guarantees and the subjective rights of the clients ensuring official protection against the public authority, and guarantees that decisions related to tender procedures are passed in a predictable and controlled manner.

Such guarantee elements include, in particular, the detailed rules for seeking legal remedy against the decisions of the Media Council (against the decision refusing registration in the tender register, and against the regulatory decision declaring the tender procedure to be successful or unsuccessful), the specific definition of statutory procedural deadlines (the

Radio and Television Broadcasting Act laid down rules concerning the deadline for the examination of formal validity), and the exhaustive list of reasons for the formal invalidity of tender offers.

The tendering process

1. Draft invitation to tender, public hearing, invitation to tender

After the approval of the frequency plan prepared by the Office on the basis of the request of the Media Council, the Media Council decides on the adoption of the draft invitation to tender. After adopting the final text of the invitation to tender, the Media Council publishes the draft invitation to tender, holds a public hearing, collects the written comments submitted after the hearing, and decides on the adoption of the final text of the invitation to tender, preferably with due regard to the observations and recommendations submitted.

2. Formal examination

After the submission of the tenders, the next procedural step is the examination of the tenders' formal validity. The Media Act provides an exhaustive list of grounds for formal invalidity. With regard to formally invalid offers, the Media Council, by virtue of an order, refuses the registration of the tender in the tender register. According to the Media Act, separate legal remedy may be sought in court against this order. It is important to note that, on the basis of Paragraph (3) of Article 58 of the Media Act, it is the right and obligation of the Media Council to verify the formal validity of the tenders throughout the entire course of the tender procedure. If the Media Council discovers causes of formal invalidity only after registration in the tender register, in the course of the tender's evaluation on the merits, it shall not establish the formal invalidity of the tender in a separate order; instead, it shall stipulate such invalidity in the decision on the merits closing the tender procedure.

3. Examination of the contents of the offers

After the formally valid offers were registered in the tender register, the Media Council examines whether the offers comply with the substantive validity requirements. The Media Council does not establish the substantive invalidity of any tender in a separate order, but such invalidity is stipulated in the decision closing the tender procedure. However, decisions adopted on the substantive invalidity of the tenders may be challenged within the petition for review filed against the decision closing the tender procedure.

4. Evaluation

According to the Media Act, tenders shall be evaluated on the basis of the principles and criteria defined in the invitation to tender. Evaluation criteria shall be based on quantitative or other assessable factors, and be in line with the subject of the tender or the material conditions of the public contract. The different criteria may not result in the same content element of the tender being evaluated several times. The Media Council may, in connection with a tender component related to the evaluation criteria, determine, in the invitation to tender, a requirement compared to which no less favourable an offer can be made. The evaluation principles shall be transparent, free from discrimination and proportionate.

The Media Act sets forth, as a fundamental rule, that tenders may only be evaluated based on the criteria specified in the invitation to tender. The process and circumstances of the evaluation may be fully reconstructed from the justification for the decision closing the tendering procedure.

5. Announcement of results

Having examined the form and content of the tenders, the Media Council adopts a regulatory decision on the result of the tender procedure.

6. Legal Remedies

The judicial review of the Media Council's decision closing the tender procedure may be requested from the Metropolitan Regional Court within fifteen days of the decision's announcement on the grounds of breach of law. If any petition for review is filed against the decision of the Media Council, the public contract may not be concluded until the final decision of the court.

VI. Tendering of the media licence used by Klubrádió (95.3 MHz, Budapest)

1. The announcement of the tender procedure, the Draft Invitation to Tender, criticisms

On 26th May 2011 the Media Council launched the tender procedure for three Budapest regional reception area (i.e. in excess of 500,000 citizens, but below 50% of the country's population) commercial frequencies and one community frequency. The frequency of Budapest 95.3 MHz, used by Klubrádió Zrt., was announced for tendering again as part of these three commercial frequencies. (All three frequencies had operated as commercial frequencies previously, too. All three media licences had expired; therefore, on the basis of Paragraph (11) of Article 65 of the Media Act, the previous media service providers were able to continue operation on the frequencies previously used by them on the basis of provisional 60-day media licences until the closure of the tender procedures with final effect. All three media service providers made use of the possibility granted by the provisional media service licence; however, with regard to the 89.5 MHz and 103.9 MHz frequencies, the Media Council had already announced the results and concluded the public contract with the winning tenderers. As a result of this, the winning tenderers could commence media service provision while, on the basis of the Media Act, the previous rights holders had to terminate their media provision activity on the frequencies in question. In respect of the frequency of 95.3 MHz, Klubrádió, the previous media service provider, has been operating on the basis of a provisional media licence since the expiry of its original contract on 12th February 2011, as the tender procedure has not yet been closed with final effect.

For almost two years now, domestic and foreign political organisations and prominent left-wing and liberal opinion-formers, as well as members of foreign diplomatic bodies, have intervened at the Media Council of the National Media and Infocommunications Authority to promote the interests of Klubrádió. The original objective of these political influencers had been to get the Media Council to announce the tender for the utilisation of the Budapest 95.3 MHz frequency in a manner that violates the principle of equal opportunity, tailored to the requirements of Klubrádió Zrt. (subsequently such undesirable pressure was noticeable in respect of the evaluation of the tenders). However, the invitation to tender concerning the utilisation of the Budapest 95.3 MHz frequency may not and could not contain an evaluation scheme in the favour of any tenderer – not even Klubrádió – that would limit market competition, since such a scheme would clearly violate the principles of equal opportunity and equal treatment, as well as the prohibition of discrimination. For this reason, the Media Council could not set any condition or evaluation criterion in favour of the previous rights holder or rights holders, because such a condition or criterion would discriminate against new actors attempting to enter the market. At the same time, the Media Council had to take into consideration the commercial operation of the respective frequencies, as well as the economic changes that had occurred in the radio media market in the meantime.

After the public hearing, the Media Council published the final invitation to tender on 21st July 2011.

2. The final text of the invitation to tender and its rationale

The final invitation to tender reflected the media policy objectives expressed by the Media Council, according to which the three Budapest frequencies with significant reception areas were to be subject to tendering as commercial frequencies. Due to the impact of the economic crisis in the last years, the profitability of the radio market, as well as the revenues realised from advertisements, significantly decreased. Hence, the Media Council decided to publish a tender for the Budapest frequencies with larger reception area – consequently with a higher economic viability potential – as commercial frequencies, in order to ensure the stability of operating in a market environment.

In the course of drafting the invitation to tender and drawing up the evaluation criteria, the Media Council took care to ensure that both music-type radio stations and talk-news type radio stations, such as Klubrádió, had equal opportunity in the tender procedure.

For this reason, and in the course of evaluation, undertaking to broadcast programmes on subjects related to local public affairs or facilitating local everyday life was awarded with the highest number of points among the scoring criteria applicable to the programme flow plan (20 points). On the other hand, several points could be earned by undertakings concerning music programmes (10 points), and undertakings concerning specifically Hungarian music programmes (10 points). The objective indicated in the invitation to tender also reflects this dual nature of evaluation of the tender: *“the objective of the Tender Invitation is that the Media Council ensures, with the Budapest 95.3 MHz media service opportunity as a state property, a responsible, purposeful and effective management, and that the media services contribute to the creation of the diversity of the media market, and that, besides its informative, entertaining, and musical nature - with an emphasis on meeting Hungarian music quotas - local information and values relevant to the reception area be expressed and featured in the media service.”*

According to the invitation to tender, the evaluation and scoring criteria were the following:

“1.11.2.3. Tenderers may score a maximum of 72 points.

1.11.2.4. The Media Council assigned the following evaluation framework to the individual evaluation categories:

Offered media service provision fee: 15 points

The highest offered media service provision fee is worth 15 points.

The points for the remaining offered media service provision fees should be calculated by the following method: the offered media service provision fee should be divided by the highest offered media service provision fee, and the quotient should be multiplied by fifteen. The resulting number (or, in the event of non-integer numbers, rounded up if higher than X.5) should be the score awarded to the respective offered media service provision fee.

Programme flow plan total: 52 points

Including:

- proportion of programmes in daily transmission time (excluding the night hours between 11 PM and 5 AM) on subjects related to local public affairs or facilitating local everyday life, if
 - it exceeds 25 per cent of the transmission time: 20 points
 - it is between 20 and 25 per cent of the transmission time: 10 points
 - it is below 20 per cent of the transmission time: 0 points

- proportion of music programmes,
 - above 60 per cent of the transmission time: 10 points
 - between 40 and 60 per cent of the transmission time: 7 points
 - between 20 and 40 per cent of the transmission time: 4 points
 - below 20 per cent of the transmission time: 0 points
- proportion of Hungarian music programmes in total daily transmission time devoted to music programmes,
 - above 40 per cent of the transmission time: 10 points
 - between 37 and 40 per cent of the transmission time: 5 points
 - below 37 per cent of the transmission time: 0 points
- subjective evaluation of the programme flow plan: 12 points

The proportion of programmes on subjects related to local public affairs or facilitating local everyday life was evaluated according to the definition of “programmes on subjects related to local public affairs or facilitating local everyday life” provided among the interpretative provisions of the invitation to tender.

Media service experience: 3 points

Undertaking of ancillary media services: 2 points

with the reservation that Tenderers undertaking to provide RDS station/programme identifier services (RDS PI) are awarded 1 point of the 2 points automatically.

Maximum total: 72 points”

3. The submitted tenders and their evaluation

After the publication of the invitation to tender, the tenderers could submit their tenders to the Media Council within the statutory deadline, which was August 30 2011.

The following seven tenderers submitted their tenders for the Budapest 95.5 MHz frequency:

1. Click Rádió Reklám és Marketing Szolgáltató Kft.
2. Autórádió Műsorszolgáltató Kft.
3. Klubrádió Szolgáltató Zrt.
4. Rádió Juventus Műsorszolgáltató Zrt.
5. Rádió 1 Rádióműsört Készítő és Közlő Kft.
6. Rumba Rádió Kft.
7. Radio Code Broadcast Kft.

Result of the formal examination:

In the course of the formal examination of the tender submitted by Radio Code Broadcast Kft., the Media Council established in its Decision No. 1387/2011 (X. 12.) that the tender was formally invalid, and registration of the tender in the tender register was denied.

Result of the examination of the contents of the offers:

The tenderers achieved the following scores with their offers:

| Tenderer | Offered fee (up to 15 points) | Programme flow plan up to 52 points (20 + 10 + 10 + 12 points) | | | | Media service experience (up to 3 points) | Ancillary media services (up to 2 points) | Total points |
|---------------------|-------------------------------|---|---|---|--|---|---|--------------|
| | | Proportion of programmes in daily transmission (excluding the night hours between 11 PM and 5 AM) on subjects related to local public affairs or facilitating local everyday life (up to 20 points) | Proportion of music programmes in total transmission time (up to 10 points) | Proportion of Hungarian music programmes in total daily transmission time devoted to music programmes (up to 10 points) | Subjective evaluation of the programme flow plan (up to 12 points) | | | |
| Click Rádió Kft. | 14 points | 20 points | 10 points | 10 points | 4 points | 0 point | 2 points | 60 points |
| Autórádió Kft. | 15 points | 20 points | 10 points | 10 points | 9 points | 0 point | 2 points | 66 points |
| Klubrádió Zrt. | 11 points | 20 points | 7 points | 10 points | 12 points | 3 points | 2 points | 65 points |
| Rádió Juventus Zrt. | 13 points | 20 points | 10 points | 10 points | - | - | 2 points | - |
| Rádió 1 Kft. | 11 points | 20 points | 10 points | 10 points | 3 points | 2 points | 2 points | 58 points |
| Rumba Rádió Kft. | 11 points | 20 points | 10 points | 10 points | 1 point | 1 point | 2 points | 55 points |

With regard to its Decision No. 1982/2011 (XII. 20.), the Media Council – declaring Rádió Juventus Zrt. to be the winner of the tender published for the Budapest 103.9 MHz licence –

established that the tender offer submitted by Rádió Juventus Zrt. was formally invalid on the grounds of Article 57 Paragraph (2) Point (a) of the Media Act and Point 1.10.6.1.a of the Invitation to Tender, as it was in violation of the statutory rules of conflict of interests. For this reason, the Media Council did not determine the points to be awarded for the offer.

For the purposes of the subjective evaluation of the programme flow plan, the Media Council took into consideration the attempts of the tenderers to develop a unique and distinctive programme flow plan and image, and the service such a plan and image would create for the pluralism of the media market in Budapest. Other, non-objective factors ignored during objective scoring were also taken into consideration when awarding the corresponding score. Such objective components included factors such as the proportion of public service media programmes, the proportion of spoken content in comparison to musical content, and the proportion of transmission time devoted to regular daily news programmes within the total transmission time.

As for Klubrádió Zrt. and Rádió 1 Kft., the Media Council also took into consideration, during the subjective evaluation of the programme flow plans of the tenderers, that the Tenderers offered a solid and already operational programme flow plan.

Just like any other tenderer, Klubrádió Zrt. had been well aware of the tender evaluation criteria ever since the tender procedure was launched. It was also aware of the scores that may be awarded for “objective undertakings” – such as the offered fee, and the proportion of local public affairs-related programmes and of musical programmes –, and it compiled its tender offer with due regard to all these factors. In terms of the objective undertakings, the offer submitted by Klubrádió Zrt. was significantly below the offers submitted by other tenderers. As such, the final fee offered in its tender was far below the sums offered by other tenderers. Its undertakings concerning musical programmes were also lower. Consequently, the tender of Klubrádió Zrt. gained the last position on the basis of the objective scores achieved with its tender.

For the licence for the Budapest 95.3 frequency, which was to be granted for HUF 53 million, the representatives of Klubrádió Zrt. recommended a base fee of zero but not more than HUF 6 million, during the public hearing held in relation to the invitation to tender.

The Media Council does not have any discretionary power over the objective criteria, and ignoring the content of the tender offer would have made the entire procedure unlawful.

The Media Council awarded the maximum possible number of “subjective” points to the programme flow plan of Klubrádió Zrt. However, these could not make up for the low number of “objective” points that could be awarded for the undertakings made in the tender.

4. The evaluation of the tenders, the result of the procedure and the decision of the Media Council

According to the invitation to tender, the tender procedure was won by the tenderer with the highest score. On the above grounds, Autórádió Kft. achieved the highest score, so the Media Council, in its Decision No. 1983/2011 (XII. 20.), awarded the contract to Autórádió Kft.

This decision of the Media Council was amended by the Media Council's Decision No. 196/2012 (II. 1.), exclusively in respect of the statement of reasons in the subjective evaluation criteria. The amended statement of reasons expounds in detail the criteria for the evaluation of the discretionary categories and the detailed scores awarded to the tenders as a result of its evaluation.

Although, according to the consistent and uniform jurisprudence in respect of media administration and the management of tenders of both the National Radio and Television Commission and the Media Council, the subjective aspects reflecting the collective thinking and values of the body are not stated in detail in the decisions, and no court or legal objections have been raised against this practice, nor did the jurisprudence of the courts require this from the media authority's practice of the application of the law, given the significance of the case and its extensive media coverage, the Media Council opted to provide a more detailed statement of the reasons for the subjective criteria expounded in its decision.

5. The legal remedy against the decision, the verdict of the court

Klubrádió Zrt. applied for legal remedy against the decision of the Media Council, claiming that, according to their position, the tender submitted by Autórádió Kft., the tenderer announced as the winner, had been invalid in terms of both form and content.

In its verdict No. 2.K.27.053/2012/20 of 14th March 2012, the Budapest Court of Appeal upheld Klubrádió's appeal, revoked the point of the decision of the Media Council that declared Autórádió Kft. as the winner of the tender procedure, and instructed the Media Council to conduct a new procedure in respect of the evaluation of the remaining tenders.

The verdict of the Court of Appeal discussed in detail the assessment of the formal requirements towards the tenders participating in the tender procedure. The Court of Appeal established that, on the basis of the invitation to tender, all pages of all documents that constitute the original copies of the tenders had to be signed by the tenderer, while the various statements and other documents have to be signed according to the rules of corporate procurement: *“the Court of Appeal wishes to point out that the defendant (the Media Council) may freely define the various elements of the invitation to tender within the confines of the Media Act and may provide for both substantial and formal requirements towards the tenderers and the tenders. Only tenders in full conformance with the requirements of the invitation to tender are considered to be valid. (...) It may also be stated that, during the definition of the formal requirements, the defendant had made no distinction, i.e. did not stipulate different provisions in respect of the documents containing information on the merits from those documents, sheets and pages that do not contain such, and did not discriminate between the individual documents on the basis of whether they originate from the tenderer or from others. That is, the same formal criteria apply to all partial elements of the tender that together constitute the whole. Accordingly, the provision of Point 2.1.1.4 of the invitation to tender may only be interpreted as saying that the tenderer is required to sign all pages of the tender. (...) Had the defendant expected the tenderer's official representative to sign only the pages issued by the tenderer and containing on the merits information, this is what should have been prescribed. Lacking any differentiation within the regulations, the obligation to affix the official corporate signature applied to all documents of the tender, i.e. all pages thereof.”* (Verdict No. 2.K.27.053/2012/20 of the Budapest Court of Appeal, pp. 7-8.)

On the basis of all this, the Court of Appeal stressed in the verdict that the only possible interpretation of the formal requirement stipulated in the invitation to tender is that it prescribes that the tenderers must affix their corporate signatures to all pages of the tenders. That is, we may record that the signing of the empty pages of the tenders on the basis of the invitation to tender as a – somewhat absurd – condition of validity which originated not from the legal interpretation and law application of the Media Council, but reflects the principled position made clear by the above-cited verdict of the Budapest Court of Appeal.

With respect to these considerations, the Budapest Court of Appeal established that the tenderer announced as the winner of the tender procedure, Autórádió Kft. did not fully meet the formal requirements stated in the invitation to tender, as the tender did not contain the corporate signature of the tenderer (on the pages signed by the CEO of the company, the corporate name of the company was missing from the signature of the person with signatory right), and certain pages of the tender were not signed at all by the tenderer. Due to these shortcomings and formal errors, the tender submitted by Autórádió Kft. was formally invalid as it did not meet the formal requirements provided for in the invitation to tender. As a matter of principle, the Court of Appeal stressed that the Media Act does not assign relative ranks to formally incorrect tenders but assigns the legal sanction of invalidity to all of them and so there is no possibility to exercise discretion in respect of the relative gravity of formal errors; no distinction may be made between non-substantive and substantive formal errors.

Also as a matter of principle, the Court of Appeal referred to the fact that the formal requirements stated in the invitation to tender are binding upon the Media Council, i.e. the Media Council is bound to observe the provisions of the invitation to tender, even if it notes subsequently that a prescribed requirement is undue or does not reflect its original intentions. That is, there may be no loose or strict interpretation of formal errors. On the basis of the statement of reasons of the verdict, the tender of the winning tenderer was formally invalid, i.e. no judgement on the merits should have been passed on Autórádió Kft's tender. In this respect the decision of the Media Council had been in violation of the law. This, obviously, affected the merits of the decision, as formally invalid tenders may not participate in the evaluation and, consequently, such a tender may not be the winner of a tender procedure. In this respect, too, the Court of Appeal referred to the fact that formal invalidity should be stated in the decision on the rejection of the registration of the tender, or, if the Media Council discovers causes of formal invalidity only after registration in the tender register, it shall establish the formal invalidity of the tender in the decision on the merits closing the tender procedure.

Furthermore, in the verdict the Court of Appeal stressed that, during the course of the repeat procedure, the Media Council has to draw the appropriate conclusions from the formal invalidity of Autórádió Kft's tender and may not announce Autórádió Kft. as the winner of the tender procedure in the new decision on the remaining tenders.

6. The decision passed in the repeat procedure

One day after the receipt of the complete documents of the case, on 4th May 2012, the Media Council launched the repeat procedure and informed all tenderers thereof. (On the basis of Paragraph (6) of Article 33 of the Act on the General Rules of Administrative Proceedings and Services, the administrative deadline is calculated as of the day following the date of the receipt of all the documents on the case by the competent authority.)

During the course of the repeated procedure the Media Council examined the tenders of the tenderers participating in the tender procedure from the aspect of formal adequacy, taking into account the content of the Court of Appeal's verdict. With respect to the repeated procedure, the Media Council performed the formal examination as part of the registration of the tenders and concluded that the tenders of all tenderers were formally invalid. Consequently, on the basis of Paragraph (2) of Article 58 of the Media Act, the Media Council rejected the registration of the tenders via separate orders passed in respect of each tenderer.

In the repeated procedure, the Media Council examined, on the basis of Paragraph (1) of Article 57 of the Media Act, whether the tenders of the tenderers qualifying as clients conformed to the criteria of formal and substantial validity.

On the basis of Paragraph (2) of Article 58 of the Media Act and Point 1.10.7.3 of the Invitation to Tender, the Media Council issued order no. 1196/2012. (VII. 5.) rejecting the tender registration of Click Rádió Kft., order no. 1197/2012. (VII. 5.) rejecting the tender registration of Autorádió Kft., order no. 1198/2012. (VII. 5.) rejecting the tender registration of Klubrádió Zrt., order no. 1199/2012. (VII. 5.) rejecting the tender registration of Rádió 1 Kft. and order no. 1200/2012. (VII. 5.) rejecting the tender registration of Rumba Rádió Kft. with respect to the fact that the Media Council had established that, on the basis of Points b) and d) of Paragraph (2) of Article 57 of the Media Act and Points b) and d) of Section 1.10.6.1 of the Invitation to Tender, the tenders of the aforementioned tenderers were formally invalid.

With regard to Klubrádió Zrt., the Media Council rejected registration and established formal invalidity on the basis of the following:

- Tenderer Klubrádió Zrt. failed to sign all pages of its tender as required by the criteria of formal validity. With the exception of the pages numbered 126-136 by the tenderer, only the pages containing the tender text bore the tenderer's official signature according to Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings (hereinafter: Company Registration Act).
- Tenderer Klubrádió Zrt. failed to continuously number the pages of its tender, with the exception of the pages numbered as 126-136 by the tenderer.

With regard to the other tenderers participating in the procedure – similarly to the tender submitted by Klubrádió Zrt. – the Media Council ruled that their tenders were invalid primarily for the following reasons:

- the lack of continuous numbering of all pages of the tender, as required by the formal criteria of validity;
- the lack of the tenderer's signature on all pages of the tender, as required by the formal criteria of validity;
- the lack of the tenderer's official signature on the adhesive label on the back of the last page of the tender.

7. The legal remedy against the decision passed in the repeated procedure

In a petition filed on 12th July 2012, tenderer Klubrádió Zrt. requested the Budapest Court of Appeal to annul order no. 1198/2012. (VII. 5.) of the Media Council on the rejection of the registration of Klubrádió Zrt. in the tender register.

Order number 2.K.27.372/2012/2 of the Budapest Court of Appeal dated 18th July 2012 annulled order no. 1198/2012. (VII. 5.) of the Media Council on the grounds that, according to the Court of Appeal in the repeated procedure, the Media Council had no right to issue an order on the formal invalidity of the tenders. The ruling of the Court of Appeal stated that, according to Paragraph (3) of Article 58 of the Media Act, the Media Council is obliged to examine formal validity until the conclusion of the procedure; therefore the Media Council would have proceeded correctly if it had stated the invalidity of the tender in the decision on the merits closing the procedure (rather than in a procedural order). Furthermore, the Court of Appeal stressed that the Media Council is required to decide upon formal and substantial validity, the success of the procedure and the winner of the tender in a decision passed according to Article 62 of the Media Act. This obligation is independent of the fact that the Media Council had refused the registration of the other tenderers, too, similarly to Klubrádió Zrt. On the basis of these considerations, the Court of Appeal revoked the decision of the Media Council on the refusal of the registration in the tender register on the basis of formal reasons, i.e. it did not examine and assess on the merits the causes of invalidity established in respect of Klubrádió Zrt's tender.

8. The 2012 August decision of the Media Council

Taking into account the provisions of decision no. 2.K.27.372/2012/2 of the Budapest Court of Appeal dated 18th July, the Media Council revoked its orders on the rejection of the registration of certain tenderers in the tender register, then – in decision no. 1488/2012. (VIII. 15.) closing the tender procedure on the merits – the Media Council ruled that the tender procedure had been abortive, as all tenders were formally invalid.

On the basis of the above, in the decision closing the tender procedure on the merits, decision no. 1488/2012. (VIII. 15.), which was passed as a result of the decision of the Budapest Court of Appeal, the Media Council, similarly in content to order no. 1198/2012. (VII. 5.), established that, on the basis of Point b) of Paragraph (2) of Article 57 of the Media Act and Point 1.10.6.1 b) of the invitation to tender, Klubrádió Zrt's tender was formally invalid as it had not been submitted in the form prescribed by Point 1.10.4.7 of the invitation to tender.

Furthermore, the Media Council established that the tender submitted by tenderer Klubrádió Zrt. failed to meet the formal criteria prescribed in Point 2.1 of the invitation to tender and so it was formally invalid according to Point d) of Paragraph (2) of Article 57 of the Media Act and Point 1.10.6.1 d) of the invitation to tender.

Given the fact that the documents submitted by Klubrádió Zrt. to the Media Council to remedy the deficiencies of the tender also failed to meet the formal requirements (there was no official signature and not all pages were numbered continuously), and, apart from this, the tender did not contain the elements listed in Article 56 of the Media Act and Point 2.3 of the invitation to tender, the Media Council established that the tender submitted by Klubrádió Zrt. was formally invalid on the basis of Point e) of Paragraph (2) of Article 57 of the Media Act and Point 1.10.6.1 e) of the invitation to tender, too.

9. The legal remedy against the August 2012 decision

On 29th August 2012 Klubrádió Zrt. submitted an application for the judicial review of the 15th August 2012 decision of the Media Council. On 6th September 2012 the Media Council forwarded the statement of claim, along with the Media Council's statement on the merits of the case, to the Budapest Court of Appeal. On the basis of Paragraph (5) of Article 62 of the Media Act, the Budapest Court of Appeal must assess the statement of claim for a judicial review in a board comprised of three members within thirty days from the date of the dispatch of the statement of claim by the Media Council.

Verdict no. 2.K.27.474/2012/5 of the Budapest Court of Appeal adopted on 26th September 2012, on the basis of the claim of Klubrádió Zrt., revoked the order on the frustration of the tender procedure provided for in Point 1 and the establishment of the formal invalidity of the tender submitted by Klubrádió Zrt. in Point 4 of the Media Council's decision no. 1488/2012. (VIII. 15.).

The Budapest Court of Appeal stressed that although, during the evaluation of the tenders in the repeated tender procedure, the Media Council had been required to examine the formal and substantive invalidity of the tenders, the Media Council could not have lawfully established the frustration of the tender procedure, as in this respect the Media Council had been bound by the provision of its original decision, decision no. 1983/2011. (XII. 20.), according to which the tender procedure had been successful, as this provision had not been repealed by the Budapest Court of Appeal. The Budapest Court of Appeal construed that "not only is it impossible to interpret two simultaneous, but contradictory provisions, but (...) this is also contrary to Paragraph (1) of Article 62 of the Media Act", and that, "despite the guidance of the conclusive judgement, the Media Council failed to pass an unambiguous decision of the result of the tender procedure", and this "constitutes a substantial violation that affects the merits of the case, which requires that this provision of the decision be annulled".

The Court of Appeal revoked the provision on the formal invalidity of the tender of Klubrádió Zrt. on the grounds that the content of this point of the decision, Point 4, was closely related to the decision on the frustration of the tender procedure expounded in Point 1. At the same time, the Court of Appeal did not examine the formal validity or invalidity of the tender of Klubrádió Zrt. on the merits.

According to the judgement of the court the authority could not modify the decision establishing the success of the tender procedure, irrespectively of the validity or invalidity of the tenders. This, however, gives rise to an absurd situation, as in this case a tender procedure may be deemed to be successful even in the absence of any valid tenders and, conversely, a tenderer submitting an invalid tender may be declared to be the winner. This, however, would be contrary to the provisions of Paragraph (2) of Article 62 of the Media Act, according to which the tender procedure is unsuccessful if all tenders submitted are invalid.

VII. Other decisions of the court in cases related to frequency tenders

The above judgement of the court, however, led to the legal contradiction that, in the given case, the Media Council could not establish the frustration of the tender procedure even if there were no valid tenders or if all tenderers revoked their tenders. From the judgement of the Budapest Court of Appeal it follows that even if all tenders were formally invalid, a winner must be announced, as otherwise the tender procedure could not remain successful. If, however, the Media Council were to closely adhere to the judgement and declare Klubrádió's tender to be formally valid, this would render the tender procedure discriminatory, as the same errors occurred in Klubrádió's tender as in the tenders of the other tenderers deemed to be formally invalid by provisions of the decision that were not annulled by the court.

Judicial practice is inconsistent in respect of adjudging the causes of formal invalidity.

In the previous practice of the Media Council and its legal predecessor, the National Radio and Television Commission, formal errors by the tenderers that were of lesser importance had not led to the establishment of the formal invalidity of tenders. For example, tenders in which the tenderer failed to sign and number the empty pages (pages without text) were not excluded.

It was precisely the judgement of March 2012 (no. 2.K.27.053/2012/20), passed on the basis of the judicial review procedure initiated by Klubrádió Zrt. in respect of the right to the Budapest 95.3 MHz frequency, that provided the basis for the application of strict criteria in the examination of tenders.

In the statement of reasons of judgement no. 2.K.27.053/2012/20 of the Budapest Court of Appeal, the Court declared that the tender of Autórádió Kft. was formally invalid, because the obligation to sign is applicable to all documents, i.e. all pages of the tender. The Court of Appeal stated that the obligation to sign is irrespective of whether the given page contains any substantial information and stressed that tenders may be evaluated exclusively according to the invitation to tender; no distinction may be made between important and unimportant formal errors.

In adherence to the decision of the Court of Appeal, the Media council applied the strict approach provided for by the judgement in other ongoing tender procedures, too. The Council amended its jurisprudence in respect of the evaluation of formal criteria and declared 15 tender procedures to be unsuccessful due to formal invalidity.

In the court proceedings initiated against the decisions of the Media Council on formal invalidity or the frustration of the tender procedure in respect of frequencies other than the Budapest 95.3 MHz frequency, the judgement of the Budapest Court of Appeal was identical to the decision of the Media Council in every case.

At the same time, in respect of the adjudication of certain causes of formal invalidity, especially the lack of signatures on empty pages, judicial practice is not homogeneous. In the out-of-court proceedings initiated in respect of the independent tender procedures related to

the countryside network of Klubrádió Zrt. [Esztergom 98.1 MHz (Klubrádió), Tatabánya 96.7 (Klubrádió), Veszprém 90.6 MHz (Rádió JAM), Balatonfüred 91.8 MHz (Rádió JAM), Keszthely 92.2 MHz (Rádió JAM), Pápa 92.7 MHz (Rádió JAM)] the order of the Court of Appeal did not establish invalidity on the grounds of the lack of the numbering and signing of empty pages. (At the same time, the Court maintained the decisions of the Media Council in these cases, too, as it found that other causes of invalidity were proven.)

In order no. 2.K.27.437/2012/2 of the Budapest Court of Appeal, the statement of reasons for the decision passed on the signing of the pages of the tender documents states that *"irrespective of whether only a single side or both sides of the page contain data, the term 'submitted page' denotes pages that contain data."*

On the basis of this, the Court of Appeal formulated the following principled position: *"Even in the everyday sense of the term, 'document' denotes a data carrier; consequently, empty sheets or pages are not documents and the requirement to sign such cannot be deduced from the Media Act or the relevant points of the Invitation."*

In court proceedings initiated by other tenderers [Rumba Rádió Kft. (Budapest 96,4 MHz), Rádió Jam Zrt. (Ajka 88,8 MHz), Kapos Rádió Kft. (Kaposvár 99,9 MHz), Varage Kft. (Debrecen 92,3 MHz)], in the judgements in cases no. 3.K.27.421/2012/5, no. 2.K.27.467/2012/4 and no. 2.K.27.490/2012, order no. 2.K.27.265/2012/2 and the judgements related to the Budapest 95.3 MHz frequency, however, the Budapest Court of Appeal clearly stated that all pages of the tender, including empty pages, must be numbered and bear the tenderer's corporate signature.

Judgement no. 3.K.27.421/2012/5 declares: *"By failing to sign the empty pages and the annexes specified in itemised form in the decision of the defendant, the plaintiff submitted a tender that did not conform to the formal criteria applicable towards the tenders."*

Order no. 2.K.27.265/2012/2 of the Budapest Court of Appeal states: *"(...) the term 'document' denotes all documents forming part of the tender, including the annexes, the forms and all other documents, irrespective of their issuer. From this it follows that the formal requirements applicable to the tender as a whole apply to all partial elements of the tender too, including the annexes, the forms and all other documents, too. Accordingly, on the basis of point 2.1.1.4 of the invitation to tender, the tenderer is required to sign all pages of the tender and, according to point 2.1.1.5. all such signatures must be corporate signatures."*

Judgement no. 2.K.27.467/2012/4 of the Budapest Court of Appeal stated that *"all the pages and both sides of the individual pages of the string-bound single unit of documentation authenticated according to point 1.10.4.8 form part of the tender, irrespective of their data content or designation, therefore, especially, of whether a given page carries content or is an empty back page within the documentation." (...)* *"Consequently, the tenderer should have numbered and signed all pages of the tender (and not only the pages with content)."*

In judgement no. 3.K.27.421/2012/5, in the case of the Budapest 96.4 MHz frequency, the Budapest Court of Appeal stated: *"the rear sides of the pages constituting the single original hard-copy tender are empty; the plaintiff did not take into account the empty pages of the tender when numbering the pages. On the basis of the cited provisions of the Media Act, the defendant may, within the bounds of the provisions of the Media Act, define the various*

elements of the Invitation to Tender at their discretion, including the formal requirement of point 1.10.4.7, according to which all pages of the Tender must be continuously numbered. It was this method of page numbering that was binding upon both the plaintiff and the defendant. It is obvious that the sheets making up the tender have two sides, i.e. pages, and the invitation to tender clearly required the continuous numbering of all pages. It is evident from the comparison of points 1.10.4.7 and 1.10.4.8 of the Invitation to Tender that, in defining the tender criteria, the defendant made a deliberate distinction between 'pages' and 'sheets'. The defendant had not expounded this formal criterion in any further detail and had not assigned any other conditions to it; therefore any subsequent interpretation based on practical considerations would not stand, according to which the omission of the numbering of existing, but empty pages that are void of information has no bearing on the fulfilment of the requirement of continuous numbering. Due to the fact that the tender was binding, in itself the circumstance that the numbering of an empty page and the corporate signing thereof is unnecessary, because the given page carries no elements or information that are substantial in respect of the tender, and did not discharge the defendant from the obligation to examine the fulfilment of the formal criteria of the tender procedure or the plaintiff from the obligation to submit a tender that conforms to such criteria. The plaintiff was expected to meet all formal requirements, i.e. the plaintiff should have continuously numbered all the pages of the tender, including the empty pages. This criterion of formal validity was not negligible and the plaintiff could not have ignored it on the grounds that the defendant in other tenders had raised no exception towards the absence of the numbering of the empty pages or that in subsequent tender procedures the defendant required that empty pages be crossed out rather than numbered."

The previous argument was reinforced by the Court of Appeal in judgement no. 2.K.27.489/2012/7 of 3rd October 2012 in the case of Kapos Rádió Kft.: *„the plaintiff should have fulfilled all formal requirements; accordingly, all pages, including the empty pages of the tender, should have been numbered continuously. Accordingly, the defendant was correct in declaring that, since the tender submitted by the plaintiff did not conform to the formal criteria according to point 1.10.4.7 of the Invitation to Tender, on the basis of point 1.10.6.1 b) of the Invitation and Point b) of Paragraph (2) of Article 57 of the Media Act the tender was therefore invalid."* (...) *"By failing to number and to affix their corporate signature to the empty pages, the plaintiff submitted a tender, which – beyond doubt, according to the position of the Budapest Court of Appeal – did not conform to the formal validity criteria applicable to the tenders. As such, the defendant's conclusion that the tender was invalid on the basis of Point d) of Paragraph (2) of Article 57 of the Media Act was well-founded, since the tender did not meet the criteria on signatures formulated in the invitation to tender."*

In the judicial review procedure instituted on the basis of the statement of claim of Kapos Rádió Kft. and Rádió Jam Zrt., however, both parties pointed out that, in respect of the signing and continuous numbering of the pages of the tender documentation, there was a marked discrepancy between order no. 2.K.27.437/2012/2 of the Court of Appeal ("empty pages" do not have to be signed) and judgement 3.K.27.421/2012/5 ("empty pages" have to be signed as well).

It was probably as a result of this that this board (2.K.) of the Court of Appeal unified its case law and clearly stated in the judgement of the Court of Appeal (in contrast with the content of order no. 2.K.27.437/2012/2) that all pages of the documentation, hence the "empty rear sides", too, have to be signed and numbered continuously.

The table below summarizes the court decisions on the regulatory decisions of the authority:

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| <p>Budapest 95,3 MHz tender procedure</p> <p>Judgement no. 2.K.27.053/2012/20 (14th March 2012, Chamber 2Kf.) on the statement of claim of Klubrádió Zrt.:</p> <p>The signing of empty pages void of content is a mandatory formal condition of validity.</p> | <p><i>“the tenderer is required to sign all pages of the original copy of the tender” ... “Furthermore, it may also be established that the defendant made no distinctions when providing for the formal criteria: the defendant did not provide for separately in respect of documents containing substantial information and documents, sheets or pages containing no such information” ... “Therefore the provisions set forth in point 2.1.1.4. of the invitation to tender may only be interpreted as saying that the tenderer is required to sign all pages of the tender.” ... “Lacking any different provisions the requirement to officially sign the pages was applicable to all documents, i.e. all pages of the tender.”</i></p> |
| <p>Budapest 96,4 MHz tender procedure</p> <p>Judgement no. 3.K.27.421/2012/5 (12th September 2012, Chamber 3Kf.) on the statement of claim of Klubrádió Zrt.:</p> <p>The signing of empty pages is a mandatory formal condition of validity.</p> | <p><i>"By failing to sign the empty pages and the annexes specified in itemised form in the decision of the defendant, the plaintiff submitted a tender that did not conform to the formal criteria applicable towards the tenders."</i></p> |
| <p>Veszprém 90,6 MHz tender procedure</p> <p>Decree no 2.K.27.437/2012/2 (13th September 2012, Chamber 2Kf.) on the petition submitted by Rádió JAM Zrt. (under the same ownership as Klubrádió Zrt. prior to October 2012):</p> <p>Empty pages need not be signed, this is not a formal validity condition.</p> | <p><i>“in the present case, the term submitted page means a page containing data, irrespectively of whether both or only one side of the page contain data.”</i></p> <p><i>... "Even in the everyday sense of the term, 'document' denotes a data medium; consequently, empty sheets or pages are not documents and the requirement to sign such cannot be deduced from the Media Act or the relevant points of the Invitation."</i></p> |
| <p>Kaposvár 99,9 MHz tender procedure</p> <p>Judgement no. 2.K.27.489/2012/7 (3rd October 2012, Chamber 2Kf.) on the statement of claim of Kapos Rádió Szolgáltató Kft.:</p> <p>The signing of empty pages is a mandatory formal condition of validity.</p> <p>The invitation to tender of the given tender procedure is (in respect of the formal validity conditions) factually and</p> | <p><i>“accordingly all the pages of the tender, including the empty pages of the tender should have been continuously numbered. The defendant was correct in declaring that the tender submitted by the plaintiff did not conform to the formal criteria according to point 1.10.4.7 of the Invitation to Tender” ... "By failing to number and to affix their corporate signature to the empty pages the plaintiff submitted a tender, which – beyond doubt, according to the position of the Budapest Court of Appeal – did not conform to the formal validity criteria applicable to the tenders. Therefore, the defendant's conclusion</i></p> |

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| <p>verbatim identical to the invitation to tender forming the basis of the Tender Procedure in question.</p> | <p><i>that the tender was invalid on the basis of Point d) of Paragraph (2) of Article 57 of the Media Act was well-founded, since the tender did not meet the criteria on signing formulated in the invitation to tender."</i></p> |
| <p>Ajka 88,8 MHz tender procedure</p> <p>Judgement no 2.K.27.467/2012/4 (3rd October 2012, Chamber 2Kf.) on the statement of claim submitted by Rádió JAM Zrt. (under the same ownership as Klubrádió Zrt. prior to October 2012):</p> <p>The signing of empty pages is a mandatory formal condition of validity.</p> <p>The invitation to tender of the given tender procedure is (in respect of the formal validity conditions) factually and verbatim identical to the invitation to tender forming the basis of the Tender Procedure in question.</p> | <p><i>"All the pages and both sides of the individual pages of the string-bound single unit of documentation authenticated according to point 1.10.4.8 form part of the tender, irrespective of their data contents or designation, thus, especially, of whether a given page carries contents or is an empty rear page within the documentation."(...)"Consequently, the tenderer should have numbered and signed all pages of the tender (and not only the pages with content)."</i></p> |

The contradictions of the relevant judicial practice raise the question of how it would be possible, on the basis of the contrary judicial practice and the various court directives, to achieve the lawful conclusion of the tender procedure for the Budapest 95.3 MHz frequency without violating or permanently establishing such public administration related legal principles that would lead to infringements in other branches of public administration.

VIII. The motion for prosecutor's notice, the reply of the Prosecutor General's Office and the new decision of the Media Council

In the interest of redressing the controversial situation that had ensued as a result of the judicial review of the above-mentioned decisions of the Media Council, in November 2012 the Media Council submitted a motion to the Chief Prosecutor's Office for prosecutorial action. In this motion, the authority proposed that the Prosecutor's Office launch an investigation *ex officio* and at its own discretion on the basis of the provisions of the Act on the Prosecution Service under its power of the judicial oversight of regulatory procedures against the provision of Point 1 of the operative part of Decision No. 1983/2011. (XII. 20.) of the Media Council not repealed by the court on the success of the tender procedure, and to issue a prosecutor's notice.

In its letter of 17th December 2012, the Budapest Prosecutor General's Office first of all established its power of judicial oversight, but also stated that it was primarily the task of the public administration body involved – i.e. the Media Council in the present case – to rectify any legal violations committed by it. Furthermore, the Court also established that it follows from judgement no. 2.K.27.474/2012/5. of the Budapest Court of Appeal passed in respect of decision no. 1488/2012. (VIII. 15.) of the Media Council that, given the possibility of *ex officio* judicial review, the Media Council may revoke, within its own cognizance, point 1. of decision no. 1983/2011. (XII. 20.), establishing the success of the tender procedure as it had been illegal. The cause of the said illegal situation was that the Media Council had accepted tenders that had not met the necessary formal criteria (as interpreted according to the court decision of March 2012) as valid.

In its letter, the Budapest Prosecutor General's Office also established that “the Court of Appeal had formulated its instruction on the judicial review of the decision aware of the fact that the Media Council had already amended its decision” (page 4 of letter no. T.K.5517/2012/3-I. of the Budapest Court of Appeal). According to the findings of the Prosecutor General's Office, although the Media Council had amended decision no. 1983/2011. (XII. 20.) in respect of its reasoning, the decision on the success of the tender procedure had not been brought under judicial review. According to the letter of the Budapest Prosecutor General's Office, in respect of this latter point – point 1 of the decision – all conditions were given for its revocation within the Media Council's own cognizance, therefore the Council “*may pass the decision at its own discretion without the issue of a prosecutor's notice*”. (According to Paragraphs (1)-(3) of Article 114 of the Act on the General Rules of Administrative Proceedings and Services, if the Authority finds that a decision passed by it that has not been judged by an authority or supervisory body vested with powers to hear appeal cases or by a court of jurisdiction for administrative actions is unlawful, then it shall amend or withdraw its decision within one year from the delivery of the decision, unless such amendment or withdrawal would compromise any right that was acquired and exercised in good faith. That is, according to the interpretation of the prosecutor's office, the possibility of a one-time amendment within one year should be understood separately for each point of the decision rather than the decision as a whole.)

Taking into account the above described contents of the letter of the Office of the General Prosecutor, on the basis of the instructions of the Budapest Court of Appeal's judgement no. 2.Kf.27.053/2012/20 on the adequacy of the formal requirements towards tenders, in decision no. 2295/2012. (XII. 19.) the Media Council established the following.

From the seven tenders submitted during the course of the tender procedure, the Media Council established the formal invalidity of six tenders with final force. As described previously, the Budapest Court of Appeal repealed the point of decision no. 1488/2012. (VIII. 15.) of the Media Council establishing the formal invalidity of Klubrádió Zrt.'s tender without performing any examination or passing any decisions on the merits. In the reasoning of the judgement, the Court of Appeal claimed that, since the part of the decision establishing the formal invalidity of Klubrádió Zrt.'s tender is closely related to point 1 of the decision establishing the frustration of the tender procedure, the Court therefore did not examine the point on the formal invalidity of the said tender.

It is thus evident that the Court of Appeal conducted no on the merits examination in respect of the formal invalidity of Klubrádió Zrt.'s tender because, according to the position of the Court, the illegitimacy of the decision of the Media Council establishing the frustration of the tender procedure entailed, as an incidental consequence, the decision establishing the invalidity of the offer. This illegitimate situation ensued because, following the establishment of the success of the tender procedure by the 2011 December decision of the Media Council, the Media Council could not legitimately have established the frustration of the same procedure.

According to the Budapest Prosecutor General's Office, however, it was possible to remedy this illegitimate situation since decision no. 196/2012. (II. 2.) of the Media Council amending the reasoning of decision no. 1983/2011. (XII. 20.) within the Council's own cognizance had no bearing on point 1 of decision no. 1983/2011. (XII. 20.), therefore the Media Council had not yet reviewed its decision on the success of the tender procedure within its own cognizance. Among other matters, it was on the basis of this that the Budapest Prosecutor General's Office found that all conditions were given for repealing point 1 of decision no. 1983/2011. (XII. 20.), and so the Media Council could lawfully repeal it within its own cognizance.

Therefore, in decision no. 2295/2012. (XII. 19.) the Media Council once again established that the tender submitted by Klubrádió Zrt. was formally invalid for the reasons stated previously, whereby – since there were no valid tenders – point 1 of decision no. 1983/2011. (XII. 20.) establishing the success of the tender procedure was in violation of the law (Paragraph (2) of Article 62 of the Media Act and point 1.11.3.2 of the Invitation to Tender provide that the tender procedure is to be considered as frustrated if all tenders submitted are invalid). Since – with respect to the contents of the letter of the Budapest Prosecutor General's Office – all the necessary conditions were given for repealing the decision, the Media Council repealed point 1 of decision no. 1983/2011. (XII. 20.) establishing the success of the tender procedure within its own cognizance via an ex officio judicial review procedure.

IX. The judgement of the Budapest Labour and Public Administration Tribunal, the closure of the tender procedure

Klubrádió Zrt. submitted an application for the judicial review of Media Council Decision no. 2295/2012. (XII. 19.) to the Budapest Labour and Public Administration Tribunal, the court with competence to review the regulatory decisions of the Media Council as of 1st January 2013, as a result of the reform of the organisational system of the courts. In its application, Klubrádió Zrt. requested that the decision on revocation be repealed and the Media Council be bound to conduct a new procedure in respect of the establishment and announcement of the winner of the tender procedure.

The court examined the decision of the Media Council in the light of whether the authority had proceeded according to the provisions of the previous court judgement, and took, as its “starting point”, the adherence to the directions of the December 2011 judgement of the Budapest Court of Appeal on the first decision of the Media Council on the result of the tender procedure (No. 2.K.27.053/2012/20.). On the basis of this, the court established that the “*new procedure [of the Media Council] should be restricted to the ‘assessment’ of the tenders that remained standing after the establishment of the formal invalidity of the tender of Autórádió Kft., i.e. to passing a new decision on the merits with respect to these tenders according to Paragraph (1) of Article 62 of the Media Act*” (p. 5., Judgement No. 5.K.30.062/2013/7. of the Budapest Labour and Public Administration Tribunal).

Furthermore, in the statement of reasons for the judgement, the court stated that “*the Court of Appeal had provided the directions in the judgement, taking into account that, according to the provision of the base decision not affected by the judgement of the court, the tender procedure was valid*” and besides, “*repealing the provision establishing the winner of the tender procedure only bound the defendant to conduct a new procedure exclusively in this respect*” (pp. 6-7., Judgement No. 5.K.30.062/2013/7. of the Budapest Labour and Public Administration Tribunal). According to the judgement referred to, the Media Council should have passed a decision on the merits closing the tender procedure; however, no such decision had been passed, and “*this (...) in itself, constitutes a substantial procedural violation with bearings on the merits of the case, the gravity of which provides sufficient grounds for repealing the decision*”.

It was only after this that the court examined the legality of decision no. 2295/2012. (XII. 19.), the decision repealing the resolution that established the success of the tender procedure. As opposed to the position of the Budapest Prosecutor General’s Office stated in the letter referred to in the previous section, in this respect the court concluded that the authority had no legal possibility, on the basis of Article 114 of the Act on the General Rules of Administrative Proceedings and Services, to repeal, via an *ex officio* review process, the provision of the decision, the reasoning of which had already been modified earlier. According to the decision of the court, during the course of the new procedure to be conducted by the Media Council with priority, the Media Council is required to fully adhere to, but not to go beyond, the content of the judgement of the Budapest Court of Appeal referred to previously. According to the position of the court, furthermore, the protraction of the tender procedure and the lack

of its closure on the merits may result in a situation violating fundamental principles, which also calls for passing the decision on the merits of the case as soon as possible.

(On the basis of the above it may be seen that the public administration and labour tribunal reviewed and repealed the most recent decision of the Media Council solely on a procedural law basis, without conducting any on the merits examination of, nor providing a position on and legal assessment of, the formal validity or invalidity of the tender of Klubrádió Zrt.)

The court repealed decision no. 2295/2012. (XII. 19.) and set a single, clear and unambiguous duty for the Media Council: to pass a decision on the merits regarding the winner of the tender procedure during the new procedure to be conducted with priority. From among the seven submissions made to the invitation to tender in August 2011, the final decision of the Media Council established the formal invalidity of six, therefore, at the time of the judgement of the labour and public administration tribunal, Klubrádió Zrt. alone qualified as a client in the tender procedure.

With respect to the above, decision no. 406/2013. (III. 13.) of the Media Council – adhering to the directions contained in the judgement of the labour and public administration tribunal – established that the winner of the tender procedure was Klubrádió Zrt., the only tenderer that qualified as a client in the repeated tender procedure, and initiated the procedure for the conclusion of the public contract.

Within the 45 day deadline available for the conclusion of the contract on the basis of Paragraph (1) of Article 63 of the Media Act, on 2nd May 2013 Klubrádió Zrt. and the Media Council concluded the public contract according to the bid submitted by the winning tenderer and the provisions of the invitation to tender.

Budapest, 10th May 2013