CONSTITUTIONAL QUESTIONS OF THE NEW HUNGARIAN MEDIA REGULATIONS

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List of abbreviations

AVMS Directive – Directive 2010/13/EU (the Audiovisual Media Services Directive)
Data Protection Act – Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest
Administrative Proceedings Act - Act CXL of 2004 on the General Rules of Administrative Proceedings and Services
Media Act - Act CLXXXV of 2010 on Media Services and Mass Media
Hungarian Media Authority - the National Media and Infocommunications Authority (the current media and infocommunications authority)
Media Council - the authority overseeing the media market
ORTT - National Radio and Television Commission (the former media authority)
The Hungarian Code of Civil Procedure - Act III of 1952 on the Code of Civil Procedure
Radio and Television Broadcasting Act - Act I of 1996 on Radio and Television Broadcasting (not in effect)
The Press Freedom Act - Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content
The Press Act - Act II of 1986 on the Press (not in effect)
Competition Act - Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition

I. Introduction

One of the sad experiences regarding the professional debate surrounding the new Hungarian media regulations (Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content, hereinafter: the Press Freedom Act and Act CLXXXV of 2010 on Media Services and Mass Media, hereinafter: the Media Services Act) is that a large majority of the opponents criticizing the new laws on theoretical bases believe that they possess unquestionable wisdom and know the only possible path that would lead to a democratic, constitutional media legislation. Their comments charged with serious statements disregard possible counterarguments and the different views crystallized in the course of the centuries long debate over the principle of the freedom of the press. These modern critics depict freedom of the press as a one-dimensional right, where the press is free, and the duty of the state is to leave this right undisturbed. According to this view, the state can take part merely in the enforcement of the general restrictions of the freedom of opinion with respect to the press and the media.

In contrast, the authors of this study believe that the freedom of the press could have – in a manner influenced by a given country, continent, and cultural environment -, more than one, contradicting but well-founded, defendable interpretations. The freedom of the press is not a full, unrestricted right anywhere, not even in the United States. In other words, if we state about a country that they observe the freedom of the press, but at the same time, they have laws and regulations restricting the movement of the press, with this, we accept that the freedom of the press is associated with the definition of necessary restrictions, and regulating the press does not automatically mean a violation of its freedom.

The new Hungarian media regulation received several criticisms in Hungary and abroad. Among these, the most unrealistic accusations were also made, sometimes even by representatives of the profession. This study makes an attempt to focus on, and respond to, the criticisms that can be taken seriously. The authors do not mind at all if after reading this study, somebody would not be persuaded that their view is correct. We apologize if some important criticisms were left out, because although we strived to address all, it was obviously an illusory goal.

This study argues for the so called democratic view of the freedom of the press and regards from this perspective the new Hungarian media regulation as constitutional, but the authors do not view its content as indisputable wisdom. However, they believe that the new Hungarian media regulation was born clearly based on this democratic view of the freedom of the press, and the Hungarian Parliament had the right and opportunity to make this decision – to select from the different views of the freedom of the press – and what is more, we can find several theoretical arguments to support this decision.
We believe that the media regulation of a given state cannot be understood based solely on the letter of the relevant laws, but familiarity with the related constitutional, administrative, judicial, and sometimes international law practice and experience is also necessary. Our study made an attempt to employ such a complex approach when weighing the constitutionality of the disputed provisions.

We wish to note that this study works with the effective text of the amended statute (Act XIX of 2011) resulting from the Government consultations with the European Commission and makes references to the text before the amendments only when necessary. Before each section, we provide a short summary of the section in a box.

II. A possible interpretation of the freedom of the press

The freedom of the press is quintessential for the functioning of the democratic public sphere. In the course of this, the state – if necessary and to a reasonable extent – has the right and means, and what is more, the obligation to intervene with the instruments of media regulation in the operation of the media market. The exercise and concept of the freedom of the press, because of its nature, is different from the right and concept of the freedom of opinion, and thus, the level of its regulation can be also different.

According to the democratic freedom of opinion theories, the freedom of opinion can be considered as one of the fundamental rights because of its role in free and cooperative decision-making. Being the field of the most effective exercise of the freedom of opinion, the media has a definite importance. The debate can be conducted in the forum it provides. And

the media is the number one venue for obtaining and providing information. On the one hand, the media keeps the state under continuous check, and on the other hand, ensures that individual citizens have access to relevant information, and that – with certain restriction – they sound their voices and participate in the debate.

Proponents of the individualistic view believe that the freedom of the press does not mean more than the right of media professionals and owners to exercise without restrictions their right to the freedom of opinion. According to this view, the freedom of opinion is nothing else but one of the instruments of individual fulfilment, one of the especially valuable, and thus, more protectable, expressions of individual autonomy. In comparison, the freedom of the press does not represent a difference *in its quality* and it does not carry different content but merely increases the effectiveness of the expression of opinions. If, however, we evaluate the freedom of opinion from the perspective of the audience (viewers, listeners, and readers) and not of the speakers, ensuring their autonomy requires that to the extent possible, all relevant information reach them: thus, the free press may have obligations in the area of information.

The freedom of the press cannot be considered identical with the basic case of the freedom of opinion, and it does not mean the same freedom enjoyed by the soapbox speaker or a speaker in Parliament.[1] According to this view, the freedom of the press is not an individual right but is the right of the media as an institution. The persuasive and oft-cited article discussing this theory was written by Potter Stewart, a justice of the Supreme Court of the United States.[2] So, the right is an institutional right protecting not the individual working for a media outlet (who, of course, is also entitled to his individual freedom of opinion) but the institution, and, therefore, the institution has additional rights and obligations as well. According to this view, the freedom of the press is clearly a tool, thus, an instrumental right, whose objective is to advance public interest with information and idea exchange, and provision of forums for communication before the public.[3]

William Brennan – also a justice of the US Supreme Court – in one of his speeches stated that he does not view the freedom of the press as a right that cannot be broadly restricted, unlike the freedom of opinion. As he says, the press must be aware that the nature of its work is such that it has to be considerate of multiple, even possibly conflicting interests, and it has to meet certain – community entailed – obligations.[4] Even authors, otherwise representing views that consider individual autonomy with regard to the freedom of opinion as a primary value, emphasize the instrument-like role and institutional nature of the freedom of the press. Edwin Baker in his "liberty model" describes the freedom of opinion as the individual's justifiable right that cannot be restricted, but he does not extend this principle to the freedom of the press. As he argues, because of its institutional nature, since in the course of its operation the

[1] Owen M. FISS: Free speech and social structure. *Iowa Law Review*, July 1986. 1405; Geoffrey MARSHALL: Press freedom and free speech theory. *Public Law*, 1992. 40.
[2] Potter STEWART: Or of the press. *Hastings Law Journal*, 1975. 631.
[3] See, e.g. Randall P. BEZANSON: Institutional speech. *Iowa Law Review*, May, 1995. 823.; Eric BARENDT: Inaugural lecture – press and broadcasting freedom: does anyone have any rights to free speech? *Current Legal Problems*, 1991. 79.; Frederick SCHAUER: Towards an institutional First Amendment. *Minnesota Law Review*, May 2005. 1256.
[4] William J. BRENNAN: Address. *Rutgers Law Review*, 1979. 173.

individual's right to self-expression becomes marginal and primarily other (financial) interests dictate, the individualistic approach no longer makes sense.[5]

The media regulations of some European states have certain content requirements, for example balanced coverage, broadcasting of public service programming, and advertising restrictions. European public view trusts in the state and believes that a certain level of legal regulation – of course, with appropriate safeguards protecting freedom – is necessary. It follows that in the media (especially, in the area of electronic media) in the case of negative programming standards (such as hateful expressions and protection of morality), the standard of protection – in the name of social responsibility – may be lower than in the "basic case" of the freedom of opinion.

According to a possible, simplified, and schematic model of the struggle for the freedom of the press, the participants of the bout include, on one side, the heroes fighting for the rights proudly sacrificing their lives and blood, and, on the opposite side, the ruthless and oppressive machinery of the state.[6] According to the conviction of people thinking in this model, the early philosophical foundations of freedom – which, of course, only claimed the provision of the freedom of the press in opposition with the state – are exceptions even today and are valid without alteration. What is more, during the centuries passed, they could not add anything new to it. According to the final conclusion, enemy number one of the freedom of the press is still the state, which has to be deprived by any possible means of the slightest chance of intervention. Although, the more critical authors note that in the course of the operation of the media, there are signs, which confirm the existence of private censorship, but even the imaginable most serious level of this can be rather accepted than the mildest intervention by the state (beyond the necessary market regulation).

The interpretation of the freedom of the press, forming as the result of the debates, is multi-dimensional, and many different interests must be taken into account when analyzing it. The sharp dividing line, if we view the question in a simplified manner, is between the supporters of free market and the supporters of state intervention, but several different shades of these thoughts exist on both sides. Many supporters of the free market trust in the market not because they consider the media as goods to be sold like, say a nail polish, but because they regard with concern all roles of the state that influence the operation of the media. They may be precisely aware of the imperfection of the market, with the dangerous effects of the logic of the market on the freedom of the media, but they do not consider even this price too high for keeping the state at a distance. Others, with blind faith in the market – or perhaps with a good portion of cynicism – believe that the market is omnipotent: with rules created for itself, it ensures the best possible and most effective operation of the media, satisfying private and public interests concurrently. Adamant present day supporters of *laissez faire* want to maintain the arguments of 19th century early liberalism, in a slightly modified version but relentlessly advocating them, and the fundamental values defined there and then (liberty, individualism, autonomy, opportunity, progress, etc.) in opposition to the state and in the safety of unaltered safeguards, for the protection of the now already significantly stronger private sector and multinational companies, which rise above national borders and state

[5] Edwin C. BAKER: *Human liberty and freedom of speech*. New York-Oxford: Oxford University Press, 1989., esp. at 229, 233.; ibid: Press rights and government power to structure the press. *University of Miami Law Review*, 1980. 819.

[6] John DURHAM PETERS: *Courting the Abyss – Free speech and the liberal tradition*. Chicago-London: University of Chicago Press, 2005. 14–22.

interest with unparalleled ease. With the words of Clinton Rossiter, this is nothing else but the "great train robbery of intellectual history."[7]

However, the operation of the media inherently in the realm of private autonomy and claiming for itself simultaneously several fundamental human rights (freedom of the press, property rights, freedom of entrepreneurship, etc.) is being regulated exactly for the protection of the original meaning of liberty. Although, prohibition of press monopolies, the positive and negative content regulation in the public interest, and the measures aimed at protecting culture doubtlessly restrict the scope of operation of the media, in reality, they are not the constraints of liberty: to the contrary, they serve to repair the concept of liberty possibly deformed by the private sector.

The models of the freedom of the market and public forum are in fundamental and irreconcilable conflict with each other. The market proclaimed of itself that it improves efficiency, facilitates quick reaction time in response to changing circumstances, creates feedback methods (for example, by measuring media consumption), in other words, it does not isolate the audience from the influence of the media; the freedom of enterprise and the lucrative material gains guarantee technological and content development, which of course indirectly also serves the public interest. However, the market is not democratic the least but is the battlefield of ruthless struggle, where the enterprises with strong capital bases dominate, and moral considerations do not play any role.[8]

In the course of historical developments, the negative character of the right to the freedom of the press was emphasized, which right was identified then as the *prohibition of censorship*; a corresponding view is that the abolition of "preliminary control" would result in the total freedom of the media. Shortly after the adoption of laws eliminating censorship, this view had to be re-evaluated. However, influencing the freedom of the press from the outside is possible to a much broader extent than by merely restricting publication. The media market is much more restricted compared with other enterprises. In order to prevent that catering information to the public become the monopoly of a few, the law regulates the obtaining of property rights associated with media services and press products, defining a limit beyond which the same owner is not permitted to obtain additional rights. With the state financing the pubic service media, free competition suffers further restrictions. All these rules, of course, have an indirect effect also on the content transmitted by the media.

Interference with the freedom of the press is possible not only externally but also *internally*. This phenomenon stems from the business nature of the media. It is a fundamental truth that the media, which is a rather expensive pastime, is financed not by the readers, viewers, and listeners but by its advertisers. Logically, the following conclusion can be drawn from this: approaching the issue from a business perspective, the "goods" offered for sale are not the newspaper articles and programs produced by the media. If this was the case, the media - at least in its present form and extent - would not be able to support itself. The "goods" are actually the *viewers*, the *listeners*, and the *readers*, who are offered to the advertisers - the larger the number, the higher the advertising fee. Thus, popular products must be offered almost as *bait* to attract many future costumers and turn them into the consumers of the media

[7] Clinton ROSSITER: *Conservatism in America*. (second edition) New York: Vintage Books, 1962. 128.
[8] David CROTEAU – William HOYNES: *The business of media – Corporate media and the public interest.* Thousand Oaks-London-New Delhi: Pine Forge Press, 2006. 17–26.

and with this, of advertisements. The advertisers - who can only be really large companies in case of the most important media outlets due to the high costs - are the primary controllers of the entire process, even if their influence remains only indirect. And on the market, where a lot of money is at stake, the rules are tough: advertisers like to see their advertisements in a media environment they deem satisfactory, possibly together with programs that are popular, non-controversial, entertaining, airing peace and tranquillity, or perhaps - without real stakes - generate excitement and suspense. Variety shows, television series, game shows, magazine shows, and action movies are perfect for these purposes, but programs dissecting real societal problems, fact finding documentaries, programs channelling culture of higher standard, or shows appealing to only a smaller segment of society are less suitable for such functions.[9] This results in the almost complete *homogeneity* of the selection of competing program flows, in which significant deviation (because of the risk of losing customers) cannot be observed. Free competition that provides the possibility for the operation of several competing media outlets, increases only the *quantity* but not the *variety* of programming. Our opinion is that the media market on its own is not necessarily able to guarantee the diversity of programming - it is enough to take a look, for example, at the Hungarian television market. At the same time, it is also true, that diversity can be facilitated directly with regulation only with difficulties and to a limited extent.

And the competition for customers is becoming more intense, the converging media is more and more interwoven with everyday life, and, in the meantime, public debate and societal "*discourse*" is slowly fading away.[10] The advertisers categorize their customers (the target group) based on their financial situation (purchasing power), convincibility, and other such factors that can hardly fit the democratic principle of "one person - one vote."[11] Nonetheless, internal "*private censorship*" that subordinates everything to profit maximization - which can equally stem from the personal interests of the proprietors or employees of the media as from political conviction - cannot be identified with external censorship. In the former case, there is no arbitrariness involved or even otherwise justifiable external intervention using regulatory safeguards to limit its extent. Censorship, by the way, has long since disappeared in constitutional states. However, its new form, private censorship indirectly deployed by business interest groups commissioning the advertisements has the same effect, just as its original, late "stepbrother" expressly coming into being by external force, can significantly impede or even prevent the fulfilment of the media's public interest obligations. It is worthy to turn to Jürgen Habermas, according to whom "...as newspapers develop into capitalist enterprises, interests outside the industry gain control over it, and these forces try to influence it. The history of big daily newspapers in the second half of the 19th century proves that the press to the extent of its commercialization, can itself become subject to manipulation. Since the sale of the editorial section is in interaction with the sale of the advertisement section, the press, which to date was the institution of private individuals as audience, is becoming the

[9] Robert W. MCCHESNEY – Ben SCOTT (editor): *Our unfree press – 100 years of radical media criticism*. New York: New Press, 2004. 119–176; Edwin C. BAKER: *Advertising and a democratic press*. Princeton University Press, 1994.
[10] Ronald K. L. COLLINS – David M. SKOVER: *The death of discourse*. Carolina Academic Publishers, 2005.
[11] Owen M. FISS: *The irony of free speech*. Cambridge, Massachusetts: Harvard University Press, 1996. 54.

institution of certain members of the audience as private individuals - the gate through which privileged private interests can infiltrate the public sphere."[12]

Behind the birth of public opinion or, in other words, the civil public sphere, lies the development of market economy. The gradually emerging middle class rejected the prevailing authority of the aristocracy; they demanded participation in decisions concerning public matters. The category of public opinion is important for us because democracy that is considered the only acceptable form of society can only function through it. If we fail to discuss "public" affairs in the various public institutions, if the citizens fail to reach out to each other through various forums, if these forums fail to provide minimally required cohesion between the members of society, than - although the laws may be passed by the Parliament based on public representation - the community is not living in a democratic system.

The most prominent supporter of the state intervention in the areas concerning the freedom of the press is without doubt Professor Cass Sunstein of Chicago. His study summarizing the problems of modern age freedom of opinion is an indictment against the free market of ideas.[13] In his book, Sunstein demands a second New Deal, because according to his realization, the media not only fails to lend a helping hand but actually undermines the functioning of democracy. The conclusions of the book focusing on the United States should be taken into consideration in Europe, too. The main problems troubling the author are not new: in proportion to the full expansion of commercial media diminishes the hope for the education of active citizens playing a decisive role in representative democracies. According to the professor, they should quit in the US the stubborn resistance that prevents state intervention - because the strict restrain is only strengthening the status quo, i.e. the ever growing media empire. In certain cases well fortified with firm safeguards, the state is indeed able to promote freedom. Borrowing the metaphor of the market, the foundation of representative democracy is that from time to time citizens give mandate to representatives from among themselves to manage the affairs of the community and make decisions. Obviously, during elections, average citizens generally have less information at their disposal compared to those running for office. The political elite will always be more informed than other members of society. This *information deficiency* should be balanced by the media to the extent of its available means - because the decision of the citizens is irreversible and irreparable. The current system, however, does not guarantee the publication of available views and information, because the public debate is not at all important for the majority of media outlets, and what is more, it would be an explicitly burdensome task. András Sajó reviewing Sunstein's book exclaims with surprise: "Whether »democracy can be still built« with the consumers of mass communications, has been an undecided question for decades and is a source of concerns. In fact, it is a true miracle that political democracy is still functioning despite so many and such television programs."[14]

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[12] Jürgen HABERMAS: *The Structural Transformation of the Public Sphere*. (Third edition) Budapest: Osiris, 1999. 270–271.

[13] Cass R. SUNSTEIN: *Democracy and the problem of free speech*. (second edition) New York: Free Press, 1995. About the media see esp. 53–92.

[14] András SAJÓ: Hírpirítós és sajtótisztesség. Kelet-európai megjegyzések Cass Sunstein könyvéhez [News Toast and Decency of the Press. Eastern European Comments on Cass Sunstein's Book]. *Világosság*, 1995/3. 34.

What is ultimately the concept of the freedom of the press? Would A. J. Liebling be right, according to the *bon mot* of whom, "freedom of the press is guaranteed only to those who own one"?[15] Not at all. It can also be observed in the case of the fundamental right of the freedom of opinion that the law protects political communications and public communications to a greater extent than those not willing to contribute to decisions relating to public affairs. This principle applies exponentially in the case of the media and may lead to new conclusions. Opinion with public content not only receives enhanced protection in the media, but also, in addition, the media even has to contribute - in an active manner - to the conducting of the public debate. This is because the freedom of the press "cannot be unlimited without contradicting the moral foundations that justify its existence."[16] At the same time, the proper interpretation of the freedom of the press is a "matter" of laws and regulations and their application only to a certain extent; the law has only limited resources to spur the media to fulfil its responsibilities of public interest.

III. Regulation of print and online press - the material scope of the statutes

The print and online press similarly to media services are components of the functioning of the democratic public sphere, thus, certain fundamental rules may be applied or prescribed with respect to them also. The reason for this should not be sought necessarily in their potential effect on the readers. Similarly, the scarcity of resources cannot justify their regulation either. The primary justification for the intervention of the law is to ensure compliance to the fundamental "rules of the game" - manifesting in obligations of negative nature - of the public sphere to ensure its appropriate (democratic) functioning. The main issue is not whether restriction of the press may be appropriate but whether the scope of these restrictions is sufficiently narrow and whether the necessarily generalizing legal norms have constitutionally acceptable range of interpretations.

Such interpretation of the concept of the freedom of the press explained above that contains the interest of forming the democratic public opinion can be generally applied to the players of the media market. It clearly follows also from the traditions of the history of media regulation that the regulations have to differentiate between the (print and Internet) press and the electronic media (traditional television, radio, and on-demand media services). The new Hungarian laws were drafted to comply with this requirement. In spite of this, according to one of the most common criticism raised, any regulation and official oversight of the press is a serious mistake.

According to the almost unanimous opinion of critics, it was a mistake to ignore the theory of "*media effects*" when drafting the regulation; although the regulation of media services having a stronger effect because of the moving pictures and sounds can be justified to a certain extent (although some authors also question the effects of these on the audience), but the regulation of press products cannot be explained with this.
One could even agree with this criticism if indeed the theory of media effects would be behind the regulation as its theoretical foundation. However, this is not the case. The new laws prohibit, for example, the violation of human dignity for all media content providers, because the legislature thought that if this rule is not included, those exposed to the content

[15] A. J. LIEBLING: *The press.* (third edition) New York: Pantheon Books, 1981.
[16] John LAWS: The limitations of human rights. *Public Law,* 1998. 265.

violating human dignity would suffer irreparable damages or inspired by that content, they would commit similar violations themselves in the future. And, although, the regulation pertaining to media services is rather differentiated, it cannot be said even about the additional rules pertaining to the latter that their existence is justified because of the more significant effects of media services on the audience. The restriction of commercial communications are justified by general consumer protection considerations, the requirement of program quotas serves the preservation and enrichment of Hungarian and European culture, the reasons for protecting minors are obvious, and the regulation of exclusive broadcasting rights is related to consumer protection also. In other words, even in the course of the creation of media services regulations, achieving greater effect is not the main and especially not the only theoretical starting point.

The new regulation prescribes - differentiated - obligations for all players of the media market (media services as well as press products), because it wishes to protect through this the "public consultations" and public debates conducted through the press and the media; based on the logic of the regulation, the press can only become a "functioning" (i.e. capable for meaningful debates and respecting others' rights and freedom) public forum by respecting certain minimal rules. There are no retrograde or dictatorial views behind this idea: general freedom of opinion is also restricted by limitations protecting open public debate and, thus, the rights of others (and only a few realize that, e.g., the privacy protection rules or the unconstitutionality of the crime of incitement against the community would result from the state's obligation to guarantee the freedom of opinion). On the media market, because the contents published there are *different in quality* from the contents published by practising - not in the media - the freedom of opinion, sometimes stricter, sometimes more lenient, rules apply (in contrast with the civil code, for example, good reputation in the media regulation is only protected by the institution of press correction). The public conference, however, can take place on a platform provided by any player of the media market, and the fundamental rules may be prescribed for everybody, as the interest in providing a "functioning" public forum is independent from how many people use the given forum at the time, or what effects the content published there have on them.

Another group of the criticisms cannot overcome the argument of *narrowness*. Based on the concept of narrowness that was traditionally treated as a basic standard in media regulation, one of the reasons of regulation was the naturally finite number of resources (analogue frequencies), and the state's obligation stemming from this to manage the media market. However, today - at the eve of transition to digital technology and in the world of the Internet - the narrowness argument should be forgotten. Although, today approximately one-fifth of Hungarian households can only follow three television broadcasting services, the other four-fifth have access to a number of other media services. Today, narrowness cannot be, and is not, the basis of regulation. However, it is worthy to take a look at today's Hungarian media market: the large number of players - neither on the market of press products nor on the market of media services - brought automatically the anticipated diversity. It is a false claim according to which, today's Hungarian media market is diverse; especially, the structure of the television market is distorted, as the various media services copy each other, and, thus, they are barely different from each other, while the pubic service media, which in theory could serve as a counterbalance, has been marginalized. At the same time, promoting diversity in the market can be the responsibility of media regulation only to a certain point (limiting concentration of ownership, or by requiring balanced coverage).

It is important to emphasize that the content of the new regulation is negative regarding the press (i.e. prescribing constraint), and it defines concrete content requirements enforceable against the individual press products (human dignity and human rights, prohibition of the violation of constitutional order and privacy, prohibition of hate speech, rules for the protection of minors, and certain advertising restrictions). In contrast with the regulation of the electronic media, in their case the regulation does not oblige them for any active conduct. (Only certain advertising rules are the exceptions; see Article 20(1)-(2) and (8) of the Press Freedom Act.)

If we accept the concept of the freedom of the press explained above as a starting point and consider the press (also) as one of the instruments of mass communications, then it is a true statement that the press has certain public responsibilities and some of its obligations stemming from these responsibilities can manifest in legal regulations as well. Based on the differentiation respecting the historical traditions and enforced by the new media regulation, these must not be some norms forcing active conducts, but certain obligations of negative nature - fundamental "rules of the game" - may be prescribed that are necessary for the functioning of the democratic public sphere.

According to Decision No. 37/1992 (VI. 10.) AB of the Hungarian Constitutional Court, "*Article 61 of the Constitution guarantees, on the one hand, the subjective fundamental right to the expression of opinion, and, on the other hand, the state obligation to provide for the conditions and functioning of the development of democratic public opinion.*" It follows from the theory of social responsibility that the press is obligated to respect human dignity, constitutional order, and it has to respect other responsibilities as prescribed by law. These can be such fundamental norms that serve the formation and preservation of democratic public opinion, or such issues over which there is almost full social consensus (protection of minors), or - in principal, with a fundamental rights approach also less debatable - consumer protection-like rules in nature (advertising rules). We believe that for the sake of the functioning of democratic public opinion, certain basic rules may be adopted with respect to every players of the media market.

It also follows from the concept of the freedom of the press explained above that the issue is not whether restriction of the press may be appropriate but whether the scope of these restrictions is sufficiently narrow and whether the necessarily generalizing legal norms have constitutionally acceptable range of interpretations. If the answer to these questions is *yes*, than it logically follows that the narrow norms that can be constitutionally interpreted may be monitored within the scope of official oversight. Actually, Decision No. 30/1992 (V. 26.) AB of the Constitutional Court ruled that "*the right to free expression of opinion has to yield only to a few other rights, in other words, laws restricting the freedom of opinion must be narrowly construed.*" Considering that - although, based on our earlier arguments, the standards for the freedom of the press and the freedom of opinion may be different - restriction of the freedom of the press results obviously in the restriction of the freedom of opinion, and, thus, the media authority must narrowly interpret the norms prescribed by the media regulations.

Some critics raise concerns separately regarding the freedom of the Internet. First, these disregard the fact that the Internet has been regulated even before (naturally, the entire Internet is subject to the Civil Code and Criminal Code, as well as Act CVIII of 2001 on Certain Issues of Electronic Commerce Services and Information Society Services). Although, many believe that the new media was born to be free and it cannot tolerate any

censorship or oversight authorities, in case this view was accepted, for example, the fight against pedophilia on the Internet would not make any sense at all either.
Such "romantic" view of the freedom of the Internet is debatable. The thought, which is integral part of this view, is also worthy to debate, according to which the Internet had transformed social communication to such an extent based on which any form of media content regulation is unjustified. In other words, since the Internet "subverted" previously well identifiable - and regulated - traditional forms, and a portion of social publicity was transferred into the online world, hence, the regulation of traditional media outlets became obsolete, because it does not make sense to regulate the more and more marginalized media, while the free World Wide Web is flourishing.
Today, we cannot know to where the path of the developments of the media world leads. What is sure, however, is that during the history of human kind, no new medium sidelined entirely the older one: the radio did not destroy the press and the book, and the television did not eliminate the interest in radio communications. It should be not forgotten either that the majority and dominant portion of Hungarian society obtains its information from traditional media outlets to date, and, although, the present and future of the Internet is appealing, it has not yet taken over the dominance in influencing the social public sphere.
The unregulated marketplace of ideas does not operate perfectly on the Internet either. The competition for customers is tough on the World Wide Web, too. In this competition, arguments for the non-regulation of the Internet and the objective to preserve the "untouched reservation of democracy" are no longer relevant. Players with greater material resources have a huge advantage on the World Wide Web also.[17] The most frequently visited web pages are the properties of such companies that are dominant players of the market outside virtual reality, in the real world, too.[18] These company giants and media empires try to transform the World Wide Web to their own images, and although, because of the character of the medium, they probably will not succeed ever, they may achieve at least that much that they restrict the Internet use of broad masses to contents provided by them. The portion of the Internet that can be included in the definition of "press product" should be regarded as a forum of public conferences similarly to print newspapers; the possible difficulties of legal enforcement in itself cannot provide a sufficiently strong case against regulation.

The press in some manner, and to some extent, is regulated in every European state. In some places this method is self-regulation, and in others the state or an organization established by the state (authority or court) exercises this responsibility. But there is regulation everywhere. The system of "clean" self-regulation has many advantages, where they attempt to apply solutions outside the law - and thus the state - to resolve problems, but this solution also have numerous critics. But it is important to note that in Hungary no culture and mechanism of self-regulation whatsoever has developed since 1989. If this was otherwise, assumingly, the new statutes would also look entirely different in this respect.

It is also important to note that there was a press legislation before January 1, 2011, Act II of 1986 on the Press (hereinafter: the Press Act), with all of its contradictions and constitutionality problems. This law also provided for certain content requirements for the press, but it did not assign to them monitoring mechanisms. In Decision No. 34/2009 (III. 27.)

[17] Seth F. KREIMER: Technologies of protest: insurgent social movements and the First Amendment in the era of the Internet. *University of Pennsylvania Law Review*, 2001. 119.
[18] Andrew CHIN: Making the World Wide Web safe for democracy. *Hastings Communication and Entertainment Law Journal*, 1997. 322–325. and 328–329; James CURRAN – Jean SEATON: *Power without responsibility*. London-New York: Routledge, 2003 (sixth edition). 248–250. and 281–282.

AB, the Constitutional Court ruled that "*without encroaching on the authority of the legislative power, the Constitutional Court wishes to emphasize that Article 3(1) of the Press Act sets forth the fundamental principles of the exercise of the freedom of the press for the legislature and judiciary as a guidance. Thus, it cannot be ruled out that the legislature assigns certain sanctions to the violation of concrete legal rules based on similar provisions of fundamental principles...*". Thus, the existence of an independent press law - containing concrete obligations - is accepted based on constitutional grounds, too. It is the result of a decision by the legislature whether the Parliament tasks an independent organization (an authority) with the monitoring of these or it refers the decision of legal disputes directly to the courts (of course, the administrative proceedings could end up before the courts independent from this).

"Platform neutrality" is a fashionable expression in the media regulation. This means that the regulation pertaining to the individual media outlets is getting independent from the content distribution method. But if we accept that television contents must be regulated independent from whether they are broadcasted via analogue frequency, cable, or satellite, than why could not we accept that the interest in human dignity can be protected with respect to every media service and press product serving mass communications?

According to Decision No. 30/1992 (V. 26.) AB, "*thus, it is not enough in itself for the constitutionality of the restriction of fundamental rights that it is imposed to protect another fundamental right or freedom or to realize another constitutional objective, but it is necessary that the restriction meets the requirement of proportionality: the importance of the objective to be realized and the weight of the violation of the fundamental right caused in order to achieve this objective are in appropriate proportion with each other. In the course of the restriction, the legislature is required to use the least restrictive means. It is unconstitutional to impose restrictions on the substance of the right without compelling reasons, arbitrarily, and disproportionately to the objective to be achieved.*" From the view point of the media outlet against whom a complaint was filed, an administrative proceeding is necessarily more lenient and less restrictive than if the complaining party could only file the case with the courts, because an administrative decision can always become a subject to judicial review, thus, the case is reviewed by more tribunals independent of themselves and from each other. Although, in principle, it is possible that based on a statement published in a press product or media service, criminal, civil, or administrative proceedings can be filed; in other words, in certain cases the official oversight of mass communications forums may increase the number of potential proceedings that can be initiated. However, first of all, the media authority looks at the legality of the communication at issue from a fundamentally different perspective (we will talk about this later in more detail), and secondly, in the course of exercising its enforcement activities, the authority cannot extend its jurisdiction as stipulated by the statute, i.e. it cannot exercise judicial powers.

It is worthy to note - refuting with this, too, the argument in connection with the by itself restrictive effect of simultaneous proceedings - that the content requirements contained in the Press Freedom Act are not required in these forms by other branches or areas of the law. Criminal law does not recognize the violation of human dignity as an independent crime, and civil jurisprudence - although it appears in the Hungarian Civil Code as an independent individual right - rarely references it either (not to mention that the civil law and constitutional law concepts of human dignity are different). In general, privacy is not protected either by the legal system, just as hate speech has an entirely different meaning under criminal law than in

the media regulation. The protection of the constitutional order as a restriction of the freedom of opinion does not appear in any other laws or regulations. Thus, it is not true that the causes of action of the Press Freedom Act redundantly "duplicate" rules already existing in the legal system.

The material scope of the Press Freedom Act and the Media Act

The material scope of the Press Freedom Act and the Media Act covers linear media services (traditional radio and television), on-demand media services, as well as print and online press products. Under the statute, the content of the above services is collectively referred to as "media content" and the individual service providers and publishers are collectively referred to as "media content providers". The content offered by all media services and in press products is considered as media content.

The concept of the media service includes four clearly distinct elements:

- as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, independent business-like service provided on a regular basis, for profit, by taking economic risk,
- for which a media service provider bears editorial responsibility,
- with the primary aim of delivering programs to the general public for information, entertainment, or educational purposes,
- through an electronic communications network.

Linear media services are media services "provided by a media service provider for simultaneous viewing of programs on the basis of a program schedule" and in case of on-demand services, "the user may view or listen to programs at the moment chosen by him/her and at his/her individual request, on the basis of a selection of programming selected by the media service provider." The statutes essentially adopt word by word the definitions under Article 1 of the AVMS Directive. At the same time, the definition of press product - which is not covered by the Directive - also aims to conform with the definition of media service to the greatest extent possible.

Accordingly, press product means:

- individual issues of daily newspapers and other periodical papers, as well as Internet newspapers or news portals,
- any independent business-like service provided on a regular basis, for profit, by taking economic risk,
- and for the content of which a natural person or legal entity, or a business entity with no legal personality has editorial responsibility,
- with the primary aim of delivering textual and/or image content to the general public for information, entertainment, or education purposes,
- in printed format or through an electronic communications network.

It is important to note that when applying the concept of linear and on-demand audiovisual media services, the commentary in the preamble of the AVMS Directive (Recitals 21-24) should also be taken into consideration.

Accordingly, those services may be considered as audiovisual media services, which

- are intended for a significant part of the general public, and
- may clearly influence it.

The services may not be considered as audiovisual media services, which

- are primarily not of an economic nature, and
- are not competing with television broadcasting.

Furthermore, those services may not be considered as audiovisual media services either, which have a

- primary objective different from broadcasting, including also those, which may contain audiovisual content, but this is not the primary objective of the service.

On demand audiovisual media services

- are similar to television services, i.e. they compete for the same audience as television broadcasts,
- the concept of "program" should be interpreted dynamically, taking into account the developments in television broadcasting.

The scope of the AVMS Directive does not cover press products; however, the quoted commentaries may be of assistance for the accurate interpretation of the latter concept. After examining certain criteria of these concepts, it can be clearly established that private or company websites and Internet blogs featuring both text and embedded video content are generally not covered by the statute. In the course of the amendments resulting from the consultation with the European Commission, the term “economic service” was clarified in the concepts of both media services and press products (and thus it can only mean “independent business-like service provided on a regular basis, for profit, by taking economic risk” economic services), and with this, the interpretation also mentioned before was also clarified, according to which Internet blogs - including blogs featuring advertisements but not qualified as economic services - are not governed by the statute.

IV. Geographical scope (Article 2 of the Press Freedom Act and Articles 1-2 of the Media Act)

The regulation pertaining to the geographical scope of the Press Freedom Act and the Media Act does not violate Union law at all, but, what is more, it codifies the relevant provisions of the AVMS Directive and jurisprudence of the Court of Justice of the European Union.

Pursuant to the Press Freedom Act and the Media Act, the Authority may act in connection with the media services or press products of media content providers established in Hungary or media services or press products directed towards Hungary. The starting point, according to which, services directed towards Hungary - but which are not under Hungarian jurisdiction - cannot be regulated at all by statute enacted by the Hungarian state is wrong; this view contradicts many EU directives regulating various areas (among others, in the area of media administration, Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, and in the area of infocommunications directives regulating the infocommunications framework).

Pursuant to Article 176 of the Media Act, linear audiovisual media service providers established in other Member States may be sanctioned if their media services infringe the requirements pertaining to the protection of minors or the prohibition of hate speech. This rule is the adoption of Article 3(2) of the AVMS Directive.

Article 177 of the Media Act provides for measures against on-demand audiovisual media services established in other Member States, if certain conditions - contained in, and adopted from, Article 3(4) of the AVMS Directive - are met.
Article 178 of the Media Act defines possible measures against content coming from other Member States with respect to media content services outside the scope of the legal harmonization of the Union (radio and press products). These are identical with the conditions included in Article 177(1) of the Media Act and Article 3(4) of the AVMS Directive, which is the codification of the jurisprudence of the European Court of Justice. It can be concluded that measures against radio media services and press products coming from other Member States even in absence of Article 178 of the Media Act - in other words, if exclusively the rules of the Treaty on the Functioning of the European Union and related jurisprudence would have to be applied - would be applicable exactly the same way; but, in any case, the codification of Union jurisprudence create a clear situation. The rules of the Media Act list here the restriction criteria of the free flow of goods and services permitted by the EU; thus, it would be hard to allege the violation of Union law in this respect (it is not what the European Commission did either).

Articles 179-180 of the Media Act include rules applicable in case of the so called "circumvention of national measures" or circumvention doctrine. Article 179 of the Media Act implements into the Hungarian legal system Article 4 of the AVMS Directive with respect to linear Audiovisual media services under the jurisdiction of other Member States. The conditions for taking measures are textually identical with the text of the AVMS Directive, and to a certain extent, they provide more favourable treatment for the media provider, as Article 179(2) also adopts the jurisprudence of the European Court of Justice into the text of the Media Act, and, thus, it becomes clear to whom the circumvention doctrine applies.
Article 180 of the Media Act extends the circumvention doctrine also to media content providers not governed by the AVMS Directive, and, with this, essentially codifies the jurisprudence of the European Court of Justice even though it was not an obligation of legal harmonization.

Those provisions were also criticized according to which the regulation of the prohibition of circumvention is too broad, is not in harmony with community law, as it aims at enforcing compliance with the entire Hungarian media regulation by foreign service providers and publishers.

According to the consistent jurisprudence of the Court in Luxembourg since Case 33/74, the Van Binsbergen case[19] "*the European Court of Justice recognized the prohibition of circumvention as a general restriction on the freedom to provide services*". Pertaining to media services within the scope of the AVMS Directive, the Directive codified the foregoing jurisprudence of the European Court of Justice in Article 4(2)-(5).
However, the implementation by the Media Act is more than the simple adoption of Article 4(2)-(5) of the AVMS Directive, as, by creating additional safeguards, the Media Council is obligated to wait two months for the action of the Member State. With this, the statute takes into account the basic doctrine of the Centros case[20] in which the European Court of Justice established that every instant of circumvention must be examined on a case by case basis

[19] Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging* [1974] ECR 1299.
[20] C-212/97 *Centros v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459.

based on a transparent system of criteria: "*However, although, in such circumstances, the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.*"

In the TV 10 case[21] the European Court of Justice provided the criteria to be taken into account in cases of circumvention that was summarized in Paragraph 42 of the AVMS Directive's Preamble. These rules were adopted by Articles 179(2) and 180(2) of the Media Act: "*(2) In its assessment as to whether the conditions defined under Paragraph (1) are met, the Media Council shall examine, among others, in which of the Member States the major sources of the advertisement and subscription revenues of the linear media service provider established in another Member State are to be found, what is the primary language of the media service, in which Member State can the majority of its broadcast sites be found, and which Member State's audiences the programs are addressed to.*"

According to the critics, the proportionality of the restriction is questioned, because the Authority may enforce the entire Media Act and all content regulation related provisions of the Press Freedom Act. Section 2 of the Operative Part in the European Court of Justice's decision in the TV 10 case states exactly this:
"2. *The provisions of the EEC Treaty on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State."*

The fact that a Member State may treat the circumventing service provider that is under the jurisdiction of the other Member State as if it was established domestically, precisely means that it can fully apply the rules applicable to domestic service providers, because only this make circumvention "pointless". The arbitrary domestic (Hungarian) application of the rules is precluded even in theory also by the cooperation of the media authorities of the two Member States concerned, the notification of the European Commission, and the condition of proportionality required by the Media Act.

It should be noted that the Press Freedom Act and the Media Act may be applied without invoking similar procedures against non-EU media content providers with respect to services distributed in Hungary.

It is also worthy to mention the objection of the European Commission according to which the fine under Articles 176-177 of the Media Act that can be imposed on media service providers established in another Member State is a disproportionate sanction. The basis of the objection was the different interpretation of the term "*measures".* While the Hungarian Government believed that the term "measures" include fines, the Commission assumed that if under the laws of a Member State exercising jurisdiction, the use of fines as a sanction is not allowed, than, if the Hungarian media authority imposes fines, it alone may be disproportionate. At the

[21] Case C-23/93. *TV 10 v Commissariaat voor de MEDIA* [1994] ECR I-4795.

same time, the content of the term "*measure*" is not even clarified within the EU either; nonetheless, the misunderstanding was later clarified via statutory amendment. The Commission did not object to the possibility of imposing fines with respect to Articles 179-180 of the Media Act (i.e. circumventions) - taking into account that these rules establish the applicability of the full Hungarian media regulation against media services and press products under foreign jurisdiction, including, of course, the application of the system of sanctions.

V. Protection of human dignity and human rights (Articles 14 and 16 of the Press Freedom Act)

The protection of human dignity and human rights in the media regulations does not provide for legal remedies for individual violations; such remedies continue to be available under criminal and civil law. The relevant rules of the Press Freedom Act protect not the - identifiable - person whose rights were violated but the audience (viewer, listener, and reader) of the media content. The restrictions seek to provide the audience with publicity in an appropriate manner, while respecting the fundamental social and civil norms. This justifies the prescription in the Press Freedom Act of other obligations (prohibition of the violation of privacy and constitutional order, and prohibition of hate speech).

The conflict between respecting human dignity and human rights, and the fundamental right of the freedom of the press is one of the most serious and, at the same time, most complex issues of the media regulation and its application by the media authority. The conflicting rights are high in the hierarchy of fundamental rights, which makes the resolution of the conflict especially difficult. Under the interpretation of the Constitutional Court, the right to human dignity is the "mother right" for all other individual rights, and, thus, the source of all other concrete individual rights (Decision No. 8/1990 (IV. 23.) AB). Human dignity is a paramount value, that is unapproachable and inaccessible for the law. The law is unable to define human dignity, cannot summarize all of its sub-elements, cannot grasp its essence in the technical sense, but it can protect it even in absence of a detailed definition.

One of the functions of the right to human dignity is to guarantee autonomy, as human dignity "*is the seed of individual self-determination free from any other person's will, which ensures that [...] the person can remain an individual and does not become an instrument or object*". (Decision No. 8/1990. (IV. 23.) AB).

The other function of this right is to guarantee equality by ensuring that dignity is the equal right of everybody. According to the interpretation of the Constitutional Court, it follows also from the "mother right" nature that human dignity is "*such subsidiary right that the Constitutional Court as well as other courts may invoke for the protection of the individual's autonomy if none of the concrete, specific fundamental rights can be applied to the specific facts of the given case.*" (Decision No. 8/1990. (IV. 23.) AB).
Human dignity is only unrestrictable in connection with, and forming a whole with, the right to life (see the issues of death penalty, abortion, and euthanasia); if it is separated from the right to life, the different individual partial licenses deriving from it can already be restricted.

In Decision No. 30/1992 (V. 26.) AB, which can be considered the "basic decision" on the freedom of expression of opinion, the Constitutional Court stated that: *"Thus, besides the subjective right to the freedom of expression of opinion, from Article 61 of the Constitution*

follows the state's obligation to provide for the conditions and functioning of the development of democratic public opinion. The objective, institutional aspect of the right to the freedom of expression of opinion pertains not only to the freedom of the press, the freedom of education, etc., but also to the aspect of the institutional system that inserts the freedom of expression of opinion among the other protected values. Hence, the constitutional limits of the freedom of expression of opinion have to be determined in such a way that those, besides the subjective rights of the person expressing his opinion, take into account the formation of public opinion as well as its free shaping, which is essential for democracy".

Thus, in the interpretation of the fundamental right appears both the right of the individual and the interest of the community - manifesting through the openness of public debate and the free shaping of public opinion -, and this double foundation will remain valid in future decisions, too.

The freedom of expression of opinion is placed to an exclusive position in the imaginary hierarchy of fundamental rights: according to the interpretation of the Constitutional Court, it can be found immediately at first place right behind the inseparable right to life and right to human dignity. Although this does not mean that in the event of conflict, every other fundamental right has to yield to the freedom of opinion, it means that the right on the opposite side has to be interpreted restrictively, and the right to expression of opinion has to be presumed to enjoy priority.

The Constitutional Court defined the freedom of expression of opinion - similarly to human dignity - as a "mother right", which gives rise to the other "fundamental communications rights": the freedom of the press, freedom of information, artistic freedom, scientific freedom, freedom of the conscience and religion, as well as freedom of assembly (Decision No. 30/1992 (V. 26.) AB). In the interpretation of the tribunal the "power" of the mother right emanates into the other derivative special rights (Decision No. 21/1996 (V. 17.) AB).

Simultaneous enforcement of the two mother rights, thus, means a conflict hard to resolve. Practically, in the media, the case of the violation of dignity could be an issue by exercising the freedom of the press; in other words, through the exercise of one fundamental right another fundamental right can be violated. When considering these cases, on the one hand, interests in the freedom of the press have to be weighed (primarily, the public interest in the development of the open, democratic public opinion), as well as the aspects of protecting human dignity. Considering that these are rights of similar "strength", prior opinion regarding the "priority" of one over the other cannot be formed without knowing the concrete facts.

In the case of conflicting fundamental rights, for the identification - on a case by case basis, regarding concrete fact patterns - of boundaries between legal and illegal behaviour, there are certain "reference points" for the adjudicator. The basic principles of the Media Act are such that cannot be considered as pure declarations or written divine grace, but they assist legal interpretation, and in case of conflicting laws, they help to resolve it, or if a legal loophole appears, they help to define the missing legal provisions (with the choice of word of legal literature, the basic principles operate as "general clauses" - facilitating the application of the law).

Article 3 of the Media Act is about the freedom of the press, which always represents the basis and starting point of media regulation in a democratic constitutional state, and Article 5

is about the right to receive and provide information, as well as about democratic publicity. Based on the latter, the citizens of the state have the right to receive information about issues concerning them or the public, and sometimes this interest may be stronger than other individual rights (this is the reason, for example, that public figures can be subject to broader criticism under civil and criminal law).

In the course of its activities, the Media Council takes into consideration the decisions of the National Radio and Television Commission (hereinafter: ORTT) as well as relevant case law. Although, the nearly 15 years of ORTT practice may provide a number of useful starting points for deciding the cases, the work of the previous tribunals was tainted by numerous debilitating factors, wherefore there is no such solid, clear judicial or administrative practice available in every area concerned, which could essentially provide ready recipes for deciding the cases before the Media Council.

The media authority, as a player of the administrative institutional system, functioning at the field of public law, may act in the protection of public interest and apply legal rules concerning media contents that could appear as a restriction of the freedom of opinion and the press. The basic model of European media regulation rests on two fundamental values: provision of the freedom of the press and the necessary protection of public interest against the freedom of the press.

The freedom of the press is a protected value because a democratic society cannot exist without free press; debates of the public can only be conducted by and through the press. This is only paradoxical for the first sight, because precisely this interest justifies the restriction of the freedom of the press, too, since in the interest of open debate, the press may become a subject of legal obligations. Accordingly, the norms, positive in nature (prescribing active behaviour), found in content regulations, typically serve the development of democratic public opinion (primarily the diversity of the press) or the protection of national or European culture; an example for the former is the rule of balanced coverage, and for the latter, the requirement of program quotas.

The protection of human rights is one of the negative obligations (i.e. it prescribes restraint, in other words, avoidance of infringements), which - similarly to certain positive obligations - protects the appropriate functioning of the democratic public sphere and not the individual. Because the main justification of rules appearing as restrictions to the freedom of the press is the protection of the viewer/listener/reader (collectively: the audience) - "entitled" to such protection as a member of society.

The negative obligations set forth in the Press Freedom Act establish through the press such basic "rules of the game", the respect of which is a condition for conducting the debate. At the same time, the community has an interest in knowing all opinions, thus, even the strong, sometimes offensive or disturbing opinions, in other words, the freedom of the press - open debate - can only be restricted, referring to human rights violations, for adequately serious reasons.

In Decision No. 46/2007 (VI. 27.) AB the Constitutional Court states that "*if a broadcaster violates an individual right, the injured person may decide whether to enforce his individual rights, for instance, by initiating litigation, against the broadcaster having committed the violation. In addition to judicial action, Articles 112(1) and 136(1) of the Media Act provides*

for administrative proceedings. The ORTT - proceeding pursuant to Article 3(1) of the Media Act - in these administrative proceedings does not decide on the violation of the rights of individual legal entities. Article 3(1) of the Media Act is a provision of principle. Accordingly, the ORTT during the administrative proceedings is entitled to establish whether the broadcaster carries out its activities while respecting human rights, and whether the subject-matter, nature, and perspective of its different programs violate fundamental values embodied in human rights."

In this decision, the Constitutional Court also stated with respect to the right to self-determination that "*an important element - among others - is the right of the person to enforce his subjective rights covered by the claim before various state authorities, thus, including also the courts. However, the right to self-determination also includes - as a general right to act - the right to refrain from enforcing claims or non-action. Since this right is intended to protect the autonomy of the individual, in general, everyone is free to decide whether to enforce claims by way of administrative proceedings available under the Constitution for the protection of rights and lawful interests, or to refrain from doing so" (Decision No. 1/1994 (I. 7.) AB).* Therefore, the right to self-determination also covers the right to refrain from resorting to court action in case of violation of one's rights or refrain from enforcing his rights in any other way. "*If a broadcaster violates an individual right, the injured person may decide whether to enforce his individual rights against the broadcaster having committed the violation (...)*"

Thus, based on the decision of the Constitutional Court, the jurisdictional and procedural provisions of the Media Act, and general administrative law theory, it can be established that, in general, the Media Council has the authority to monitor compliance with the provisions of Article 14 of the Press Freedom Act, but in the course of these proceedings, it can only make a finding of the fact of the violation of a fundamental right by "anonymizing" it. The Media Council cannot be a tribunal restricting the individual right to self-determination, and as a general rule, it cannot act in the defence of others' - individual - rights, irrespective of the fact that whether or not the person concerned has acted before other available forums. In the course of deciding such cases, the Media Council has to take into account also the option of initiating other (criminal or civil court) actions to an extent it needs to shield its own competence from such proceedings. Thus, the Media Council is not called to enforce individual fundamental rights but the abstract public interest; it has to ensure that the functioning of the media remains within constitutional limits.

The primary objective of criminal law is to deter citizens from the commitment of crimes in the future with the instruments of the state's penal authority, while the objective of civil law is to provide, in the case of the violation of a right, the injured party with appropriate remedies (for example, compensation for damages) - this justifies, for example, the conducting of simultaneous proceedings for the protection of the person. At the same time, no similarly strong arguments can be raised for creating the option for a third proceeding (that of the media authority) protecting the individual. This is because the media regulation protects primarily the audience and not the individual attacked in the media. Its task is not to protect the audience from outrageous, disturbing, and offensive content but to guarantee for the audience a press, properly functioning in accordance with the "rules of the game," that is necessary for the democratic provision of information.

It is important to emphasize that the protection of human dignity within the framework of media regulation should not be imagined as exactly categorized fact patterns. Accordingly, we believe that the Media Council can only establish the violation of the fundamental value of human dignity, if the injury has reached the "threshold" of the assertion of a public claim - of the threat to the democratic public -, for example, if a program suggests that the human personality does not have untouchable regions, that human dignity can be made available to anyone out of financial interest. Especially - but not exclusively - cases could be considered as such of the explicit, recognizable depiction of people in vulnerable, helpless, or degrading situation - e.g., victims of accidents or crimes - (in their cases the enforcement of rights is inherently limited, and showing people in these situations violates the rules of social coexistence also), or showing minors in a way which violates human dignity (individual enforcement of rights is limited in their cases also, and the appropriate development of the personality of minors is common social interest, and action against content threatening that is justifiable).

Such infringements violate and destroy one of the generally accepted foundations of social coexistence and European civilizations - the recognition of people as beings with unrestrictable, equal dignity; in this case, action taken for public interest cannot be considered disproportionate.

The Press Freedom Act explicitly instructs the Media Council to act in cases of violation of dignity occurring in the course of the production of programming. In the case of such programming, whose participants are "deprived" by contract - with their consent but under dubious circumstances - from the possibility of future enforcement of rights and legal remedies, or in the case of whom - also by contract - they exclude the possibility to prevent the broadcasting of program recorded (even if the broadcasting is clearly injurious with respect to the contracting party, and the withdrawal of the consent to broadcasting would not cause disproportionate damages to the media service provider), the media authority may initiate proceedings. Another important novelty is that Article 14(2) of the Press Freedom Act provides explicit protection to people in vulnerable or humiliating situations, thus codifying the previous practice of the ORTT.

VI. Obligation to respect constitutional order (Article 16 of the Press Freedom Act)

According to Decision No. 46/2007 (VI. 27.) AB of the Constitutional Court, the obligation to respect constitutional order can be constitutionally prescribed by the media regulation. Accordingly, the tribunal found the provision in Article 3(2) of the Radio and Television Broadcasting Act, which is the same word by word than the new statutory provision, constitutional. Constitutional order is not an indefinable "elastic concept" but a legal category that is not defined separately in the media regulation but which appears in the legal system with clearly identifiable content. "*The duty of constitutional institutions is to protect and guarantee the order stipulated in the Constitution, in other words, parliamentary democracy was founded on the respect of constitutional rights. (...) Broadcasters, like any other legal entity, must respect the constitutional order, and this obligation is specified by the provision of the Media Act setting forth basic principles. Based on this provision of basic principles, pursuant to Article 112 of the Media Act (...), the Media Authority may impose sanctions in case of legal violations if justified by extraordinary circumstances. Such situation would be for example, if a broadcaster were constantly propagating an ideology disregarding equal*

human dignity, which constitutes the foundation of constitutional order. With respect to the rule of the Media Act pertaining to the respect of human rights, such penalties applied based on the relevant paragraph of the Media Act may have an important role in such special situation in the course of action against broadcasters disrespecting the fundamental constitutional structure."

VII. Prohibition of violation of privacy (Article 18 of the Press Freedom Act)

In the jurisprudence of the Court of Justice of the European Union, proceedings initiated because of privacy violations gained great importance in recent times, which primarily aimed at preventing the intrusions of boulevard media (see, for example, Von Hannover v Germany, where the Strasbourg Court took a stand for the broad interpretation of privacy). While provisions concerning human dignity, constitutional order, and prohibition of incitement to hatred were already included in the Radio and Television Broadcasting Act, too, the protection of privacy is a novelty. It must be emphasized with respect to this rule also that application of the law cannot be directed to the protection of individual rights: protection of the private sphere in the media regulation is possible, when the level of infringement makes action necessary for the public interest, because the media content provider at issue violates a basic rule of the democratic public, with which it threatens the proper functioning of the public sphere. In the case of privacy, we face the same apparent paradox (enforcement of specified individual rights for public interest), but, actually, this is not the case: the objective is always the protection of the public without affecting the enforcement of individual rights.

VIII. The prohibition of hate speech (Article 17 of the Press Freedom Act)

The standard of hate speech in the media regulations is lower than its general criminal law standard. The reason for this is not exclusively the theoretically more significant social effect of the media, but its role played in the functioning of the democratic public sphere: some opinions may be justifiably excluded from the public debate. The Constitutional Court has already recognized before - in connection with the Radio and Television Broadcasting Act - the constitutionality of the causes of action set forth in the Press Freedom Act, thus, the only issue that can be a subject of constitutional debate is perhaps the scope of subject matter (on the latter issue see more above at III.).

The constitutionality review of the previous Radio and Television Broadcasting Act provisions on the prohibition of hatred was done by the Constitutional Court in 2007 (Decision No. 1006/B/2001 AB). In this decision, the Court found that the regulation was constitutional, stating that the possibility for intervention by the media authority - independent from the will of the injured community or person - does not pose restrictions on the right to self-determination, and also, it does not substitute the enforcement of the claims of the holders of subjective rights.

In the course of assessing constitutionality, the reasons for the considerably lower level of restriction standards – compared to those pertaining to criminal law – were also questioned. Article 17 of the Press Freedom Act is in many respect similar to the rules of the Radio and Television Broadcasting Act, and, thus, according to this: "the media content may not be suitable for incitement to hatred against any nation, community, national, ethnic, linguistic

and other minority, or any majority as well as any church or religious groups" and "may not be suitable for the exclusion" against these.

The decision of the Constitutional Court mentioned above states that *"the option of simultaneously available legal remedies and even proceedings that can be conducted simultaneously under different branches of law regarding the fundamental rights complementing each other does not violate, and, what is more, does not even restrict unnecessarily the freedoms of expression of opinion and of the press"*. Accordingly, actions against hate speech may be constitutionally promulgated also outside of criminal law system within the framework of media regulations.

However, based on a provision - not particularly relating to the media - of the Criminal Code, conviction on grounds of hate speech requires more than the offence of the community or the suitability for incitement to hatred; it requires the "instigation of hatred", which is clearly a more severe behaviour. The constitutionality of this difference was established by the Constitutional Court partly by making a distinction between the sanctioning systems of criminal and media law, as sanctions available under the media regulations are less severe. What is protected under the general freedom of opinion (incitement to hatred against, or exclusion of, a community) is not protected by the freedom of the press. According to the decision: "*In the system of legal liability, criminal law is the last resort. This means that if with respect to a socially harmful conduct - in this case instigation of hatred and incitement to hatred - even criminal liability is not an exaggeration and is not unconstitutional, then other less severe prohibitions possibly promulgated with respect to the given conduct under other branches of law could not be unconstitutional either."*

The Decision mentions the significant opinion forming power of the electronic media as another reason for the distinction, thus referring to Decision No. 1/2007 (I. 18.) AB: "*it is generally accepted that the opinion forming powers of radio and television broadcasting and the persuasive effects of animated images, audio and live coverage are multiple times more effective than the ability of other social information services to provoke thought.*" Further elaborating on this thought, the Decision states that "*the media is therefore of critical importance for the existence of diversity of opinion, also serving as one of the most important stages for community debate; however, one must also take into account the fact that the broadcasting of programs found to be offensive or exclusionary to, or discriminative against, persons or certain groups within society (whether minorities or the majority) may have similarly considerable negative effects of unforeseeable magnitude*." Based on the above, the prohibition of the incitement to hatred and of the abuse of communities in the media regulation is constitutionally acceptable. In the decision, the Constitutional Court pointed out also that "*the criticized paragraph of the Media Act does not mean that there would be no place for debates in radio and television programs or that there could not appear a plurality of opinions regarding society. The objective of the provision is to prevent radio and television to be the "amplifier" of hateful and offensive people who judge based on race and who call for exclusion and hatred."*
In response to the argument citing the lack of a precise definition of the cause of action, the tribunal held that "*the fact in itself that the regulation provides the adjudicator with the discretion to assess whether a conduct is suitable to incite hatred does not lead to the conclusion that the provision violates Article 8(2), Article 60(1)-(2), or Article 61(1)-(2) of the Constitution*".

It must also be noted, that the decision of the Constitutional Court has only ruled concerning the restrictions on television and radio media services. Meanwhile, the respective rules of both the Media Act and the Press Freedom Act are applicable to media content providers of all types. Can a prohibition of such general scope be justified under the Constitution? The Constitutional Court's statement about the opinion forming powers of media is also true to media contents other than radio and television. Media usage habits vary between different social classes and age groups; therefore, it is true for all media types that they are of considerable significance with regards to their own audience or a segment thereof (some people obtain information only from the Internet, whereas others might prefer reading print media, or primarily watch television). A national daily newspaper reaches a broader audience than a local radio station, thus, the opinion forming power depends not primarily on the nature of the media outlet but the audience it actually reaches, therefore, it is not reasonable to differentiate in the regulation based merely on the manner of distribution of the content. At the same time, regarding its adjudication practice, when applying possible sanctions, the media authority may and should take into account the size of the audience actually reached. At this point it is worthy to note again that we do not find the "media effect" theory in itself as a good basis for the regulation, because the primary justification of the regulation is much more the maintenance of the functioning of the democratic public sphere.
We disagree with the criticism according to which the new regulation would extend the circle of protected communities. Article 3(3) of the Radio and Television Broadcasting Act has been protecting every minority group since 1996 and "any majority" from offensive conduct and exclusion, and only the scope of incitement to hatred under Article 3(2) of the Radio and Television Broadcasting Act was narrower. This differentiation cannot be justified: why would the regulation protect against the less serious violation – i.e. exclusion - more communities than against the more serious – i.e. incitement to hatred?

We also disagree with the criticism according to which the concept of "any majority" is unclear, and such protection of majority communities is not justified anyway. First, if the concept of "majority" is unclear, than, necessarily, the concept of "minority" cannot be clear either (as these concepts have to be defined in relation to each other), and, secondly, the adjudicator can interpret these concepts without any difficulties. And, although, it can be concluded that, generally, minorities might need protection more frequently, against hate speech, majority communities also deserve protection.

Often appears in the scientific literature the argument, according to which, protection needs to be provided only to groups that live in a minority in society, because the majority is always "safe", as the majority community cannot be threatened by minorities.[22] We disagree with this for many reasons: First, a majority community, similarly to minorities, represents value, and, under certain circumstances, protectable value, the members of those communities have the same human dignity as members of a minority group, and it can be offended the same way (even by its own members: the Hungarian nation can be disparaged by a Hungarian, too). The injury, that does not necessarily mean physical threat and does not always have visible results either, can occur the same way. Second, a member of the majority community can easily become minority in a given life situation (in a town, a public square, or in an argument), when his vulnerability might increase. Third, the potential protection of the majority does not

[22] See. e.g. András HANÁK: Szent szólásszabadság [Sacred Freedom of Speech]. *Fundamentum*, 2009/4. 59.

decrease at all the intensity of the protection of minorities, in other words, we do not take away from the minority what we give to the majority.

Article 17 of the Press Freedom Act resolved the inconsistency, according to which the previous Article 3(2) of the Radio and Television Broadcasting Act prohibited the *suitability* for incitement to hatred while paragraph (3) prohibited the *intention* to offend and exclude. In the former situation it regulated the possible effect of the publication, while in the latter it restricted it based on the intention thereof. However, the protection of the democratic public sphere can only justify the restriction based on the former approach, in other words, it can only provide for the restriction independently from the intent of the speaker - whom, by the way, the media authority most of the time cannot even locate.

(Finally, it should be mentioned that, as a result of the consultations between the European Commission and the Hungarian Government, the rule pertaining to the prohibition of "open or concealed offence" of communities was rescinded from Article 17(2) of the Press Freedom Act. The Commission criticized the content and not the material scope of the subject matter of the rule. For our part, we can agree with this amendment, however, it is curious that here the Commission requested the amendment of a rule, which it had once approved before our 2004 EU accession.)

IX. Offences against public morals (Article 4 (3) of the Press Freedom Act)

The prohibition of offences against public morals may constitute in theory a constitutional restriction to the freedom of the press, but in its current form - similarly to the 1986 Press Act - it exists exclusively as a declarative rule in the area of media regulation, considering the competences as defined by law of the media authority and the general and theoretical nature of the wording of the rule.

Media content providers may not be sanctioned for violating public morals. Even though the Press Freedom Act does adopt provisions declaratory in nature from the earlier the Press Act (Article 4(3) of the Press Freedom Act "the exercise of the freedom of the press may not constitute or abet an act of crime, violate public morals, or prejudice the moral rights of others"); however, according to the Media Act, the Media Council does not have a supervisory competence over these provisions. Article 182 c) of the Media Act charges the Media Council with the supervision of compliance with the requirements set forth in Articles 13-20 of the Press Freedom Act, but does not mention Article 4 whatsoever. However, an administrative body may only exercise powers as defined by law, without being able to expand their scope at will. This kind of extension of authority would be clearly unconstitutional, and a decision issued in absence of jurisdiction is void under Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: Administrative Proceedings Act).

Pursuant to Article 4(3) of the Press Freedom Act - in absence of the specification of the precise legal obligation - media authority proceedings could not be initiated anyway, because public morals is such a general category that has to manifest in concrete fact patterns to be enforceable within the framework of the administrative authority. Such rules protecting morals are for example rules - serving the protection of minors - under Articles 9-11 of the Media Act that sets forth obligations primarily with respect to violent or pornographic

programs; pursuant to these, administrative proceedings are possible, but not with reference to Article 4 of the Press Freedom Act.

Decision No. 20/1997 (III. 19.) AB of the Constitutional Court analyzed the rule of the Press Act protecting public morals. At the time of the 1989 amendment of the Press Act such a provision remained in effect, pursuant to which the court was entitled, upon prosecutorial motion, to prohibit or immediately suspend the publication of a press product or other writings that violated the section cited above. The rule, making preliminary restriction possible, thus, was applicable for the protection of public morals. The option of preliminary control pursuant to motion filed with the Constitutional Court and the right of the prosecutor to act without the consent of the victim in the event of an infringement of the otherwise only personally exercisable individual rights, violate the freedom of the press. Further, the prohibition of communications offending public morals, which are otherwise not prohibited by the Criminal Code and the prohibition of publication because of the suspicion of the commission of a crime before the courts even issued a final verdict, all violate the freedom of the press and the right to self-determination to initiate legal proceedings. The petitioner requested a finding of unconstitutionality based on these grounds.

The Constitutional Court with its decision rendered unconstitutional in its entirety the disputed provision pertaining to preliminary restriction (not discussing the rule requiring the protection of public morals), but merely for legal technicalities, because it only discovered unconstitutionality with respect to the right of the prosecutor to initiate proceedings - violating others' individual rights and referencing the commission of a crime subject to private criminal complaint and independent of the will of the people concerned. At the beginning of the opinion, the judges cite to the International Covenant on Civil and Political Rights and the European Convention on Human Rights, which provide for the restriction of freedom of opinion to protect public morals, and, then, deny the unconstitutionality of the restriction: "*Decision No. 21/1996 (V. 17.) AB have already concluded that: "The Constitutional Court does not review the content of public morals enforced in law. As the Court basically made it over to the legislature to define "public interest" [...], enforcing public order as well as morals is the right of representatives - before, for other reasons, they come up against the boundaries of the Constitution." Since no laws and regulations determine, in the examined context, the definition and content of public morals, therefore, their determination falls under the competence of adjudicators. Judicial Decision No. BH1992.454 of the Civil Collegium of the Hungarian Supreme Court set forth guiding principles regarding the adjudication of request for the prohibition of publication of press products. In this decision, the Supreme Court, among others, concluded that the concept of public morals include those rules of behaviour that are generally accepted by society. The press product's conflict with public morals can be established if this is clear and undisputable according to public opinion. According to the position of the Constitutional Court, the restrictive provision of the Press Act concerning offences against public morals cannot be classified as unnecessary and disproportionate."*[23]

Since the provision found unconstitutional was in the same paragraph with others, the Court annulled the entire paragraph, and the legislature have not substituted the annulled rules. Later László Sólyom wrote that "presumably, there was a silent agreement on that (in the

[23] Section III/3 of Decision No. 20/1997 (III. 19.) AB of the Constitutional Court.

appropriate proceedings) public morals can restrict the freedom of the press."[24] In other places he stated that: "I find exaggerating the criticism, according to which adjudicating issues of morality means returning to the ages before the Enlightenment. [...] Public morals are such theoretical values, behind which it is hardly possible to find any violation of certain individual fundamental rights, and, thus, it can hardly serve as a basis for restriction. At the same time [...] the human rights conventions all provide for the restriction of rights in the protection of public morals, if »necessary in the democratic society«."[25]

X. The media system and the role of information (Article 10 of the Press Freedom Act)

According to the statute "*all persons shall have the right to receive proper information on public affairs at local, national, and EU level, as well as on any event bearing relevance to the citizens of the Republic of Hungary and the members of the Hungarian nation. The media system as a whole shall have the task to provide authentic, rapid and accurate information on these affairs and events."* Originally, the second sentence of the provision was in Article 13 with a different wording. As a result of consultations with the European Commission, the new text made it obvious for everybody that the requirement of the obligation to inform does not result in concrete obligations with respect to the different media content providers. The earlier text of Article 13 of the Press Freedom Act does not refer to the "media system as a whole", but to the duties of "all media content providers", essentially repeating the content of Article 2(1) of the Press Act. The provision did not mean in either the 1986 Act or the Press Freedom Act that everybody, e.g., the thematic media services, too, is obligated to provide general information; this is merely - in its new, currently effective version - a declarative rule setting forth the public interest duties of the media. The obligation to inform - stemming from the right to information to which everyone is entitled - is an obligation required from the media market as a whole. This rules in itself does not impose a concrete obligation on individual media content providers but sets forth a general media law principle. The prescription of concrete information obligation is only justified in the case of certain media service providers, and it has to be regulated within the framework of the media law, as it is the case currently (in the case of public service media and media services having significant influencing power).

XI. Rules on balanced coverage (Article 13 of the Press Freedom Act and Article 12 of the Media Act)

The rules of balanced coverage have changed, compared to previous rules, in that the relevant provisions of the new laws were promulgated based on the intentions of the Constitutional Court. Based on this, balanced coverage can be examined not only within one certain program but also a series of programs. The requirement of balanced coverage already adjudicated by the Constitutional Court can be considered a constitutional provision even today.

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[24] László SÓLYOM: *Az alkotmánybíráskodás kezdetei Magyarországon [The Beginnings of Constitutional Adjudication in Hungary]*. Budapest: Osiris, 2001. 484.

[25] Gábor Attila TÓTH: A „nehéz eseteknél" a bíró erkölcsi felfogása jut szerephez – beszélgetés Sólyom Lászlóval [In "difficult cases" the moral views of the judge take a role - interview with László Sólyom]. *Fundamentum*, 1997/1. 41.

The requirement of balanced coverage stems from the recognition of the public interest responsibilities of the press. Based on the rule, information and news coverage about matters concerning the community must present the conflicting views. In connection with a given issue, the relevant opinions must be collected for, and presented to, the audience, ensuring with this that they make informed decisions regarding the disputed question, thus serving the idea of democracy. Compared to pluralism, balanced coverage is a specific requirement: an obligation relevant generally to information programs (but not necessarily exclusively to news programs). Genre characteristics must be taken into account also, and based on these, certain programs (for example, political satire) cannot necessarily be expected to provide the level of balanced coverage similar to news programs.

Obviously, the rule of balanced coverage can be applied only with the assistance of media ethics and professional standards, always subject to the circumstances of the given situation. It cannot mean precisely calculated, up to the second coverage of the same length when it comes to the presentation of certain views, although the Hungarian media authority primarily looks at the temporal length of the coverage when considering balanced coverage. It is because the instruments of law are not capable of measuring precisely the equal and impartial treatment of the interviewees or the interviewer's tone of voice or gestures. Obviously, there is not always an opportunity to present *every* conflicting views, and in the course of editing, sometimes, choices have to be made between the relevant, appropriately important, and sufficiently represented views (however, this cannot mean every time the exclusive presentation of "prevailing" views). The different views and not their representatives have to be presented: in a given situation, the editor may chose between several representatives, but when justified (for example, in absence of an interviewee representing the other side), even the reporter or journalist can cover the task of balancing by presenting the conflicting opinion. Impartial coverage does necessarily have to be realized in every single program, because it would make significantly more difficult the production of, for example, informative magazine shows. In certain cases, it is adequate if - in connection with programs consisting of several episodes or broadcasted regularly - balanced coverage is realized only throughout the whole program series or program flow itself.

According to certain views, the current, general requirement of balanced coverage should be significantly narrowed in the near future, and it would be adequate to impose it exclusively on public service or perhaps terrestrial broadcasting national channels. The idea is based on the premise that with the expiration of frequency scarcity and the new methods of distribution of media services, such level of intervention in the freedom of media outlets is no longer justified today. Today, numerous television, radio, and press products provide information, as the era of previous state monopolies and limited privately owned media outlets is now over. And people interested in the truth should take the time to watch the news of more than one media services (even if separately they are biased) or read through more than one newspaper a day.
We agree that to a certain extent it can be expected that the interested citizen obtain information from more than one source, but we believe that based on this argument, the general obligation of balanced coverage cannot be eliminated. This is because if we are indeed serious about democracy, we have to create a situation that fosters informed decision-making regarding community affairs for as many people as possible: and it can be expected from only a few with enough time on their hands to watch more than one news programs a day. Access to the increased number of media outlets is not universal, and, what is more, the

larger quantity does not necessarily guarantee the proportionate distribution of views they represent and, thus, the resulting balanced coverage.

The obligation of balanced coverage does not apply to press products and on-demand media services but only to linear (traditional) media services engaged in the provision of information services. The regulation on balanced coverage exists in the Hungarian legal system since 1996 (and is used in many other European countries); therefore, the media authority and the courts also developed a solid case law (which, because of the operational dysfunctions of the previous media authority is not necessarily without contradictions, but which can be relied on as a starting point in future adjudications).

The content of the obligation of balanced coverage set forth in the Media Act is in compliance with the constitutional requirement of clear norms. The content of balanced coverage is specified jointly by Article 12 of the Media Act and Article 13 of the Press Freedom Act. Linear media services engaged in information services are required to provide "in the informational or news programs they produce, comprehensive, factual, up-to-date, objective, and balanced coverage" of events of public interest and of disputed issues, based on criteria defined by law. It has to be highlighted that this obligation - just as in the past - does not mean the disproportionate restriction of editorial freedom: only the editor or the media service provider can decide what events are of public interest, in other words, what events will be reported in their different programs.

In Decision No. 1/2007 (I. 18.) AB, the Constitutional Court deemed constitutional the obligation of balanced coverage of media service providers within the scope of the Radio and Television Broadcasting Act. In Decision No. BH 2007. 253, the Hungarian Supreme Court explained that the concept of balanced coverage also includes the requirements of diversity, factuality, timeliness and objectivity; in other words, "balanced coverage" is a general category with several of its sub-elements specified by the statute. However, pursuant to Article 181(1) of the Media Act, such an interpretation is also possible according to which the authority may only examine the last requirement out of the requirements of Article 13 of the Press Freedom Act (obligation of "diverse, factual, timely, objective, and balanced coverage"), i.e. balanced coverage. Because Article 181 of the Media Act provides for the initiation of proceedings exclusively in case of an infringement of the balanced coverage obligation. Since the list of competences (Articles 182-184) also reveals that the authority only examines the balanced coverage obligation, accordingly, the rest of the requirements remains *lex imperfecta*.

The requirement of pluralism is one of the basic principles of the media regulation. The expression itself originates from the so called third television decision of the German Constitutional Court,[26] in which the judges differentiated between internal and external pluralism. *Internal pluralism* (which, according to the decision, only binds public media service providers) requires from the given service to ensure the development of some sort of a balance in its programming as a whole with respect to the presentation of the different views found in society; in other words, it requires the programs of the channels to be unbiased toward any directions but present different disputed (not necessarily political) issues providing an opportunity for the presentation of all opinions; and it further requires that the different programs be diverse and satisfy the needs of the broadest possible audience.

[26] 57 BVerfGE 295, 326 (1981)

External pluralism requires that all of the media service providers *collectively* provide for the *diversity* of views and available content, and establish the *balance* thereof. Thus, although privately owned media service providers are not bound by the requirement of internal pluralism, they collectively have to comply with the requirements of plurality.

It could be concluded from this - erroneously in our opinion - that pluralism is identical with the requirement of balanced coverage, though the obligation is much broader than that. Pluralism summarizes in the most general way all those obligations that facilitate compliance with the democratic duties of the media. This stems from the recognition that the media has a significant cultural and political influence, in connection with which, in some way, the interest of the audience must be ensured. According to another realization - that leads to the requirement of pluralism - keeping the state away from the media, without a doubt, serves the interests of the audience, still, in itself it is not capable to ensure them. Viewing pluralism and balanced coverage as identical is not justified either, because the latter is often made the concrete obligation of media service provider in different media laws, while, in contrast, pluralism only rarely appears in constitutions or media laws, and even if it does, only as a principle.

The requirement of pluralism prescribes not only content requirements but also restrictions that influence the structure of the media market, and in addition it restricts potential market behaviour. It is possible to step up in the name of pluralism against the excessive concentration of media restricting property rights on the media market; influencing through competition law rules the behaviour of market participants; requiring the obligatory transmission of certain channels from program broadcasters (must carry); and defining concrete content requirements for media service providers (public service obligations, obligatory broadcasting of news programs, balanced coverage, etc.)[27] The different content requirements are only obligatory within the scope of "internal" pluralism, in other words, with respect to program flows produced by a given media service provider, while structural and competition law requirements contribute to the creation of "external" pluralism. The Hungarian Constitution and media regulation do not refer to pluralism, but mention its equivalent, diversity (Article 61(2) of the Constitution and Article 4(1) of the Press Freedom Act).

In Decision No. 1/2007 (I. 18.) AB, the Constitutional Court concluded that the requirement of balanced coverage is not in conflict with the fundamental right of the freedom of the press even in an era of broader and broader selection of programming. It is confusing that the decision uses the expression *pluralism* when analyzing the Radio and Television Broadcasting Act rules prescribing *balanced coverage*. The Court finds that "*having regard to the full scale of radio and television programs offered, external pluralism has been achieved by the creation of a multi-actor market. However, the multi-colored offer of programs does not make it needless to apply the requirements of balanced coverage (internal pluralism).*"[28] Thus, the Constitutional Court uses the two concepts in part interchangeably. At the same time, it concludes that the liberated media market in itself is not sufficient to achieve pluralism (balanced coverage): "*In order to maintain the pluralism of opinions, the balanced supply of information is to be examined in the case of public service broadcasters established and*

[27] Lesley P. HITCHENS: *Broadcasting pluralism and diversity. A comparative study of policy and regulation*. Oxford-Portland, Oregon: Hart Publishing, 2006.
[28] Section III/3.2 of Decision No. 1/2007 (I. 18.) AB

operating by means of public funds and in respect of commercial radio and television stations whose opinion forming power has become significant."[29] This last sentence of the opinion could be misunderstood, as in its decision the Constitutional Court did not find unconstitutional the balanced coverage requirement binding *every* radio and television media service provider. Those who find this as the most important sentence of the decision disregard the fact that the Constitutional Court did not touch upon the generally prevailing requirement of balanced coverage.
The decision also applies the expressions of pluralism and balanced coverage somewhat confusingly causing a lot of misunderstanding, as while it acknowledges the materialization of (external) pluralism, the Court continues to find the requirement of balanced coverage sustainable. The two - if we do not use the concepts as each other's synonyms - of course, are not mutually exclusive.

The operative part of the decision prescribes as a constitutional requirement that the balanced coverage of information - depending on the character of the program - must be examined within the different programs and within the totality of different programming. According to the explanation: "... *the broadcaster enjoys a freedom to present the relevant opinions about a topic of public interest in a series of program units broadcasted on a regular basis. The requirement of balanced coverage may not be interpreted in a manner expecting the broadcaster to present all individual opinions in every single program unit. Requiring the broadcaster to present all individual opinions in every single program unit in order to enforce the requirement of balanced coverage would impair the freedom of the press – and in particular the freedom of editing – to an extent not justified by the legitimate legislative aim, i.e. ensuring the plurality of opinions."* This interpretation of the Constitutional Court has been now codified in Article 12(2) of the Media Act.

Compliance with the obligation of balanced coverage can now be assessed in the course of separate proceedings defined under a separate title (Article 181 of the Media Act) clearly under administrative procedural rules. The statute expressly states that such proceedings may not be initiated *ex officio*, but only exclusively upon request. Similarly to the Radio and Television Broadcasting Act, the applicant is required to contact the media service provider with his complaint before initiating the administrative proceeding.

Under the Radio and Television Broadcasting Act, only the "person representing the unrepresented opinion" or "individuals suffering damages" had the right to file a complaint for the lack of balanced coverage, in other words, the statute and the practice of the authority required "involvement" for the initiation of proceedings. This rule meant the misunderstanding of this legal institution. Not only and primarily the person representing the unrepresented opinion is protected by the balanced coverage requirement, but also the audience wishing to receive information. In other words, incomplete coverage infringes the rights of everybody wishing to receive information, and, thus, everybody should be given the right to file a complaint. This is not a violation of the right to self-determination, but, to the contrary, it is another instrument for the "audience" to step up for the protection of their interests and rights.

In contrast with the media authority's general administrative supervisory proceedings, the regulatory proceedings examining compliance with the obligation of balanced coverage is

[29] ibid. at III/3.2

special also in the sense that, in case an infringement is established, only the specific legal consequences defined by the act may be imposed. That is, in case an infringement is established, no fines may be imposed, the media license may not be suspended, no "blackouts" may be ordered, and neither the media service agreement nor the media license may be terminated. Once the infringement has been established, the authority may only require the media service provider to have the decision - made in the proceeding - as well as the announcement defined therein published, or to provide the petitioner with an opportunity to publish its position.

It should be noted that before the statutory amendments made after the Government consultations with the European Commission, the requirement of balanced coverage was extended to the news and informational programs of on-demand media services as well. The reason - as explained in the January 31, 2011 letter of Tibor Navracsics, Minister of Justice and Public Administration to Neelie Kroes, Commissioner - was that "In the future, a significant decline of traditional television can be predicted, and thus, the role of on-demand content will further increase also in the field of public information. The preservation of political pluralism and diversity of information justify the requirement of the obligation of balanced coverage regarding the relevant programs of on-demand media services." Nonetheless, after this, the rule was amended with respect to the on-demand media services, and in its current, effective version only covers linear media services.

XII. Right to maintain the confidentiality of sources (Article 6 of the Press Freedom Act)

The right to maintain the confidentiality of information with respect to criminal proceedings is created by the Press Freedom Act. The Press Freedom Act also defines the exceptions from the right to confidentiality, but none of these pertain to the media authority, so it could not oblige journalists to reveal their sources.

Pursuant to Article 6 (1) of the Press Freedom Act, all media service providers, and publishers of press products, and journalists are entitled "to the right to keep the identity of their informants confidential". This general right of confidentiality also applies to judicial and administrative proceedings, thereby enabling the media to be exempt from the duty to testify. The 1986 Press Act failed to provide protection for the press in the most important cases, namely in criminal proceedings, when it failed to guarantee the right of confidentiality, but referred the resolution of the issue within the scope procedural law.
According to Article 11(1)(b) of the previous Press Act, journalists "are entitled – and are obliged upon his request - to keep the identity of the person providing information confidential. When receiving information pertaining to a criminal act, the provisions of criminal law shall prevail." Thus, as a general rule, in civil litigations and administrative proceedings, refusal to reveal information sources was permitted. At the same time, pursuant to Article 82(1)(c) of the Criminal Procedure Act, testimony may be refused when a person is *bound by* confidentiality due to the nature of his profession. Given the nature of their profession, journalists are not required to maintain confidentiality or, more precisely: such obligations may originate not from the nature of the profession (as is the case with doctors and attorneys), but from an agreement concluded with their sources. This means that the obligation they are subject to is not related to their profession but to a civil agreement, which may be concluded by anyone - non-journalists, too - with the source of important information.

Prior to the new regulation, therefore, journalists could be obliged to reveal their sources in criminal proceedings.

Under the new rule, the general right of confidentiality is not unlimited. It does not cover the protection of journalists' sources transmitting classified data without authorization and, in exceptionally justified cases during judicial and proceedings by investigating authorities, media content providers may be obliged to reveal their sources "in the interests of protecting national security and public order or uncovering or preventing criminal acts". The scope of exceptions is narrow and justify the restriction of journalists' rights to confidentiality (even the most debated category of "public order" can be interpreted based on criminal law jurisprudence). The courts and competent authorities must construe these exceptions narrowly in order to ensure that the freedom of the press is respected.
However, the Media Council cannot be regarded as an authority entitled to proceed under Article 6(3) of the Press Freedom Act in the investigation of sources. First of all, the Media Council is not an investigating authority. Article 182(c) of the Media Act precisely defines the administrative powers of the Media Council concerning the supervision of the obligations set forth in the Press Freedom Act ("the Media Council shall... supervise compliance with requirements set forth in Articles 13-20 of the Press Freedom Act"). Article 182 and other provisions of the Media Act provide an exhaustive list, in accordance with the Administrative Proceedings Act, on the Media Council's administrative powers. Meanwhile, based on relevant judicial and Constitutional Court jurisprudence, the "narrowly defined" range of administrative powers is unambiguous and therefore cannot be extended (pursuant to the Administrative Proceedings Act, a decision made in absence of authority is to be annulled). For purposes of Article 6(3) of the Press Freedom Act, no additional administrative powers or cases are being introduced under the Media Act, and Article 6(3) of the Press Freedom Act also falls outside the investigative rights in administrative proceedings, as no references to such powers on data provision are made even in the procedural rules of the Media Act.

Accordingly, the provisions of the Media Act on clarifying the facts (Article 155) and on data provision (Article 175) cannot be applied in connection with Article 6 of the Press Freedom Act. Obviously, it is not the task of the Media Council to protect "public order" and "national security" and investigate and prevent "criminal acts"; as these are tasks of the police and the authority responsible for national security. Provided, strictly on a theoretical level, that the Media Council would decide to use the above provisions for the disclosure of sources, the media service provider or publisher concerned could, in all cases, seek legal remedy under the Administrative Proceedings Act against such order of the Council, and the order would be adjudicated by the administrative court. Furthermore, the court conducting the legal review may not consider the annulment of the respective administrative decision, since decisions made without authority are void.

XIII. Protection of investigative journalism (Article 8 of the Press Freedom Act)

Is the press entitled to commit, as part of its investigative work and in order to uncover a criminal act or other abuse, illegal and unlawful acts, and where are the limits of investigative journalism? If we want journalists to assist in the continuous supervision of the transparent, democratic functioning of the public authorities, then - if they cooperate - charging the contributing journalists as suspects by the law enforcement authority may already be

unjustified, and investigative journalists failing to notify the police in advance may not be convicted for their offence, as their act clearly poses no danger to society.
The Press Freedom Act provides investigative journalists exemption from any liability, provided that the violation has been committed in connection with obtaining information of public interest, which could not have been otherwise obtained or could have been obtained only with unreasonable difficulties. The condition of exemption is that the infringement committed by the journalist should not cause disproportionate or serious harm and that the information is not obtained by the violation of the statute protecting classified data. The scope of exemption does not cover civil litigations initiated for the compensation of material damages caused by the journalist's unlawful behaviour.
According to certain critics, the category of "information of public interest" in the text of the statute is undefined and unclear. It was mentioned as a problem that "information of public interest" is not defined in a normative manner. The urge to define terms, that occasionally overcome some lawyers, is not required with respect to this rule, because the adjudicators will be able to precisely define on a case by case basis the content of "information of public interest". We believe that it is deeply insulting to journalists and editors to assume that perhaps they are unable to determine what information is of public interest and what is not - as this is one of the basic reference points of their profession, their work.
Our opinion is that the concept of information of public interest does not violate the requirement of clear norms under Article 2(1) of the Constitution, and it cannot be stated that this concept cannot be interpreted by the adjudicator. To define the concept of information of public interest, the starting point can be the concept of *information of public interest* in Article 61(1) of the Constitution as found in Act LXIII of 1992 on the Protection of Personal Data and Disclosure of Information of Public Interest (hereinafter: the Data Protection and Freedom of Information Act) - although information of public interest has a broader meaning pursuant to the Press Freedom Act - and the main function of exercising the freedom of the press (democratic provision of information). Following from the foregoing, information of public interest as applied by the Press Freedom Act is any information or data, which relates to, or aimed at, the constitutional functioning of the state, providing information about which is the fundamental responsibility of the media.

XIV. Right to withdraw a statement (Article 15 of the Press Freedom Act)

The new rule significantly increases the possibilities of media content providers and, at the same time, in order to protect the democratic public sphere, limits the right relating to the withdrawal of statements.

Article 15(1) of the Press Freedom Act codifies the general prohibition of taking advantage of the consent to publish a statement, and paragraph (2) prescribes the mandatory presentation of statements prepared for publication. Following the presentation, the person giving the statement may only withdraw his consent to publication, if the media content provider "has substantially altered it, and the alteration would prejudice the person giving the statement". This narrowed the possibility of withdrawal in principle, as before, pursuant to the Press Act, it was possible to withdraw any, even unsubstantial and non-prejudicial, alterations (Article 11(1)(d) of the Press Act).

The legal consequence of taking advantage of the consent in Article 15(1) of the Press Freedom Act pursuant to paragraph (3) can be also the withdrawal of the statement, but only

if the statement is not of public interest, was not pertaining to a public event, or was not made by a public figure (a person charged with official or public functions or a political figure). Thus if anybody made a statement with respect to public affairs or if a public figure made a statement about anything, even in the case of misuse, they cannot withdraw the statement. Of course, paragraph (2) contains a separate cause of action, and the option provided therein is available with respect to statements made on any subjects by anybody.

Presumably, the most important reasons for the regulation were the abuses taking place earlier in the so called talk shows and reality shows, when the media service providers restricted the right to withdraw by contract, and later published the statements of the participants to their detriments. Thus, it is important to emphasize that Article 15 of the Press Freedom Act covers not only the press and merely "conventional" interviews, the category of "statement" is broad enough to include any statements made in the media. At the same time, under the Press Freedom Act, the withdrawal must take place "sufficiently in advance of the publication" and it cannot cause "the media content provider disproportionate damages". "Sufficient time" differs by the type of media outlet, and the specifics will be developed by the jurisprudence of the adjudicators. At the same time, in contrast to anomalies experienced in the past, Article 15(3) of the Press Freedom Act gives adequate protection, which provides the right to withdraw statements made by private individuals in instances of private nature, and in case of abuse by the media content provider, and at the same time, renders the contracts restraining this right void.

XV. Rules on registration (Article 5 of the Press Freedom Act and Articles 41-42 and 45-47 of the Media Act)

With respect to the registration related rules of the Media Act, it must be emphasized that registration is merely a formality, an administrative procedure, which does not mean the substantive review of the content or "permission" of the media content service. The Media Act only allows a formal review during registration, and the authority has no discretionary powers concerning the evaluation of the registration; in other words, the authority is required to enter a media content provider into the register, provided that the statutory requirements are met; what is more, in the case of notification of a press product, registration cannot be denied. Accordingly, registration cannot be interpreted as a restriction of the freedom of the press.

General justifications of the registration related rules

The Constitutional Court in Decision No. 20/1997 (III. 19.) AB found the following: "*the mandatory notification about the production and publication of a periodical as well as its registration is a traditional and necessary aspect of press regulation.*"

The public administration theory and dogmatic justification of the media content services registration is the supervisory powers of the Authority (Media Council and the Office), which includes the power of control (authorizations and tools of control). Beside the right of inspection, the supervisory powers of the Authority include - depending on the result of the inspection - the tools of intervention, the competence of applying various legal measures, and the tools to remedy the legal violation discovered as a result of the inspection.

The Authority, thus, exercises official oversight over legal entities precisely defined by the Media Act (and the Press Freedom Act). This official oversight is exclusively directed to enforce the substantive law norms contained in the Media Act and the Press Freedom Act, as well as to ensure that expressly defined legal entities meet their legal obligations. (All this is true also regarding the special oversight proceedings - market surveillance procedures and media market sector inspections - and in the course of these proceedings the Authority conducts inspection directed at specifically defined legal entities and performs acts of public authorities and makes administrative decisions.)
The official oversight described above requires at the same time that the Authority possesses adequate, up to date information and an authentic register of the legal entities within the scope of the Press Freedom Act and the Media Act. If the media regulation did not include the registration obligation, then in every oversight proceeding the Authority would have to first clarify what type of providers fall under the personal jurisdiction of the oversight authority, which would significantly hinder the assurance of legal enforcement on the one hand, and on the other, determination of the legal entities concerned would not be guaranteed and predictable.
It should be emphasized also that the authentic official registry of the legal entities under official oversight has an importance of warranty, as the registration of the data it contains is prescribed by law, anybody can review the data, and until otherwise proven, the data must be presumed authentic.

Notification or licensing?

The new media regulation expressly abandons the previous approach of the Press Act, and - with respect to press products, as well as on-demand and ancillary media services - does not require notification of the Authority as a condition of the commencement of services or activities (Article 41(2) of the Media Act). However, despite this, notification is mandatory and must be completed within sixty days of the commencement of services or activities. In the event of failure of notification a fine up to one million Hungarian forints may be imposed (Articles 45(8) and 46(8a) of the Media Act).

In connection with registration, Article 5(1) of the Press Freedom Act contains a safeguarding rule, according to which "*the conditions set for registration may not restrict the freedom of the press*". Thus, the Authority may not interpret the relevant rules of the Media Act pertaining to registration in a way so they unnecessarily or disproportionately restrict the publication of press products and the commencement of media services. Registration in itself cannot be viewed as a restriction of the freedom of the press (only if the regulation provided the authorities with the power of discretion, as it was done by Article 14(1) of the previous the Press Act).

The conditions of registration in reality do not contain any requirements that would enable the Authority to exercise any discretion. Pursuant to the Media Act, certain data of the notifier are to be provided (name, address, contact information, name of the executive officer, and company registration number) as well as data of the service or press product (category, title, type, scheduled launch date) and an administrative service fee have to be paid for the process. The registration of these particulars does not restrict the freedom of the press to any extent. According to Decision No. 34/2009 (III. 27.) AB of the Constitutional Court, the registration could only be viewed as a restriction of the freedom of the press if "*registration was not*

merely an administrative act, but the Authority - as in the present case - had discretionary power over the subject of the petition". The Media Act does not contain such power.

Material scope

Certain critics complain that the rule of registration also extends to online press products. In case of the online press products too, the requirement of notification is only a formal requirement and it clearly follows from the rules of the Press Freedom Act and the Media Act pertaining to material scope.

With respect to the registration of press products, it must be emphasized that under the 1986 Press Act, the notification of activities and registration with the Authority was also mandatory, and with respect to online press products, this obligation was extended by the judicial case law of recent years (see for instance Decision No. BDT 2009. 2148 of the Budapest Metropolitan Court of Appeal). Accordingly, numerous online newspapers and portals have already registered - before the adoption of the new regulations - with the official register.

Grounds for revocation and cancellation

The grounds for revocation and cancellation defined by the Media Act (Articles 45(4)-(5) and 46(5)-(6)) are not based on the content of the press product or media service and do not provide the registering authority with discretionary power.
The Media Act only provides for revocation of registration, thus registration cannot be denied. (This is only important for formal reasons, as according to the effective regulation, the media service or press product must be registered no matter what, then, as a result of the inquiry during the notification - if certain conditions exist - the registration must be revoked, which in the administrative proceeding takes place with the issuance of an administrative decision. All this provides the clients with guaranteed legal protection.)

The Office revokes the registration in case of conflict of interest with respect to the notifier, or if the name or title of the media service or press product that is the subject of the notification is identical with, or confusingly similar to, that of an on-demand media service or press product, which was previously registered and which is in the register at the time of the notification.

Cancellation can take place if after the registration such circumstances arise, based on which the law provides for the application of this legal consequence. It must be emphasized that this type of cancellation is not a sanction, as it is not applied because of a legal violation; similarly to registration it is a necessary component of the regulations regarding the press.

On-demand media services or press products must be cancelled in the register if revocation of registration would be proper; the media service provider/founder/publisher requested the cancellation in the register; the media service is not started within one year of the registration or if an ongoing service is interrupted for a period of more than one year (in case of press product: the publication is not started within two years of the registration or the publication is interrupted for a period of more than five years); or a final court decision ordered the discontinuation of trademark infringement by the name of the media service or title of the press product and the banning of the infringing party from further violations.

The automatic cancellation after a certain period of time of services that has been interrupted for a long period of time or never commenced made it possible to handle the anomalies caused by earlier rules pertaining to registration. The system of the periodicals register contains a large number of such periodical titles even today, which their notifier never intended to publish but only wanted to decrease the options of their competitors by reserving periodicals' titles.
The resolution of disputes over periodical titles also became simpler and received substantial guarantees. Pursuant to the Media Act, the registration must be revoked if the name or title of the media service or press product that is the subject of the notification is identical with that of an on-demand media service or press product, which was previously registered and which is in the register at the time of the notification, and the on-demand media service or press product must be cancelled in the register if a final court decision ordered the discontinuation of trademark infringement by the name of the media service or title of the press product and the banning of the infringing party from further violations.

Special rules pertaining to linear media services

The notification procedure pertaining to linear media services differs in many aspects from similar procedures pertaining to on-demand media services and press products. First of all, the linear media service can commence only after registration (Article 41(1) of the Media Act), and with respect to these services, more data and information must be provided for the Authority (Article 42(1)), and, here, the Authority may deny registration (Article 42(6) - thus, it is not necessary to revoke with another decision the automatic registration). Reasons for denial include violation of rules pertaining to media market concentration and the failure to pay the administrative service fee in the registration process, and reasons for cancellation include cancellation for repeated and serious legal violations (Articles 42(6)(c) and (f), Article 42(7)(f), and Article 187(3)(e)).

The broadening of the scope of data required for notification is justified because the Authority can assess the media service fee to be paid after the linear media service in the possession of these data.
The cancellation contained in Article 42(7)(f) of the Media Act may only be applied as a sanction if, following the registration, the media service committed more than once serious legal violations, and the Media Council, observing discretionary factors prescribed by law (gradualism, proportionality, and equal treatment), sees the sanction of cancellation justified. By the way, the instances of cancellation of linear media services almost identical with instances of cancellation of on-demand media services and press products, but they include one additional situation: owing - for over thirty days - the media service fee to the Authority.

The Radio and Television Broadcasting Act also provided the option - with respect to linear media services - of cancellation as a sanction that can be applied in case of legal violation, but the previous media authority did not take advantage of this option. Even though the application of the cancellation sanction remains possible in theory, after the cancellation of the media service provider concerned - following new registration - the application of this legal measure does not influence the functioning of the media service, so contrary to criticism, the Media Act does not intend to "stigmatize" the infringing media service providers.

It should be noted that as a result of the consultations with the European Commission, the rules of registration were also amended. Within the framework of this amendment a rule was added to the Media Act, based on which the registration of on-demand media services and press products cannot be denied, though this rule is rather formal due to the option of subsequent revocation. And also, the one million Hungarian forint ceiling of the fine for the violation of the registration rules was added to the text as well. But such amendments did not change the basis and essential elements of the rules.

XVI. Election and composition of the Media Council (Articles 124-129 of the Media Act)

Regarding the election of the Media Council, the Media Act contains the same constitutional safeguards with respect to which the Constitutional Court found before the similar rules of the Radio and Television Broadcasting Act constitutional. The new law contains, without exceptions, the formal guarantees of the Media Council's independence, including election by the Parliament, the fact that they cannot be recalled or instructed, the long duration of the mandate, possibility of review of administrative decisions, etc.

The National Media and Infocommunications Authority (hereinafter: Hungarian Media Authority) is the convergent authority in charge of the supervision of media and communications. The President of the Hungarian Media Authority is responsible for the supervision of communications, while the Media Council — operating within the Hungarian Media Authority, but autonomous and with an independent legal personality — is responsible for the supervision of media. The President of the Media Council and the Hungarian Media Authority is the same person, however, the Media Council comprises five members and passes its decisions by a majority of votes.
The Media Council is elected by a qualified two-third majority of the Parliament. The members of the Parliament cannot be influenced in their decision regarding the election of the members of the Media Council, and members of the Media Council cannot be instructed, cannot be recalled and are independent in all respects. The elected members of the Media Council may not have any ties — either formal or informal — with the Government. Pursuant to the Act, persons *"with higher education qualification and with at least three years of experience in economic, social, legal, technical sciences or management (membership in managing body) in the field of media service distribution, media service provision, regulatory supervision of the media, electronic communications or regulatory supervision of communications"* are eligible to become members of the Media Council. Moreover, strict conflict of interest rules apply to the members.
In the course of personal decisions, the Constitution does not differentiate between representatives of the governing party and the opposition. With this respect, within the paradigm of constitutional law, it is not important as to in what proportion the representatives of the governing party and the opposition voted for the candidate(s), which in the case of secret ballots cannot even be proven. It is a different issue that an independent body after its election must become independent from the representatives who elected them.
With respect to all this, our opinion is that the current composition of the Parliament does not affect the constitutionality of Articles 124-129 of the Media Act.

Similarly to the Media Council, members of the ORTT, established pursuant to the former Radio and Television Broadcasting Act, were also elected by the Parliament, upon the recommendation of the factions of the parliamentary political parties. The Constitutional

Court has examined the constitutionality of the election of the members of the ORTT, and established the following on the respective rules in its decision No. 46/2007 (VI 27) AB: *"that the Media Act allows judicial action against material decisions of the ORTT regarding the legality of broadcasting provides adequate safeguards that parliamentary parties cannot exert substantial influence on the contents of programs through the ORTT. […] In and of itself, the nomination right of parliamentary factions indeed does not guarantee the independence of the ORTT. However, nomination by parliamentary factions does not automatically mean the election of the person recommended for ORTT membership. The fact that MPs elect the members of the ORTT ensures that the decision on members is the outcome of a democratic process. The fundamental principle of representative democracy is independent mandate, and an MP cannot legally be obliged to cast his vote in a certain manner. […] Pursuant to Article 31 (2) of the Media Act, members of the ORTT are subject only to the law and cannot be instructed in their actions. The free mandate of members and the fact that they cannot be recalled ensure independent operation free of any influence. Political and economic conflict of interest rules provide further safeguards of independence. The mandate of ORTT members elected by the Parliament is distinct from the legislative cycle. […] These statutory provisions are theoretically capable of ensuring the independence of ORTT members and excluding parliamentary parties from formally exerting their influence.*

Based on the above, the regulation of the election of the Media Council complies with the requirements of constitutionality: its members are elected by the Parliament, and, moreover not by single majority vote under the disposal of the governing parties, but with qualified two-thirds majority, requiring agreement with the parties of the opposition. Members' term of mandate is distinct from the legislative cycle: they are appointed for a term of nine years.

Article 123(2) of the Media Act also states that the Media Council and its members are subject only to the laws and may not be instructed with respect to the their activities. The mandate of members is free and they cannot be recalled. Beyond the similarities, the election procedure of the Media Council is indeed different in one aspect from that of the election of the previous body, and this is the nomination process. While the president of the ORTT was nominated jointly by the President of the Republic and the Prime Minister, the president of the Media Council is nominated exclusively by the Prime Minister. Under the Radio and Television Broadcasting Act, the parliamentary factions nominated separately one member each to the council, while under the Media Act, an ad hoc committee comprised of one member of each faction nominates the four members. In the ad hoc committee, every parliamentary faction has a number of vote in proportion to the number of its members, and in the first round they have to agree unanimously, and in the second round, with a two-third majority on the persons of the four candidates. This solution present a greater pressure for compromise on the parliamentary factions, and at the same time, it does not guarantee without a doubt that the candidates of all parliamentary faction participate in the Media Council. Only in one situation can the pressure to compromise be avoided: if any of the political powers obtain a two-third majority in the Parliament. In such situation, however, the following sentence of a Constitutional Court decision is appropriate, according to which "*the fact that MPs elect the members of the ORTT ensures that the decision on members is the outcome of a democratic process."*

The fact that the system of the nomination process can result in a situation where not all parliamentary factions are represented among the members of the Media Council does not

render in itself the composition of the Media Council unconstitutional. As it was concluded in Decision No. 37/1992 (VI. 10.) AB of the Constitutional Court, "*any controlling, substantive influence of the Parliament on radio and television is just as unconstitutional as that of the Government. The same applies to local governments, political parties, and other non-governmental organizations, advocacy organizations and groups. The duty of the legislature is to determine the legal solution that is able to guarantee comprehensive, balanced and accurate presentation of opinions and impartial reporting.*" Even if exclusively the Government appointed the members of the Media Council it would not be in itself a constitutional problem. This is supported by the previously cited Constitutional Court decision: "*in terms of its content Paragraph 6 of Decree No. 1047/1974 (IX.18) MT of the Council of Ministers is unconstitutional not because it charges the Government with the oversight of the Hungarian Radio and the Hungarian Television - including the approval of the organizational and procedural rules - but because it does not contain any substantive, procedural or organizational regulation which would preclude the possibility of the Government using its license to assert - even indirectly - a controlling influence on program content.*"

Considering also that the Media Act (contrary to the previous Radio and Television Broadcasting Act, with respect to all decisions of the Media Council) provides the opportunity of judicial review, the above referenced nomination and election process cannot provide in any way the opportunity to one or more political parties, the Government, or the Parliament to impose controlling influence on the content of media services and press products. As the Constitutional Court concluded in Decision No. 46/2007 (VI. 27.) AB, in connection with the initiative objecting the nomination of the members of the ORTT by parliamentary factions, that "*the fact that Media Act allows judicial action against material decisions of the ORTT regarding the legality of broadcasting, provides adequate safeguards that parliamentary parties could not exert substantial influence on the contents of programs through the ORTT. It is because the intention of the ORTT and of the parliamentary parties to influence the content of programming can become at any time the subject of judicial proceedings, during which the presiding judge is obligated to make an impartial and independent decision [Article 50(3) of the Constitution] on whether the decree met the requirements of the freedom of the press".*

The Prime Minister nominates the President of the Media Council by appointing him/her as the president of the Hungarian Media Authority. However, in this respect, the Prime Minister's nomination right does not mean at all that at the same time he has the right to appoint: the candidate can only become the president of the Media Council, if the Parliament votes in favour by a two-third majority. This creates an enhanced responsibility for the Prime Minister to nominate a candidate who presumably enjoys a broad support among the Members of the Parliament.

Some argue that by the nomination, the Prime Minister extends his exercise of power with respect to the time period over the government cycle and his mandate as Prime Minister. According to this argument the nomination by the Prime Minister raises the possibility of executive oversight over the freedom of the press.

In the Hungarian legal system, the heads of many authorities are appointed or nominated by the Prime Minister, for periods exceeding the government cycle. Thus, for example, the president of the Hungarian Financial Supervisory Authority is nominated by the Prime Minister and appointed by the President of the Republic of Hungary for six years. The President appoints, upon the recommendation of the Prime Minister, the presidents of the

Hungarian Competition Authority and the Hungarian National Bank, also for six years. The Parliament elects the president of the State Audit Office for twelve, and the judges of the Constitutional Court as well as the prosecutor general for nine years.
In connection with the election and appointment of the judges, the Constitutional Court pointed out that there are many ways to guarantee the independence and to neutralize political influence. One such way is election by a two-third majority of the votes of the members of the Parliament; but the same result may be achieved by the recommendation regarding appointment made by the Government or one of its members to the President of the Republic of Hungary (Decision No. 38/1993 (VI. 11.) AB).
The requirement that the president of the Hungarian Media Authority nominated by the Prime Minister has to be elected as the president of the Media Council by a two-third majority of the votes of the Parliament significantly limits the individual decision making authority of the Prime Minister, as when making a decision, he has to consider who that person might be that presumably will be supported by two-third of the Parliament.

Under the Constitution, the Parliament has an "organizational freedom" (right), which clearly includes - based on both constitutional law and public administration organizational theory and organizational law - the determination of the term of supervisory legal status and legal relations. In addition, the Parliament has the most general and extensive organizational right (compared to which, the other organs named in the Constitution - e.g., the Government or local government - have more limited powers in this area). However, neither the Constitution, nor the Constitutional Court decisions analyzing the composition of the media oversight system formulated any requirements regarding the diversity of these organizations. It is not diversity the Constitutional Court requires under the Constitution, but it sets up the requirement that no groups of society or community of interest (including the Government and the Parliament) should have the chance to exercise controlling influence on the content of media services.

In the case of different public offices and mandates, the long term of the mandate promotes independence from the Government and the Parliament. From the perspective of the functioning of the state and society, the Media Council has important, significant tasks. For the sake of "keeping distance" from the Government and the Parliament, its president and members receive their mandates for a term extending beyond a parliamentary session. According to certain critics, the current larger Government party ensured its influence on public life for nine years by electing the Media Council, regardless of its results at the next and following elections. This claim is somewhat self-exposing: this is because, indirectly it complains that other Government parties after a possible Government change will not be able to assert their own intent to influence because of the long duration of the appointment. But why would it be a problem from a constitutional perspective if after the next election parties different from the current governing parties would form a Government while the Media Council was elected during the previous parliamentary session? What is the reasonable connection, from a constitutional point of view, between the result of the next elections and the composition of the Media Council? Contrary to the claim cited above, the solution is that the Authority keeps its distance from the current as well as the following Government, too.

XVII. Tools of the Authority to reveal and establish the facts (Articles 153, 155, and 175 of the Media Act)

The new media regulation established a clear, transparent, and predictable system of exercising one's rights, which implements the European and constitutional requirement of public administration being subject to public law provisions. The Media Act places all procedures of the Authority related to media administration and media supervision within the scope of the Administrative Proceedings Act. The law of administrative procedure represents a legal regime enabling clear, guaranteed, client-friendly, and effective exercise of rights, which regulates the entire system of legal relationships between the Authority and external legal entities (clients), as well as the order and course of the procedure from start to finish, the institutions representing safeguards for clients, and the subjective rights ensuring the legal protection of clients against public authority; it also contains the detailed rules of legal remedies and judicial review.

The Media Act thoroughly regulates the toolset that can be used to establish the factual basis of different cases, and in this context, the Media Act also provides for the application of the toolset for regulatory inspections defined in the Administrative Proceedings Act, for the sake of clarity and due to priority safeguards aspects. The monitoring rules of the Administrative Proceedings Act may be specific, but they nonetheless represent a set of fundamental rules and instruments accepted for all sectors of public administration and also comply with the principles of "fair procedure" specified by the European Community with regard to regulatory proceedings, and therefore cannot be questioned from either a procedural, constitutional, or community law perspective.

The guaranteed limit of evidentiary tools used by the Authority in evidentiary procedures, on the one hand, is its statutory authority set forth by law. And, the "strictly defined" and, therefore, non-extendable nature of administrative powers is clearly established based on relevant judicial and Constitutional Court practice (pursuant to the Administrative Proceedings Act, a decision made in absence of authority is grounds for annulment); thus, the Authority does not have the power (outside of proceedings) to "arbitrarily" require the provision of data not necessary for the clarification of the facts of an individual administrative case.

On the other hand, the evidentiary procedure of the Authority and the guaranteed limitation of evidentiary tools mean that evidence can be viewed legal in the scope of such relevant facts, which are necessary for the clarification of the facts and render a decision with respect to the administrative case. In addition, from the perspective of constitutional safeguards and the public administrative legal theory bases of the statutory regulation of the Media Act, it must be emphasized that in every stage of the procedure of the Authority, the requirements of fundamental principles of lawfulness, proper exercise of powers, and the fair procedure must prevail. In accordance with the clients' rights set forth in the Administrative Proceedings Act and the Media Act, because of the subordination of procedures to public administrative procedural law, judicial control is also implemented; therefore, the option to judicial review is ensured in all procedures, taking of evidence, and clarification of facts (e.g., provision of, or familiarization with, data) conducted by the Authority.

The data provision rules of the Media Act was several times criticized for the fact that the Authority in its procedures is entitled to arbitrarily and without limitation require data provision, as a result of which, it can get to know and manage any personal data. In order to assess the criticism and constitutional objections on the finding of the facts, first of all, it is necessary to analyze the legal theoretical and dogmatic background, constitutional bases, and safeguards provisions of procedures conducted under the Media Act.

The guaranteed administrative rules of procedures of the Media Act

The Media Act has established a system of clear, transparent, and predictable enforcement regime and implements and enforces the European and constitutional requirement of subordination under the public administration act. The Media Act places all procedures of the Authority related to media administration and media oversight within the scope of public administration authority procedural law, i.e. the Administrative Proceedings Act. Administrative procedure law represents a legal regime enabling clear, guaranteed, client-friendly, and effective enforcement of rights, which regulates the entire system of legal relationships between the Authority and the external legal entity (client), as well as the order and course of the procedure from start to finish, the institutions representing safeguards for clients, and the subjective rights ensuring the legal protection of clients against public authority, and it also contains the detailed rules of legal remedies and judicial review. Thus, the guaranteed administrative procedure law basis of the Media Act as a whole can be found in the general procedural rules of the Administrative Proceedings Act and the Media Act.

Constitutional bases and principles of procedural safeguards of the administrative procedure law related to media administration

It can be set out as a theoretical starting point of constitutional requirement of public administration authority procedure related to media administration, that constitutionality in a formal sense means the existence (and enforcement) of fundamental rules pertaining to procedural order, and in a contextual sense means the guarantee of freedom rights serving as control to arbitrary exercise of power.
From the perspective of the present analysis - constitutional requirements to be examined in the scope of the establishment of the facts and in the scope of the enforcement of procedural safeguards - first the provisions of the basic principles of the Administrative Proceedings Act must be mentioned, considering that the basic principles of the Administrative Proceedings Act must be observed in every procedure of the Authority, and these rules lay out the most fundamental requirements with regard to all procedures of the Authority.
The basic principles of the Administrative Proceedings Act refer to such constitutional rights whose observance and protection is the primary responsibility of the state; these basic principles are the requirements of those provisions, including the adequate rules of fundamental rights and of the Constitution, which are mandatory for everyone with respect to administrative proceedings. These provisions, thus, supersede the detailed procedural rules in content, and provide the restrictions for their applications. It is important to emphasize that the basic principle provisions of the Administrative Proceedings Act are binding in every administrative proceeding of the Authority; they have to prevail in every stage of the proceeding, in other words, while enforcing the law, they may be cited to and they have to be applied in the decisions, in other words, they have normative power. Violation of the principles affects the legality of the Authority's decisions, may serve as a basis for initiation of legal actions, and has procedural consequences.

The requirement of legality is the central category of administrative legal theory. The principle of legality is a basic principle permeating the entire administrative procedure, which defines the fundamental objective of administrative procedure, and that the administrative authority in the course of its proceedings is obligated to observe and have others observe the provisions of the laws and regulations. The legal constraint (legality) of individual administrative acts is a complex requirement, which requires that the acting administrative organ be established by law, and that its legal capacity, powers, and jurisdiction be defined by

law. This rule of law and constitutional requirement in itself refutes the criticism of the Media Act, according to which the Authority can arbitrarily - even without administrative proceedings - conduct procedural actions, issue administrative acts, and prescribe data provision obligations.
In connection with the exercise of legal authority, the other component of the legality principle, i.e. the rules of the Administrative Proceedings Act pertaining to the principle of proper exercising of powers must be mentioned, being one of the basic constitutional principles ensuring the avoidance of arbitrary proceedings by the Authority. According to Article 1(1)-(2) of the Administrative Proceedings Act, administrative powers and administrative authority may be used exclusively to achieve the objectives as intended by the legislature (prohibition of abuse of power). From the perspective of administrative legal theory, it can be stated that the principle of legality, and within that, appropriate exercise of power and the basic constitutional principle of fair procedure and guaranteed rights of the client ensure the substantive protection against arbitrary administrative proceedings.
As the legal theory component of the basic principle of legality, it is necessary to mention the principle of enforcement upon the authority's own motion (ex officio action). The principle of ex officio action pervades administrative procedure as a whole, but with respect to the subject matter of the present analysis, we examine its forms relating to the burden of proof and the clarification of the facts. Ex officio proof is such a unique feature of administrative proceedings, which differentiates it from the procedural rules of civil or criminal cases. Because while in judicial proceedings the parties have the burden of proof, in administrative proceedings, the Authority bears that burden. Thus, in administrative proceedings, it is not the right but the obligation of the Authority to reveal and establish the true facts, and the Authority is required even in absence of a motion by the client to carry out all evidentiary acts necessary for the clarification of the facts.
Among the basic principles of administrative proceedings and the necessary elements of the paradigms of constitutionality, reference must be made to the right to legal remedies. Articles 163-165 (and Articles 155(4) and 175(5)-(6) containing the important rules regarding the subject matter of this analysis) of the Media Act guarantee the right to legal remedies against every administrative decisions rendered under the administrative powers of the Authority. It is important that it is possible to request judicial review on any grounds of legal violations - both substantive and procedural - against the decision of the Authority, and the courts are entitled to fully review the decisions of the Authority (Article 164(3) of the Media Act). Judicial review thus extends to the contents (issues of substantive law), and procedural grounds and form (procedural issues) of administrative decisions, and furthermore, to the rationality and legality of reviewing the discretion and the criteria thereof included in the administrative decision. It is important to emphasize that based on the regulatory regime of the Media Act, in the course of the review of the administrative decision, the court has a quasi oversight - amending - power (Article 164(3) of the Media Act).

The legal regulation established in accordance with the foregoing constitutional requirements and defined by constitutional standards means the basic constitutional foundation and relevance and the guaranteed procedural framework of administrative proceedings related to media administration.

Safeguard rules regarding the clarification of the facts under the Media Act

Regarding the regulatory instruments for the clarification of the facts defined in the Media Act, first, it should be highlighted that ensuring the operation of the media system and market, economic, social, public service, constitutional, and human rights correlations thereof is a primary responsibility of the state, in which adequate law enforcement is quintessential. The basis for law enforcement is, however, the establishment of the facts of the specific cases and knowledge of data related to media services. On the other hand, however, state intervention in the media system and establishment of the facts of the case are significantly limited by the constitutional principle and safeguards of the freedom of the press. Based on these constitutional foundations, the method and instruments by which the State intervenes in the domain of media represent a central issue and are the target of a now permanent critical attention from the media and society.
First of all, it is important to emphasize that based on the provisions of the Media Act, provision of data may only be (legally) requested within the framework of administrative proceedings or administrative inspections. From the perspective of safeguards, with respect to the constitutional basis of statutory regulations of the Media Act, it must also be emphasized that data provision is only possible in the course of administrative proceedings conducted under administrative authority, and it must be ensured that the requirements embodied in the basic principles, as described above, of legality, appropriate exercise of power, fair process, etc. are observed at every stage of these proceedings.

The three main types of data provision in the regulatory system of the Media Act

(1) Data provision in the course of the administrative proceeding

It is just natural in all administrative sectors that the state reveals, assesses, and analyses certain facts for the purpose of proper law enforcement, but in the domain of media this became an issue of central "interest." In order to avoid criticisms referring to harsh intervention and censorship, the Media Act thoroughly regulates the toolset that can be used to establish the factual basis of different cases, and in this context, for the sake of clarity and to ensure the priority safeguards, the Media Act also requires the application of the toolset for regulatory inspections defined in the Administrative Proceedings Act (Article 155(1) of the Media Act).
It is important to emphasize that although the inspection rules of the Administrative Proceedings Act may be specific, they nonetheless represent a set of fundamental system of rules and instruments accepted for all public administration sectors and also comply with the "fair process" principle of the European Union regarding administrative proceedings; therefore, they cannot be questioned from either a procedural, constitutional, or community law perspective.
It can be stated based on the regulatory system of the Media Act that in pending administrative proceedings, on the one hand, the Authority has the right to request data from the client pursuant to Article 51 of the Administrative Proceedings Act (which under the provisions of the Administrative Proceedings Act does not mean data provision obligation for the client, only an opportunity to provide evidence, make statements, and provide data). On the other hand, under Article 155 of the Media Act, the Authority has the right to obligate the client (and persons defined under this Article of the Media Act) to provide data. If the obligor fails to fulfil his obligation to provide data under Article 155 of the Media Act, a procedural fine may be imposed on him/her under Article 156 of the Media Act.

With respect to the regulation of data provision, it is also important to emphasize that the Administrative Proceedings Act itself refers to separate regulations (statute or government decree) the task of defining those proceeding categories where the disclosure of data and making of relevant factual statements as specified by separate regulations is mandatory and their denial may be punishable by separate sanctions. The reason for the wording of the Administrative Proceedings Act - among other things - is that since the Authority is obligated to act in administrative cases under its competence and, further, obligated to clarify ex officio the facts necessary for rendering a decision, and also, in the majority of cases of social relationships governed by sectoral laws, generally the client has the information that may serve as a basis of the decision, therefore, with legal regulation, the Authority must be enabled to prescribe data provision obligations in order to familiarize itself with these data.

Compared with the mandatory data provision specified in the authorization of Article 51(3) of the Administrative Proceedings Act, the Media Act contains only one important additional rule: based on Article 155(4) of the Media Act, in particularly justified cases, for the sake of the clarification of the facts of the case, the Authority has the right to obligate persons or organizations other than the client and other actors in the proceedings to provide data or means of evidence. The critics of the Media Act often attack this paragraph stating that it enables arbitrary application of the law and the unlimited prescription of data provision.
These statements, however, are refuted, on the one hand by the safeguards provisions introduced above: the Authority has the right to prescribe the provision of data exclusively in administrative proceedings initiated in an administrative matter under its competence as defined by law in order to clarify the facts (i.e. in order to establish the legally relevant facts of an individual, concrete case). Based on relevant judicial and Constitutional Court practice, the "strictly defined nature" of administrative powers is unambiguous and therefore cannot be extended (as per the Administrative Proceedings Act, a decision made in absence of authority is grounds for annulment), thus, the Authority legally is not entitled to "arbitrarily" require data provision outside of administrative proceedings or when it is not necessary for clarifying the facts of the individual case of the administrative matter.

The question also emerged, as to whether persons besides the client could be obligated to provide data under the Media Act, if these persons are bound by confidentiality obligations pursuant to other laws and the Media Authority requests from them data that falls within the scope of this confidentiality obligation. Article 172(f) and (n) of the Administrative Proceedings Act differentiates between concepts of "privileged information based on profession" - physician-patient or attorney-client privilege, etc. confidentiality - and "statutory secrets." The Media Act, however, only mentions "statutory secrets", thus, it only differs from the rules of the Administrative Proceedings Act in respect to the management and familiarization with statutory secrets. Thus, professional secret is not an issue of the procedural law regulation of the Media Act, but the general procedural rules of the Administrative Proceedings Act applies to them fully.

From the perspective of safeguards, it should be separately emphasized that obligating persons besides the client for data provision can only take place in especially justified cases and only as an exception. In other words, exclusively in situations if in the individual case – after the evidentiary procedure and clarification of the facts – relevant data, documents, and evidence necessary for rendering a decision on the merits are not available. Thus, the order instructing data provision is only legitimate in this respect, if the Authority has justified in detail, and provided adequate and reasonable legal as well as factual reasons to support all

these circumstances in the order. Besides this, it has to be emphasized that the determination of the subject and content of data provision obligation under the Media Act is not without examples in the sectoral regulatory system of the Hungarian public administration.
Because of the criticism directed at the Media Act, it is also important to emphasize that in the course of ordering data provision, the Authority is not entitled to conduct a "search of the premises" or resort to other similar instruments or legal institutions falling within the scope of criminal law. It may only resort to the instruments regulated and authorized in all sectors of public administration, as it must conduct its procedures according to the rules of the Administrative Proceedings Act generally applicable in all sectors of public administration.
Critical statements regarding arbitrariness by the Authority in connection with data provision, on the other hand, are refuted by the rules of the Media Act on the guarantees for legal remedies. This is because pursuant to the special legal remedies rules of Article 155(4) of the Media Act, judicial control is also available against the Authority's order instructing data provision, as the person obligated to provide data and evidentiary instruments may turn to an administrative court for legal remedy (as an independent legal remedy) against the order of the Authority. With this respect, it is important to emphasize that based on the safeguards rules of the Media Act, the judicial petition for legal remedy - unlike the general rules of the Administrative Proceedings Act - has a suspensive effect. In other words, the person or organization obligated to provide data is only obligated to comply with the data provision challenged by the petition for legal remedy after the decision of the reviewing authority becomes final - i.e. if the court declares the order legitimate in the review procedure. Thus, it is wrong and unfounded to claim that the refusal to provide information results in immediate and automatic fine, because exactly as a result of the safeguards regulation of the Media Act only in case of final finding of failure to comply with the data provision obligation (failure to comply or failure to adequately comply) can the Authority apply legal sanctions.

(2) Requirement of data provision obligation in individual cases pending as administrative matter outside of administrative proceedings

Based on the particularities of the tasks and competencies of media administration, the Authority is entitled to prescribe data provision obligation outside the pending administrative proceeding based on Article 175 of the Media Act. With respect to data provision, the statute sets forth that the Authority may instruct persons and organizations under the jurisdiction of the statute to provide such data, which are essentially necessary for the administration of the tasks rendered under the administrative powers of the Authority.
Thus, it is important that because of safeguards reasons, the Media Act only provides for the prescription of data provision exclusively for the administration of tasks rendered under the administrative powers of the Authority for the sake of the exercise of its authority, and data provision obligations may be prescribed exclusively with respect to persons and organizations under the jurisdiction of the statute. According to Article 175 of the Media Act, in general the objective of data provision is to enable the Authority to make well-founded decisions, after getting familiar with relevant data, as to the necessity of the initiation of an administrative proceeding. With regard to the foregoing, the provision entitles the Authority to request data in separate administrative proceeding for the exercise of its administrative powers even if under the given administrative power, there is no pending administrative proceedings yet.

Since Article 175 of the Media Act contains data provision authority outside the scope of pending administrative proceedings, in this case, the prescription of data provision is an independent administrative matter, whose subject is the prescription of data provision itself.

In other words, the only and exclusive subject of an administrative proceeding initiated under Article 175 is the data provision, and the subject of administrative decisions terminating the proceeding is also the prescription of the data provision itself. It should be separately highlighted that this legal institution of the Media Act may be found in other sectoral regulations as well.
According to Article 175 of the Media Act, both the Office and the Media Council are entitled to issue data provision requests and orders, but only within the scope, and for the sake, of its own administrative powers. In other words, decisions based on Article 175 may be rendered only by the organ, under whose competence the case regarding the data provision belongs.
For the objective of the flexible exercise of the administrative power under this Article, fundamentally based on voluntary compliance with the law, directed to the prescription of data provision, and for the objective of taking into account the interests of the entities obligated to provide data, the Authority first issues an official notice (not requiring formal decision) requesting from the obligor the provision of the data specified in the notice. In the case of failure to comply with the notice, the Authority has the right to render a decision.
In the case of the data provision obligation regulated under Article 175 of the Media Act - with respect to its special aspects - the statute regulates an individual legal remedy. There is no administrative legal remedy (appeal) against the notice, however, the client may request judicial review of the decision rendered for "failure to comply" with the notice. The data provision notice may be challenged in this petition for legal remedy.

(3) Special data provisions and data provision procedures

The category of special data provision includes special data subject matters regulated by the Media Act or specially prescribed data provision "processes," such as, for example, data provisions regulated by Articles 77(1), 81, and 175(3)-(4) of the Media Act. These data provisions, however, are only special with respect to their subject matter. The bases of their constitutionality and legal theory (thus, especially: their being subject to administrative proceedings, existence of guaranteed client rights, right to legal remedies, etc.) are the same, wherefore, we omit the detailed analysis of these special data provisions.

Rules governing the data management of the Authority

Because of its role on the media and electronic communications market and regulatory tools provided to achieve its statutory objectives, the Authority bears a special responsibility in the course of the fulfilment of its duties: it has to enforce the requirement consistently that it manages the confidential information that came into its possession or official attention in accordance with the law. With respect to the data and information brought to the official attention of the Authority, the Authority has the obligation to manage this confidential information (e.g., personal data, trade secret, etc.) exclusively in accordance with the laws and regulations, as well as protect it from disclosure to any unauthorized entity (individual or organization).
Due to the Authority's scope of activities and major role on the media and communications market, as well as the work of the staff carrying out its activities, in many cases they get to know the trade secrets of service providers also, the confidentiality of which is the legally protected right of the concerned entities.
During the term of the proceedings, the Authority ensures that secrets defined in the Administrative Proceedings Act and protected by law are not disclosed to the public or to

unauthorized persons, and that personal data is protected. For the guaranteed enforcement of the abovementioned rules, the subjects of the regulatory proceeding may, with respect to each data, request limitation of access to documents or of making copies or taking notes of such documentation, in other words, restricted handling of the data (Article 153 of the Media Act). The only situation where restricted handling of documents cannot be requested is in the case of data that is publicly available for reasons of public interest and which, according to the law, cannot be considered a secret otherwise protected by law.
The Media Act contains safeguards rules for the protection of trade secrets of media service providers and publishers of press products, which rules ensure the protection of information in the course of the regulatory proceeding and also thereafter. Under Article 147(1) of the Media Act, the scope of data enjoying special protection in the course of the data management by the Authority include personal and qualified data, trade secret with which the Authority became familiar in connection with its official activities and the fulfilment of these activities, and any other data, fact, or circumstance that the Authority is not obligated by law to make accessible for the public.
Based on all this, it can be concluded that the Authority is authorized to manage data only for the purpose of legitimate objectives defined in the Media Act. Articles 147 and 153 of the Media Act and Article 17 of the Administrative Proceedings Act, to be applied as a framework regulation, ensure that the legal restriction is carried out in the least intrusive manner for the subject of the data necessary for achieving the objective. Under these Articles, the Authority has a duty to ensure the safeguarding of the protected data and professional secret, as well as the protection of personal data. The statute sets out that the Authority must ensure that this data is not disclosed for the public, and that it is transmitted only in accordance with laws and regulations or upon consent by the person concerned.

The scope of data clearly accessible by the public

Out of the provisions pertaining to the data to be disclosed to the public the following can be highlighted, including but not limited to:

- The Authority maintains a register of service providers (or services) defined under Article 41(4) of the Media Act, and pursuant to paragraph (6) of the same Article, the data concerning the names, contact information of media service providers, press product founders and publishers, as well as the names and titles of the media services and products are public and accessible on the website of the Authority.
- Pursuant to Article 58(1) of the Media Act, the Media Council maintains a public tender register and publishes the list of tenderers recorded in the tender register on the Media Council's website.
- Pursuant to Article 162(2) of the Media Act, the Authority publishes - subject to protection of personal data and data restricted in the proceedings - its administrative decisions, and the relevant court decisions on its website.

The Authority is obligated to release upon request data of public interest (with the exception of data defined in relevant laws and regulations).

XVIII. Regulations relating to the Media and Communications Commissioner (Articles 139-143 of the Media Act)

The legal institution of the Commissioner is an efficient problem-solving forum operating through its special procedure - with an administrative toolset not available in other proceedings - protecting consumer and user interests, and thus promoting consumer welfare while constructively cooperating with service providers. The institution and procedure of the Commissioner complement public administration activities; he carries out activities of mediation, consultation, and cooperation, which are generally used and well functioning administrative solutions in the regulatory systems of both the European Union and Hungarian public administration. The Commissioner acts in cases of such legitimate violations to interests - public interest or threat to rightful private interest - where the Authority with its tools cannot act in order to rectify the violation, and at the same time, the consumers and users turning to the Authority - taking into account also that in these markets virtually the entire population is involved - rightly expect intervention and assistance. The legislature, taking into account the protectable objective and considering also the constitutional expectation that the interference should be on the lowest possible level and with the mildest possible means, developed special procedural rules - fundamentally based on publicity and positive incentives -, according to which the Commissioner's proceedings do not qualify as administrative proceedings, the Commissioner may not exercise administrative powers, may not render a decision in an official matter on the merits, and the complaint handled is not an official matter.

In connection with the appointment of the Media and Communications Commissioner, there were concerns that the Commissioner's legitimacy cannot be compared to that of the commissioners elected by the Parliament, that the Commissioner is a simple civil servant of the Hungarian Media Authority whose mandate can be revoked at any time according to the relevant rules.

It was raised as a concern that - compared to the ombudsmen - the President of the Hungarian Media Authority appoints and dismisses the Commissioner and his staff, and also, the President approves the Commissioner's standing order. The budget of the Commissioner's office is formulated within the budget of the Hungarian Media Authority, the Commissioner reports to the President and the Media Council, and thus the Commissioner is the "extended arm" of the President that can "harass" and "spy on" the players of the media market.

The Media and Communications Commissioner in his legal status, or in his legitimacy, indeed cannot be measured to the ombudsmen elected by the Parliament, but this could not even have been the intention of the legislature. The Parliament elects the parliamentary commissioner - as a representative reporting exclusively to the Parliament - for the protection of fundamental rights. Anybody can turn to the parliamentary commissioner if he believes that in the course of its activities, a government agency or public service organization caused anomalies regarding the fundamental rights of the petitioner, given that the petitioner has exhausted all available administrative legal remedies - not including the judicial review of an administrative decision - or there is no legal remedy available for the petitioner. The ombudsman may implement measures as defined by law. The ombudsmen elected by the Parliament belong to the legislative branch of the Government, and their objective is to scrutinize the enforcement of fundamental rights upon authorization by the Parliament.

In comparison, the Media and Communications Commissioner acts within the executive branch, and his duty is to contribute to the promotion of other "rights" and equitable interests outside of the administrative jurisdiction of users, subscribers, viewers, listeners, consumers of electronic news services or media services, as well as the readers of press products, regarding electronic communications, media services and media products (Article 139(1) of the Media Act).

Thus, the similarities between the ombudsmen and the Commissioner is exhausted in that both legal institutions serve to remedy complaints, the settlement of which is not possible through administrative procedures; but with respect to their principles, legal status, the manner of remedies - the resources at their disposal - the two institutions are so different from each other that to compare their "legitimacy" or "independence" is impossible. Namely, a basic difference is that the parliamentary commissioners (ombudsmen) are independent organs of parliamentary oversight, and thus their activities is linked to the legislative power. In contrast, the Commissioner under the Media Act can be linked to the Hungarian Media Authority, as an organization engaging in executive activities. Differences between the legal statuses and competences of the ombudsmen and the Commissioner stem from these differences.

Thus, the Commissioner functions within the executive branch. In the legislative history of the Media Act, the legislature clearly specifies the objective of the role of the Commissioner: the legal institution of the Commissioner operates as an efficient problem-solving forum, protecting consumer interests, that cannot be enforced in other proceedings, by using his special procedure and administrative toolset set out in the statute, thus promoting consumer welfare while constructively cooperating with service providers. Thus, the institution and procedure of the Commissioner complement public administration activities, it is an organization that carries out activities of mediation, consultation, and cooperation, which are generally used and well functioning administrative solutions in the regulatory systems of both the European Union and Hungarian public administration.

The Commissioner is a civil servant appointed and dismissed by the head of the organ, who also exercises the employer's right pursuant to Act XXIII of 1992 on the Legal Status of Civil Servants. Organizational hierarchy is a natural component of the executive branch just as the exercise of management authority competences over the budget; in other words, the budget of the Commissioner's office is formulated within the budget of the Hungarian Media Authority.

The critics failed to mention that extremely important aspect, which is also a special feature of the executive branch, namely, that the Media Act sets forth the Commissioner's competences, detailed procedural rules, which can be precisely differentiated from the organs of the Hungarian Media Authority exercising administrative powers, and states that in the course of the fulfilment of his duties under Chapter III of the Media Act, the Commissioner cannot be instructed by anybody - thus, of course, not even by the President (Article 139(2) of the Media Act). Thus, regarding the independence in carrying out of his duties in connection with his competences, it is indifferent that otherwise the Commissioner functions within the framework of an organization.
It is important to emphasize here that regulatory authorities (e.g. some of the Government offices, the Hungarian Energy Office, etc.) are under organizational control, but with respect to their duties and authorities, they are independent, cannot be instructed, and their competences cannot be revoked. All these are public administration organization theory questions that clearly guarantee the professional independence and autonomy regarding the competences of these organizations.

The Commissioner's report provides important information for the organs mentioned above regarding the situation of the markets monitored, and most of all, as to whether public interest in the increase of consumer welfare adequately prevails, because this can be clearly measured based on direct experience by assessing the complaints filed in the fields of both electronic

communications and media market.

The critics also complained that the Commissioner can act even in absence of any suspicion concerning specific legal violations. Under Article 140(1) of the Media Act, if a conduct related to the provision of a media service, press product, or electronic communications service is identified, which conduct does not constitute a breach of a regulation of media services or electronic communications services and falls outside the scope of the competence of the Media Council, the President, or the Office, but is, or likely to be suitable to cause harm to the equitable interests of the users, subscribers, consumers, viewers and listeners of media services, press products, or electronic communications services, the person that suffered the harm to the interest or with respect to whom an imminent risk of harm to the interest exists, or a non-governmental organization representing the interest of consumers, if the harm to the interest concerns or likely to concern a significant number of consumers, may file a complaint with the office of the Commissioner.

Thus, the Media Act defines those situations when the Commissioner may act, and this is the domain of such equitable harms to interest, where the Authority cannot act with its own means to remedy the harm. "Equitable interest" may be public or justified private interest. Justified private interest in this context means all such - statutory - interests, the harm to which or the risk of harm to which arises in connection with the provision of a media service, press product, or electronic communications service, which does not expressly constitute a breach of a regulation of media services or electronic communications services and cannot be protected by the administrative instruments of the Media Council, the President, or the Authority.
The legislature, by setting forth the Commissioner's authority in such form, accepted that certain harms to interest may exist on the electronic infocommunications and media market - with special regard to the weight of participants on the market and the significant difference between the ability of users and consumers of the services to enforce their interests - whose protection for the sake of assisting users and consumers is the duty of the state, because, although, they do not reach the threshold of concrete legal violations where action with administrative means is possible, but they threaten concrete, just, and legitimate private or public interests.
The objective of the Media Act is to protect the communications related fundamental rights of the members of society. The convergent Authority is simultaneously keeping guard over the enforcement of rights and obligations related to communications with respect to aspects relating to content and the supporting infrastructure.
According to the experience of the Authority, the Commissioner, and his predecessors, consumers and users on these markets contact the Authority with numerous harms to interests, where rules pertaining to media service or electronic communication is not violated in a manner that it would enable the Authority to initiate proceedings. But at the same time, the consumers and users turning to the Authority - taking into account also that in these markets virtually the entire population is involved - rightly expect intervention and assistance in the protection of their legitimate interests.
The legislature, taking into account the objective to be protected and considering also the expectation that the interference - considering the absence of concrete administrative authority - should be on the lowest possible level and with the mildest possible means, developed a special "non-administrative" procedure that may be suitable for the effective achievement of the legitimate objective, and, at the same time, it does not restrict without justification and to a disproportionate extent the participants of the electronic communications and media market.

The critics also objected the competence and procedural tools of the Commissioner. Article 141 of the Media Act sets out that the Commissioner's proceedings do not qualify as administrative proceedings, the Commissioner may not exercise administrative powers, may not render a decision in an official matter on the merits, and the complaint handled is not an official matter. Accordingly, the Commissioner does not have the power to render decisions having a legal effect and is not authorized to establish rights or obligations.

The critics cited Decision No. 1/2007 (I. 18.) AB of the Constitutional Court, which found Article 48(3) of the Radio and Television Broadcasting Act unconstitutional and annulled the provision. In connection with this, it is important to emphasize that the Commissioner's proceeding is sharply separated from the regulation proved to be unconstitutional, since the statute exhaustively sets out the detailed rules of the Commissioner's proceeding. In the case of the Commissioner there is no alternative proceeding that would be suitable to achieve the legitimate statutory objective, and most importantly, the Commissioner does not render decisions, has no competence to make a decision with respect to the case in the complaint, and his responsibility is to help to enforce the interests of consumers and users within the framework of a defined consultation procedure in cooperation with the service provider.

It has to be noted here that the objective of the Commissioner's proceeding is to prevent the harm to interests, therefore, he primarily seeks agreements. In accordance with the Media Act, this agreement means a concordant and voluntary legal statement (representation) of the parties, concluded between the Commissioner and the particular service provider, whereby the contractual rights entitle the users, subscribers, consumers, viewers, listeners, or readers resorting to the particular media, electronic communications service, or press product (Article 142(7) of the Media Act).

In one particular case, in the proceeding specified under Article 142(2) of the Media Act - exclusively for the more effective enforceability of equitable consumer interests and to render complaints more examinable, and exclusively with respect to the media or communications service provider concerned - the statute permits the exercise of public powers in order to ensure data provision. But even in such cases, the statute empowers the Office and not the Commissioner. Accordingly, the Office, upon the Commissioner's initiation, orders the concerned media or communication service provider, or publisher to provide the data related to the harm to interest, as designated by the Commissioner. The Media Act provides the service providers and publishers concerned the right to legal remedies against this administrative act, too, by permitting the obligor to request within eight days from the announcement of the decision the review of the decision from the Budapest Metropolitan Court. The Budapest Metropolitan Court shall adopt its decision about the case in an out-of-court proceeding within 8 days. In case the Commissioner receives trade secrets, he is obligated to keep them confidential.

In order to allow the Commissioner - even in the absence of public power - to represent equitable consumer and user interests more effectively than consumers and users, the Act provides a precisely defined toolset for the Commissioner, even in the absence of public powers. It is important to emphasize that the legislature, in order to achieve the protection of equitable consumer interests as a legitimate objective, prescribes the application of the least intrusive means. Thus, the Commissioner's system of instruments is not of public authority and has safeguards in every components of the procedure. The objective and basis of the

relevant regulation is the guaranteed protection of external legal entities.

The Commissioner's system of instruments has two basic pillars, publicity and positive incentives. The Commissioner, as the representative of consumer rights, holds consultations with service providers, requests them to tolerate certain procedural acts, requests their cooperation in the interest of consumers, and communicates the outcome of this process, whether successful or not, as well as the reasons thereof, to the consumers concerned.

XIX. Legal measures applicable in case of infringement (Articles 185-189 of the Media Act)

The legal consequences applicable pursuant to the Media Act form a differentiated system of sanctions in line with the applicable constitutional principles and the general legal framework of public administration. The Media Act takes into account the constitutional and jurisprudence expectations for administrative legal consequences, as well as the practice of the former media authority and the diverse nature of possible breaches of law. The legal consequences, as well as the principles and aspects defined with respect thereto clearly reveal that the Media Act establishes an objective, clear and predictable regulation based on the principles of proportionality, progressivity and equal treatment, which, besides complying with the rule of law and legal certainty, places emphasis on the encouragement of voluntary compliance with the law. Besides the elaborateness of the method of imposing sanctions, in concert with the general rules of administrative proceedings and in line with constitutional provisions, the Media Act sets forth the rule of rendering the sanctioning administrative decision, and in line with the general legal principles and constitutional rules, it contains safeguards provisions protecting the interests and rights of the clients. In accordance with requirements stemming from the Constitution, the Media Act further guarantees the right to legal remedies both via administrative proceedings (ordinary remedies) and judicial review (extraordinary remedies), and within the scope of this, the statute provides for the possibility of suspending the sanctioning decision.
The constitutional basis of the provisions of the Media Act pertaining to the liability in connection with transmission of intermediary service providers and media service distributors is supported by the objective of the regulation, the fortification of procedural rules with safeguards elements, as well as by the development of the framework of liability in a manner that is compatible with the Hungarian legal system and Community law. Because the release of an official notice issued under non-administrative powers, as set out in the relevant provisions, can only take place, given that the conditions prescribed by law exist, for the prevention or remedy of media administration damages connected to the failure of the enforcement of final administrative decisions and, with this, lack of compliance: thus, as a special enforcement tool, it does not substitute but complements the implementation and enforcement of the decision with the involvement of intermediary service providers who play a key role in its transmission to the public, but who - similarly to Act CVIII of 2001 on Certain Issues of Electronic Commerce Services and Information Society Services-, according to the regulations of the Media Act, is not responsible for the content transmitted.

The administrative activity of public administration primarily serves the enforcement of laws and regulations enacted to protect the public interest protected by law, the rights and legitimate interests of a community, public order, public safety, as well as the life, bodily integrity, security, and rights of an individual human being, i.e. the enforcement of rights. The

administrative duties of public administration are directed to the implementation of public interest as defined by law, compliance with, and enforcement of, the laws and regulations - with the application of sanctions as an ultima ratio instrument. However, besides the mechanism of the enforcement of rights in the classical sense - resulting from the regulating authority quality of the Authority - sanctioning is not the fundamental objective and dominant element of the functioning and activity of the Authority. Due to the special structure, extremely rapid development, and functioning of the media market, the regulating authorities in general - thus, the Authority, too - have tools and powers of intervention and administration concerning the functioning of the media market as a whole, carry out numerous tasks that are not related to public powers and authority. On the other hand, the scope of their duties and powers have special characteristics, whose relationship with sanctioning is special. It can be generally concluded with respect to the proceedings of the Authority, that it aims to develop a close relationship with market participants based on mutual cooperation, and in the course of legal enforcement related to dominant market surveillance in the area of sanctions, it also thrives to avoid sanctions by applying alternative proceedings provided in legal norms. In line with the function, objective, and characteristic of the sanction, as well as the scope of activities of the Authority, the application of detrimental legal consequences is the Authority's last resort, fundamentally to protect consumer interests (in particular, numerous consumer and social groups, for example, children and minors), the democratic public opinion, the right to be informed and to inform, to maintain diversity and media market competition, and to achieve fair and effective competition.

The Constitutional Court has emphasized in a number of its decisions that legal certainty is an essential element of the rule of law. Legal certainty charges the state - and primarily the legislature - with the obligation to guarantee that the law as a whole, its different sub-areas, and the individual laws and regulations are clear, unambiguous, predictable with respect to both their function and application, and foreseeable for the addressees of the norm. Legal certainty, thus, not only requires the unambiguity of the different norms, but also the predictability of the functioning of legal institutions. That is why procedural safeguards are fundamental from the perspective of legal certainty besides the unambiguity of substantive law rules and norms. Because, only through observing the rules of formalized procedures can valid laws and regulations develop, and only through compliance with procedural norms can legal institutions constitutionally function.

The Constitution does not contain provisions with respect to the sanctions of administrative law. The legislature has a broad discretionary authority in the course of the regulation of the conditions of application and level of sanctions. The decision-making power of the legislature is only restricted by the Constitution's general provisions (e.g., the applied regulation cannot violate in an unconstitutional manner the principle of equality of rights regulated in the Constitution, the right to human dignity, personal liberty, the requirements of the rule of law, etc.).

Thus, the media administration sanction is an act, containing legal disadvantages defined in media law norms, which can be realized by state public authority by application of constraints, carried out by the Authority, as an organization having the authority and jurisdiction in the scope of its activity as a public authority, which reacts to illegal behaviour and action, and whose goal primarily is to restore the violated (social, economic, and legal) order; but besides this, however, sometimes it has different functions. The main functions of administrative sanctions manifest in the are of media administration, regarding the sanctions as a whole: a) enforcement of rights; b) prevention; c) repression by prevention; d) compensation of damages; and e) fines as a "price" of violation.

Sanctions may be applied only in cases of legal violations. The law defines which acts and violations of norms constitute legal violations, and it prescribes competence rules specifically, by the different groups of cases. (The detailed provisions pertaining to substance and competence are contained in the laws and regulations, and the administrative decisions may be issued in every case only in the scope of, and based on, the competence provided to the Authority by the regulation.) Considering the fact that the characteristics of legal violations, the concerned legal object, and the threatened social interest can be so diverse and different, that the itemized, exhaustive listing of possible legal violations is impossible. A regulation undertaking such an itemized listing would make administrative enforcement significantly difficult and would lead to the development of a casuistic, regulatory regime, which, in the end, would endanger legal certainty. Considering the fact that the Media Act clearly sets out what qualifies as a rule pertaining to media administration, that the violation of these acts and norms is considered a legal violation, and, in addition it also sets out what sanctions the legal violation could result in, thus the statute fulfils the requirement of predictability and does not violate constitutional principle.

The legal consequences applicable pursuant to the Media Act form a differentiated system of sanctions in line with the applicable constitutional principles and the general legal framework of public administration. This system of sanctions is adapted to the characteristics of modern media market, the continuously advancing technical conditions, and changing economic relations. The Media Act takes into account particularly the constitutional and jurisprudence expectations for administrative legal consequences, as well as the practice of the former media authority and the diverse nature of possible legal violations. The Media Act establishes an objective, clear, and predictable regulation based on the principles of proportionality, progressivity, and equal treatment, which, besides complying with the requirements of the rule of law and legal certainty, places emphasis on the prevention of legal violations and encouragement of voluntary compliance with the law.

One of the special legal institutions of the principle of progressivity, hitherto unregulated in media administration and promoting voluntary compliance with the law, is the instrument of official notice. In case of minor, non-recurring infringements, the Authority, instead of imposing a sanction, has the option of requesting the offender, by setting a deadline, to discontinue its unlawful conduct, refrain from infringement in the future, and act in a law-abiding manner.

It is a further novelty that the Media Act significantly broadens the range of applicable sanctions as compared with the previous regulation, thereby allowing for more differentiated sanctions, better suited to the legal violation and the perpetrator (in other words, the statute also contains previously unavailable alternative sanctions, other than fines, so that the imposition of fines may be avoided in certain cases). With the limitation of substantive law fines, besides that, a heterogeneous system can be discovered among the substantive law sanctions in line with the sectoral regulation aligned to the particularities thereof for the achievement of the most effective possible sanctioning. The introduction of the “publicity sanction” particularly serves the interests of the persons affected by the legal violation, for example, by warning parents of contents detrimental to children, without causing direct financial detriment to the offender. In addition, exclusion from participation in the tenders of the Fund means financial loss with respect to the future, in other words, ineligibility for potential financial subsidy. The so called “blackouts” combine more than one function: convey a message towards the consumers and the viewers, cause indirect financial loss, and have a character of temporary injunction. Other sanctions as sanctions restricting rights, aim at directly affecting the infringing activity or the locality thereof, thereby decreasing the

repetition and continuation of the chances of legal violations. The final, ultima ratio sanction of the Media Act is the cancellation of the media service from the register and termination of the public contract with immediate effect, restricted to cases of serious and repeat violations of the offenders' obligations. The fact that the given public law norm within the sanctions provides the possibility for the adjudicator to make the functioning of the offender "impossible" (ultimately, preventing the continuation and repetition of the violation), if no other public law tools are available for the adjudicator, it is aligned with the function and objective of sanctioning, thus, it does not raise constitutional concerns. The ultimate sanction of the given ultima ratio right must be applied in case of a particularly serious and repeated legal violation, which is especially dangerous to society, violating or threatening protected values. Obviously, a sanction imposed as a result of an infringing behaviour cannot mean the violation of the right to the freedom of the press, if it is proportionate and is aligned with the individual circumstances and characteristics of the legal violation or the offender. This requirement is ultimately guaranteed by the review provided for by an independent judicial forum.

Besides the organization itself, the Media Act permits the sanctioning (fining) of executive officers of the infringing organization as well. This solution is not entirely uncommon in media administration, since, pursuant to the previous press act and the Civil Code, the editor-in-chief, the head of the reproduction services, and the publisher etc. could also be held personally liable in certain cases. The requirement for administrative sanctions to continuously adapt to modern economic conditions, however, warrants that norms containing sanctions fundamentally applying to organizations also provide for the option of holding the executive officers of such organizations liable.
The Media Act applies the principle of proportionality in respect to the cap of substantive fines, taking into consideration the position of market actors. In other words, fixing various amounts as maximum fines for each distinguishable service and product type, and by setting a separate maximum fine for the sanctioning of executive officers. Maximum fines are imposed in case of multiple repeat or even continuous, serious infringements having a significant impact, thus, only after several procedures, final decisions, and probably even judicial reviews. With regard to this objective upper limit, the amount of the fine imposed in specific, individual cases is determined as a result of apportionment and discretion exercised by the adjudicator. Besides legislative or, more specifically, statutory apportionment, the Authority takes into account in every single individual case the criteria defined by the Media Act (seriousness of the legal violation, the repeatedness, continuity and duration of the legal violation, financial gain resulting from the legal violation, harm to interest caused by the legal violation, the number of persons suffering harm to interest and the number of persons at risk, the damages caused by the legal violation, and the affect on the market of the legal violation) and - as also highlighted by the statute - all other (mitigating and aggravating) circumstances that are relevant to the case at issue, including the capacity and financial standing (revenue) of the organization or person affected by the sanction. All these criteria must be recorded in the decisions in the course of the justification of the amount of the fine. It is because, pursuant to the Media Act, the court is entitled to review the decisions of the Authority in their entirety. The judicial review extends to the contents (issues of substantive law), as well as procedural grounds and form (procedural issues) of administrative decisions, and furthermore, it extends to the rationality and legality of reviewing the discretion and the criteria thereof included in the administrative decision. In the course of the review, the court, in order to ensure the professionally supported review of issues of content (substantive law), may appoint an expert or use other effective means of proof. In this respect, it should be emphasized, that with

respect to discretion as one of the legal institutions of administrative sanctioning of particular importance, the Constitution does not define special principles and provisions.
Pursuant to the provisions of the Hungarian Code of Civil Procedure, an administrative decision rendered on a discretionary basis can be construed lawful if the administrative body has appropriately ascertained the relevant facts of the case, complied with the relevant rules of procedure, the aspects of discretion can be identified, and the justification of the decision demonstrates causal relations as to the weighing of evidence. The court may intervene with respect to the evaluation of the discretionary criteria only, if the Authority failed to evaluate them, or weighed them in a seriously disproportionate manner, or failed to meet its justification obligation even with regards to the explanation as to why it discarded or accepted the different criteria. Besides the general procedural rules covering the entire proceeding and the appropriate finding of the relevant facts of the case, it has to be emphasized that the different discretionary criteria should be identifiable, and the justification thereof (to show that the sanction complies with the principle of proportionality and progressivity, and that the sanction is adequate and appropriate to achieve its objective) has to be revealed by the decision. Thus causal relations means justifiability and justified discretion, covering all of its elements. One of the legal institutions of particular importance of judicial review is the suspending of the enforcement of the decision. With respect to the implementation of the enforcement, pursuant to the Administrative Proceedings Act, the Authority - upon relevant motion - cannot enforce the decision before the independent court renders a decision with respect to the suspension of the enforcement, in other words, before the review and assessment thereof is made in accordance with the criteria prescribed by the Hungarian Code of Civil Procedure regarding administrative decisions. Thus, if the service provider requests the suspension of the decision of the Media Council or the Office, it cannot be enforced until the court renders a decision. It has to be emphasized that in the scope of the review of the suspension of enforcement, the court evaluates not only the criteria of legitimacy but pursuant to the Hungarian Code of Civil Procedure, during the decision-making process regarding the suspension, it has to consider whether after the enforcement, the original state of affairs can be restored or whether the lack of enforcement causes more serious damages compared to damages caused by the lack of the suspension of the enforcement. It is, thus, obvious that the Media Act, in concert with the Administrative Proceedings Act and in accordance with constitutional requirements, is correct when it provides that the filing of a complaint - in the case of a decision by the Media Council and the Office - does not have suspensive effect on the enforcement of the decision; however, the suspension of the decision challenged by the complaint may be requested from the court.
It is reasonable to apply a regulation that is based on a system diverging from that of substantive fines upon the violation of the provisions of procedural law (as the consequence and impact of the violation differs). For instance, it is mandatory in the context of sectoral inspection and provision of data, according to the Media Act, to take into account discretionary aspects of various amounts and regulated on different statutory levels. In terms of the statutory principle of proportionality, the discretionary aspects and the fine limits, the Media Act takes into account the fact that procedural violations and the procedural sanctioning thereof differ in respect of each type of official matter and regulatory procedure. Moreover, in the field of procedural fines, the Media Act takes into account not only the severity of violations, but the person committing such violation as well, so the maximum fine that may be imposed on natural persons is only a fraction of the fine imposable on organizations.

XX. Establishment of a new co-regulation system (Articles 190-202 of the Media Act)

The co-regulation system of the Media Act provides an opportunity for self-regulatory organizations to participate in the arrangement of cases falling under the competence of the Media Council. This, compared to other types of self-regulations found in other sectors and administrative areas (e.g. alternative dispute resolution procedures such as conciliation or mediation), is a stronger - the strongest possible and still constitutional - authorization ensured to self-regulatory organizations to conduct proceedings prior to the Media Council exercising its administrative powers. The self-regulatory organization upon the authorization by the Media Council provided in an administrative contract based on its activities conducted, exercises a public function. This justifies the prescription of rules, which can be considered guaranteed and constitutional, in the Media Act regarding the oversight of procedures and activities of the organization falling within the scope of the authorization, as well as the termination of the administrative contract. Also because of the provision of public function, the Media Act permits that the Hungarian Media Authority provide financial assistance to the self-regulatory organization for carrying out its duties, subject to its annual itemized accountability.
The determination of the scope of organizations participating in the co-regulation system, and the type of press products and media services included in the scope of co-regulation, as well as the Media Act and Press Freedom Act provisions that can be monitored, is not a constitutional question but a license of the Parliament stemming from its legislative and organizational authority. With this respect, it can be only examined from a perspective of constitutionality whether the relevant rules satisfy the requirements of the rule of law and legal certainty, which constitutional principles, in our opinion, are not violated in any respect by the co-regulation rules of the Media Act.

The chapter on co-regulation is a completely new element of the Media Act compared to the previous regulations, which enables professional self-regulatory organizations to participate in the application of law. In the following section "co-regulation" refers to cooperation between professional organizations and the Authority for the sake of complying with statutory regulations, but as these organizations are primarily self-regulatory due to their nature and may also define norms that are binding on their own members, the term "self-regulation" also appears in the text.

The Media Act thereby acknowledges the significance of the self-governing activity of self-regulatory organizations in media administration. The importance of self-regulation and co-regulation is recorded by the AVMS Directive as well. The AVMS Directive highlights in this context that the measures aimed at attaining objectives of public interest in the media service sectors will be more efficient if they are taken with the active support of service providers. The co-regulation procedure regulated in the Media Act is a novelty with respect to both Hungarian public administration and its administrative sectors, as a whole. It is a unique solution subject to the rule of law, which complies not only with the regulations of the European Community, but with the Hungarian constitutional principles as well, despite its novel nature.

The main novelty of the co-regulation system introduced by the Media Act, compared to forms of self-regulation existing in other sectors (such as alternative dispute resolution procedures such as conciliation and mediation, and ethical codes of conduct), is the authorization granted by the Media Council. Based on such authorization, self-regulatory

organizations may fulfil the public duty of applying the statute when they may examine the complaints making reference to a legal violation in the course of their own procedure, prior to the regulatory procedure.

The new co-regulation system is not a dispute resolution procedure (which can only settle disputes falling outside the competence of the Authority, arising between two or more parties, similarly to arbitration courts). The new system extends the regulation and the framework of shared enforcement of rights to the entire "civil sector" linked to media administration (associations and other self-regulatory organizations, in other words, not just public organizations or other administrative institutions).

The statute provides the strongest (and still constitutional) authorization that may be granted in this context to self-regulatory organizations. The Media Council may authorize the self-regulatory organization in an administrative contract to proceed prior to the Media Council's procedure, without exercising any public authority, with respect to its members and all such other media service providers or publishers who voluntarily subject themselves to the self-regulatory procedure, in case a complaint is filed.

The role assumed by self-regulatory bodies affects those official matters within the Media Council's competence the resolution of which is shared by the Authority with the self-regulatory organizations. The Media Act defines the types of cases, with respect to print and online press and to on-demand media services (in relation to all rules affecting media content), for the resolution of which regulatory organizations may be authorized.
The regulation provides participation opportunities in enforcement activities for the self-regulatory organization with respect to on-demand media services and press products. With respect to linear media services, the Media Act does not define administrative authority and case type within the framework of co-regulation, because regarding this type of media service, the legislature deemed necessary to fully keep the oversight of relevant provisions within a state-maintained administrative framework.
The definition of duties, types of media services, and scope of self-regulatory organizations involved within the framework of co-regulation is the discretion and right of the legislature to decide. By passing laws, the Parliament is entitled to determine the division (sharing) of state tasks and also the type of non-state organizations it involves and the extent these organizations are involved in performing the public functions. (In order to ensure compliance, the Media Act contains safeguards provisions.) Within this, constitutionality questions can only be raised regarding whether the involvement of non-state organizations in the state duties took place in accordance with the requirements of the rule of law and without risking legal certainty, and whether the legal regulation of the issues mentioned complies with these fundamental constitutional principles and norms. It is important to emphasize that the Parliament has organizational power and constitutional authority. In other words, our opinion is that it is not a constitutional issue (since the Constitution itself provides this possibility) as to what kind of organizations the Parliament involves in the system of carrying out state duties, but only the regulatory method of task sharing and the assignment of duties and competences can be examined. (Similarly, it cannot be a constitutionality issue whether the Parliament establishes a given public body to carry out a task of public interest.)

Within the framework of self-regulation, the other field, besides administering specified official matters, is cooperation in fulfilling non-regulatory tasks, as well as in providing programs and pursuing objectives that are not of public interest, but are closely related to

media administration. In the context of cooperation, the Media Council may provide support to self-regulatory organizations in fulfilling their duties, on the use of which the latter must report annually.

The novelty and unique feature of the co-regulation system of the Media Act compared with other self- and co-regulation systems in other administrative sectors is the fulfilling of tasks concerning administrative cases. In other words, that the self-regulatory organization, based on the authorization provided by the Media Council, fulfils the public function (administrative duty) of applying the Media Act and the Press Freedom Act, as it is authorized to examine complaints of legal violations under its own proceedings, prior to an administrative proceeding. The self-regulatory organization does not exercise administrative authority during these activities, as its proceeding precedes but does not substitute the exercise of administrative authority and proceeding of the Media Council.

From the perspective of safeguards, it is important to set out the main rules of the proceeding preceding the exercise of administrative authority of the Media Council, and the possibility of the termination of cooperation by the Media Council in case of inappropriate fulfilment of the tasks has to be guaranteed on a statutory level (so it can terminate the administrative contract). It should be emphasized that before the termination of the agreement, the Media Council issues an official notice (Article 201(4) of the Media Act), in other words, the self-regulatory organization has an opportunity to rectify the mistakes and omissions before the termination.

Based on the system of co-regulation, self-regulatory organizations and the Media Council conclude a cooperation agreement (administrative contract), in which they specify the detailed rules governing the performance of duties. The administrative contract containing the authorization contains public law elements, but essentially, it is a private contract. With respect to the contract, the Media Act instructs to apply the general rules pertaining to contracts of the Hungarian Civil Code. Termination is an element of the contract governed by public law. Since the self-regulatory organization performs public functions, the legislature may consider and define what kind of legal violations result in the discontinuation of the activities and the termination of the contract.

The professional code of conduct, approved by the Media Council, in which the self-regulatory organization defines the administration of duties, is a compulsory element of the administrative contract. Although the code of conduct is formulated by the self-regulatory organization, it must be sent to the Media Council for consultation. In the context of consultation the Media Council only examines compliance with applicable laws and regulations, but the institution of consultation has a particular significance, as the acceptance of the code of conduct by the Media Council is a condition of the conclusion of the administrative contract.

According to the Media Act, in the co-regulation system, a procedural and substantive system of rules and professional code of conduct created by the self-regulatory organization - that has a binding effect on its membership - is particularly important. In the code of conduct, within regulatory limits, the organization is free to establish the rules and requirements its members are obligated to observe, and the organization is also entirely free to define under what procedural order it monitors its own rules and the rules of the Press Freedom Act and Media Act regarding the authorization, and how it chooses to proceed in case a complaint is filed claiming the violation of the code or the regulation. The self-regulatory organization is also

free to establish a sanction system to penalize its members violating the norms. Membership in the organization is voluntary, so the potential members have the option to decide whether or not they accept the sanctioning and other rules of the code. Since the self-regulatory organization does not receive an authorization of public power and administrative authority, therefore it is not necessary to regulate under the Media Act the system of "legal consequences" that can be defined in its relevant procedures. The Media Council examines the code exclusive based on legitimacy. And the fact that the code is a compulsory, substantive element of the administrative contract and that the agreement regarding the content of the code between the Media Council and the self-regulatory organization is a validity condition of the conclusion of the contract is a safeguards rule and is prescribed by the Media Act for the sake of the appropriate performance of duties.

The authorization contained in the administrative contract may extend to content regulation provisions of the Media Act (Articles 9-40) and Articles 13-20 of the Press Freedom Act regarding oversight by the self-regulatory organization. These rules, especially the relevant provisions of the Press Freedom Act, are legal norms worded on a high abstraction level. In the course of the self-regulatory proceeding, the organization analyzes and applies these rules to the concrete case. If the members bound by the decision of the self-regulatory organization or the persons/organizations filing the complaint against these members disagree with the decision of the organization, they may contact the Media Council. The self-regulatory proceeding only precedes but does not substitute the administrative proceeding of the Media Council, and in this proceeding, the Media Council is not bound by the decision and legal analysis of the organization (Article 199(1)-(2) of the Media Act). Pursuant to Article 201(5) of the Media Act, in case of legal violation of the proceeding or decision of the self-regulatory organization, the Media Council initiates a regulatory proceeding with respect to the proceeding or decision. Based on the foregoing, it can be concluded that the Media Council can act only in a proceeding of legal remedy or in an inspection performed within the framework of its oversight authority over the self-regulatory organization, but it cannot revoke at any time the procedural authorization from the self-regulatory organization. The legislature is entitled under its organizational authority to enact the rules regarding oversight of the activities of the self-regulatory organization. From a constitutional perspective, the only aspect that can be examined is whether the relevant rules establish an organized oversight system that comply with the requirements of the rule of law.

In the official matters defined in the administrative contract, enforcement by public authority and administrative powers "recedes" in order to provide space for private and self-governance. On account of the affected administrative powers, the statute contains detailed provisions on the contents and framework of the authorization and defines the fundamental rules of the self-regulatory organization's procedure, so as to provide a framework of safeguards.

Regarding the self-regulatory organization's procedure, it is important to highlight that the self-regulatory organization does not hold administrative powers when administering the cases, and therefore, does not take on the status of a "quasi" administrative body. The Media Council may theoretically use its powers in specified cases following the conclusion of the administrative contract, thus, the self-regulatory organization's procedure precedes, but does not substitute the exercise of powers by the Media Council. In these cases, the self-regulatory organization shall proceed regarding those who have voluntarily subjected themselves to the code.

If voluntary enforcement is inadequate in the relations between the self-regulatory organization and the service providers and publishers that have accepted the code (for example, if the self-regulatory organization finds the violation of the code, and thereby, of the statute, but the affected party refuses to execute the sanction imposed), the Media Council may exercise its administrative competence and powers. In respect of the official matters itemized in the statute and forming the subject of authorization, the domain of public administration law and enforcement flexibly recedes and entrusts the self-regulatory organization with the administration of the public duties within the scope of its own self-governing activities, without granting any public authority or administrative powers. This does not mean a form of decentralization of state duties but ensures, within a guaranteed framework, the participation of self-regulatory organizations in the process of enforcement.

Decisions made by self-regulatory organizations pursuant to the co-regulation provisions of the Media Act are binding on the parties that are subject to the code. This power of self-governance is offset by strong public safeguards, in particular, by the fact that self-governance can only be exercised regarding those who have either voluntarily assumed membership as a self-regulatory organization or have voluntarily subjected themselves to the code of conduct. The self-regulatory organization must keep a register of its membership and of the companies that have accepted the code of conduct, in order to clearly identify the scope of persons the self-regulatory organization can proceed against.

The financial assistance for the performance of duties by the self-regulatory organizations is an option and not an obligation of the Media Council. The statutes defined this option with respect to the fact that the self-regulatory organization performs public functions in the framework of the authorization. When an organization performs public duties, taking into account its financial resources, on occasion, it may become necessary that the entity assigning the duty provides financial assistance for the performance of the duties.
The itemized accountability obligation of the self-regulatory organization ensures that the use of the financial assistance is transparent and can be monitored. With respect to the possibility of influencing the activities of the organization through financial assistance, it has to be emphasized that the Media Council has only oversight authority over the activity of the organization, and the relevant rules of the Media Act guarantee that the Media Council only intervenes in the performance of duties of the organization within the framework of oversight and monitoring and with the tools of oversight.
We wish to note that the functioning of the Media Council is monitored by the Parliament, and its financial management is expressly monitored by the State Audit Office pursuant to Article 134(11) of the Media Act, which guarantees that the financial assistance provided to the self-regulatory organization be justified and well-founded.
The annual or semi-annual reporting obligation of the self-regulatory organization (Article 202 of the Media Act) serves the oversight over the activity of the organization. Oversight does not imply the supervision of the entire organization or the entire scope of activities of the self-regulatory organization. Its scope only applies to the oversight of the self-regulatory activity.

The Media Council's supervision allows the review of the individual procedures of a self-regulatory organization, on the one hand, since the undertaking affected by such decision may initiate a review of the decision in this respect, if it considers the decision unsatisfactory. On the other hand, the Media Council also conducts general reviews of the procedures of the self-regulatory organization. The latter, however, does not imply the supervision of the entire

scope of activities and the organization of the self-regulatory organization. The Media Council's competence only and exclusively extends to the supervision of the self-regulatory organization's activities and decisions performed and adopted within the context of co-regulation in order to verify whether the self-regulatory organization passes its decisions in compliance with the authorization, legislation, and the code of conduct. If the Media Council discovers deficiencies, errors, or deviations from the code of conduct or the administrative contract, it first issues an official notice. If the stipulations of the official notice remain unfulfilled, the Media Council may terminate the administrative contract.