

THE EFFECT'S AND PRESSURE OF A NATIONAL AUTONOMIC ADMINISTRATIVE AGENCY ESPECIALLY IN THE HUNGARIAN MEDIA LAW FOLLOWING THE EU DIRECTIVES

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ABSTRACT: *In this article, the author's was trying to highlight and present a very interesting and problematic field of the hungarian legal background. From one side, we can say, that it is mostly affected by public administration law, especially the e-government, and info-communication law, but in the other hand, it has many other aspect's, that are originated from example the civil law and sector. We can stated, that is a continuously variable field, which is mainly formed by the European Union, but we cannot forget the importance of the hungarian authorities and agencies as well.*

KEYWORDS: *public administration, information, media law, e-governance, agency, directive*

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1. INTRODUCTORY IDEAS

Without information no social and even individual life can be imagined. In the absence of information, the individual cannot know characteristics of the environment, can not adapt to them.¹ We can examine the different type of information's, but in this article, we have tried to focus on the media-context.

To have harmonization should be stimulated the automatic exchange of information between public authorities on income received in a State by a national of another State or the beneficial by a legal structure.²

Information transferred by mass media helps consumers to select information, and through being aware of objective data they became conscious citizens. They can create their attitude to reality and evaluate whether a piece of data is important – in other words newsworthy – for them. Balanced coverage is a concept with which legislators both in the

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¹ Lucian Chiriac- Zsuzsanna Szabó: E-government (Társszerző, 1 fejezet: 1 iv terjedelemben), MPEAP Tankönyv, Aula Kiadó, Marosvásárhely 2011. ISBN: 978-963-339-020-7 (page: 21-46.)

² Dragoş Chilea: „Towards an European fiscal space?”, Curentul Juridic pg 5-6, 2011.

European Union and in Hungary indicate that it is the consumer's right – and not the obligation of the media provider – to have access to objective but still plural media. Who is responsible for making the requirements prevail? Which aspects are necessary to decide whether all of the standpoints are transferred to the public? How can balanced coverage be deemed to be realized?

In mid-March a devastating weather crisis swept through Europe and resulted in disruption. The Hungarian Ombudsman in its announcement³ stated that the extent of the alarm and the information to the public was not sufficient. Must such a crisis happened to put the satisfactory information of the public into the highlight?

2. STATUTORY PROVISIONS OF MEDIA LAW

Statutory regulation of media and broadcasting can be considered as hot topic in a democratic and information society⁴ as it is in the closest relation to human rights like the freedom of the press, freedom of speech, the constitutional responsibility of public media, the protection of minors and balanced coverage.

Balanced coverage provides the possibility of the widest range of discretion in applying and enforcing law, is declared by several statutory regulations.

2.1. EU Directive is to be implemented

The harmonisation of the 'Union acquis' is an essential part of the law system and in respect of the principle of subsidiarity the Member States shall implement the regulations of the directives known as secondary sources of law. Directive 2010/13/EU of the European Parliament and of the Council, known as the Audiovisual Media Services Directive, is one of the most important sources of law in the field of media law. 'It is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of [...] events of major importance for society' as mass media audiovisual services are those which 'are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.'⁵ However, measures taken to protect these interests do not necessarily require implementation through the prior verification of audiovisual media services by public bodies.⁶ Member States are allowed to apply more detailed or stricter rules to media service providers under their jurisdiction, while ensuring the consistency with general principles of Union law and the provisions of the Audiovisual Media Services Directive.⁷ As the Directive gives the framework, the Hungarian legislators have the right and the obligation as well to regulate this area to achieve the above-mentioned aims effectively.

2.2. Hungarian legal environment

The concept is defined by Act CIV. of 2010 on freedom of the press and the fundamental rules on media content. Pursuant to s13, media content providers engaged in news coverage operations shall provide balanced coverage on local, national and

³ Announcement of the ombudsman: Az alapvető jogok biztosának Jelentése Az AJB-2069/2013 ügyben,

⁴ MAJTÉNYI László: *Az információs szabadságok, adatvédelem és a közérdekű adatok nyilvánossága*, Budapest, 2006, Complex Kiadó Jogi és üzleti Tartalomszolgáltató Kft. 39. p.

⁵ 2010/13/EU Directive preamble (21) and (49)

⁶ 2010/13/EU Directive preamble (62)

⁷ 2010/13/EU Directive preamble (41)

European issues that may be of interest for the general public and on any event bearing relevance to the citizens of Hungary and members of the Hungarian nation.

Act CLXXXV of 2010 on Media Service and Mass Media declares that balanced nature of the information provision shall be ensured not only by one certain programme but also within the series of programmes aired by a media provider.⁸ Pursuant to s83 the obligation of media providers includes a ‘balanced, accurate, thorough, objective and responsible news service and information’.

In case of infringement of the obligation of balanced coverage the holder of the standpoint that was not expressed, or any other viewer or listener, may initiate a regulatory procedure. There is a restriction according to which the applicant may not enjoy this right if another representative of the same standpoint has already been given an opportunity to project the standpoint not presented earlier, or if this opportunity has been given to the applicant but he has failed to take advantage thereof. If it is established that an infringement has occurred, the media service provider shall broadcast or publish the decision of the administrative agency without any assessing comment thereon.

3. ORGANISATIONAL FRAMEWORK AND THE OCCURRENCE OF DISCRETION

3.1. Discretion in public administration

“Discretion is nothing other than the sense of justice with respect to the sphere of the intimate contents of life.”⁹

Decisions, made as the ending of administrative procedures, can be categorized by the level of freedom of decision making. Discretionary power appears in the principles of the regulations as well with the prevalence of the due process of law and helps to avoid the creation of a casuistic law system. Besides the categorical decisions, final statements made by applying discretionary power and equity can be considered. Can discretion be deemed as an ‘unavoidable evil’¹⁰ or should it be the necessary opportunity for the administrative agency to make fair and satisfactory decision as the act of the state closest to the citizens?

Undoubtedly there are several aspects of public administration in which discretion cannot be applied, for instance registration offices’ procedure or during the disclosure of public information. Furthermore an issue has risen according to which discretion would be a peripheral consideration in public administration.

3.1.1. Conceptual determination

Although myriad pages have been filled with the examination of the institution of discretionary power, only one clear conclusion can be established, namely that the terminology itself has not been clear; only some parts of it are deemed to be satisfactorily interpreted. A systematic set of knowledge can only be regarded as science if the synthesis

⁸ s12 (2) of Act CLXXXV of 2010 on Media Service and Mass Media

⁹ This quote derives from Georg Simmel, a German philosopher and sociologist. http://www.searchquotes.com/quotation/Discretion_is_nothing_other_than_the_sense_of_justice_with_respect_to_the_sphere_of_the_intimate_con/203742/ [20/04/2013]

¹⁰ Apurv SHAH & Paras PAREKH: *Limitations Of Administrative Discretion*, Nirma University, Ahmedabad, Gujarat. <http://legal-articles.deysot.com/administrative-law/limitation-of-administrative-discretion.html> [20/04/2013]

of that knowledge advances its subject,¹¹ therefore definitions are essential parts of research.

The substantial part of discretion, which appears in the public administration, is that the administrative agency is entitled to choose among available alternatives of a final decision provided by law.¹² The agency can choose from different alternatives determined by statutory provisions in case that the statute itself entitles the agency to do so and, as a conjunctive requirement, the viewpoints are given as well. The final determination can be reached upon the way of consideration, not exclusively dependent upon proof or the lack of it with reference to a reasonable and fair mind, not according to prejudice or personal partiality.

3.1.2. Different types of discretionary power¹³ can be separated. Delegation- type discretion is on which this paper lays emphasis on, because this is the legal term by which discretion can be realized in positive law and also in applying the rules and in law enforcement as well.

The legislator literally provides alternatives as a final decision and confers the delegated power on the agency to exercise within certain requirements. This is considered to be 'limited discretion'¹⁴ and occurs mostly in infringements cases in which those aspects must be taken into consideration which connect most closely to the circumstances and facts of the case. Exercising discretionary power, the agency does interpretation WHAT according to the general values of the society, the customs, the traditions, the religion, and everyday norms. In addition to the majority view, administrator's personal value criteria are also represented in decisions.

3.1.3. Different from equity

Discretionary power should not be considered as a way of equity or vice versa. Both cases include free choice during decision making. While for exercising discretion the law provides aspects and limits, applying equity means that the agency can waive the application of the provisions of the law, even make *contra legem* or *praeter legem* decisions in favour of the client regarding the particular features of the individual case. The law delegates and confers on administration such power as is necessary to individualize the exercise of power by the administration. This happens on a liberal ground by applying vague terms of law or filling the voluntarily left holes in the net of the law system.

3.2. Organisational framework in Hungary

The National Media and Info communications Authority (hereinafter: NMIA) is an autonomic administrative agency which was established in 2010. Its independent body is the Media Council of Hungary (hereinafter: MC). Within their power¹⁵ the agencies are entitled to supervise the broadcast of media organs established in Hungary and conduct administrative procedures according to complaint or, within its discretionary power

¹¹ Közigazgatási Jog. 1. *Magyar közigazgatási jog Általános Rész I.* Department of Administrative Law, Faculty of Law, University of Miskolc, ,2011, 84. p.

¹² MOLNÁR Miklós: Jogkövetői mérlegelés az államigazgatási jogban, *Jogtudományi Közlöny*, 1989. 44.évf. 7. szám, 376 - 378. p.

¹³ KÁNTÁS Péter: A mérlegelés dilemmái, *Belügyi Szemle*, Budapest, 2001. 49. évf. 12. sz. 66-82. p.

¹⁴ KÁNTÁS i.m.

¹⁵ s10. of Act C of 2003. on Electronic Communications and s182. of Act CLXXXV of 2010 on Media Service and Mass Media.

exercised first in a procedure, *ex officio*¹⁶. During general administrative supervision¹⁷ the NMIA is entitled to supervise compliance with law of the broadcasts of media organs.

The second exercise of discretionary power appears at this stage, as in case of the infringement of regulations the NMIA decides whether to conduct an enforcement procedure or apply consequences. Within this deliberation the agency takes into consideration:

- the circumstances of the case,
- the facts and evidences determined during the evidence procedure.
- the gravity of the infringement.
- effective enforcement.

If the special statute does not provide aspects for discretion the NMIV and the MC shall evaluate the following features:¹⁸

- the aim of the law,
- the gravity of the infringement,
- the possibility of retention of further infringement,
- all circumstances of the case.

The third situation in which discretion occurs is in relation to the determination of the consequences. In case of infringement the MC or the NMIA have the right to apply the legal sanction on parties:

- under the principle of equal treatment,
- in line with the principles of progressivity and proportionality,
- in line with the gravity and rate of re-occurrence of the infringement,
- considering all circumstances of the case and
- the purpose of the legal sanction.¹⁹

3.3. Discretion under analysis

The so-called SWOT analysis results in a chart which indicates an examination of development disparities, weaknesses and potential of a subject²⁰. It provides a complete view of a complex subject as it includes the strengths, the weaknesses, the opportunities and the threats in relation to the subject within public administration.

¹⁶ §25. (3) Act C of 2003 on Electronic Communication.

¹⁷ §53. Act C of 2003 on Electronic Communications and §167. and §182. of Act CLXXXV of 2010 on Media Service and Mass Media.

¹⁸ Case of 4.Kf.27.043/2011/4.

¹⁹ §48 and §49. Act C. of 2003 on electronic communications and §185. Act CLXXXV of 2010 on Media Service and Mass Media

²⁰ This analysis is well accepted in planning and programming mechanisms in the European Union, for instance it is a declared way of creating the national strategic reference framework in Council Regulation (EC) No 1083/2006 of 11 July 2006, Article 27.

4. DISCRETIONARY POWER IN PRACTISE

4.1. Discretion appears in the decrees of NMIA and MC

At this stage the second exercise of discretionary power occurs in an administrative procedure²¹. Balanced coverage as a general category is a concept whose essential elements are diversity, objectivity, factuality, and topicality.²² When exercising discretionary power the agency examines those aims first which can be considered as the aim of the law itself. Then the administrative agency reconstructs the media content word by word to determine all the circumstances of the case – essentially sentences are re-organized in a literal report. Strengthening the requirements of democracy, the relevant standpoints in connection with an important issue shall be collected and aired by the mass media²³, however not all of the different viewpoints shall be presented. Referring – even implicitly or in mention – to the fact of another existing standpoint provides sufficient media content.²⁴ In conducting the procedure the agency examines whether the media content has newsworthiness and is of interest to the public as a well-informed group of people.²⁵ As a consequence, after its deliberation the agency may impose an obligation on the media provider to air certain content without any evaluating comment in the same time slot as the controversial content.²⁶ When determining this the agency aims to ensure retention of further infringement in respect of the gravity of the infringement.

<p>S</p> <ul style="list-style-type: none"> • Service aspect effectively prevails • More equitable and practical decisions • All circumstances are considered • Helps to avoid casuistic regulations • Individualizes the exercise of power • Participation of the client • Applicable for new circumstances • Properly combined and structured, the degree of discretion is controlled 	<p>W</p> <ul style="list-style-type: none"> • Legal certainty weakens • Danger of arbitrary decisions • Depends on the personality of the administrator and the cultural values • Cannot be applied in every field • Sometimes results in unfair decisions • Different interpretation and practises can be formed
<p>O</p> <ul style="list-style-type: none"> • Individual decisions may show a trend • Training courses for human-orientated and well-informed professional staff • Achieve uniformity up to a certain level 	<p>T</p> <ul style="list-style-type: none"> • Features of the exceed of power derive from jurisdiction • General facts /prejudices/ can be applied for individual cases • Danger of discrimination • Time-consuming process

²¹ See part 3.1.

²² Decree 1847/2012. (X. 17.) of the NMIA

²³ Decree 721/2012. (IV. 18.) of the NMIA

²⁴ Decree 1/2007. (I. 18.) of the Hungarian Constitutional Court and Decree 471/2013. (III.20.) of the NMIA

²⁵ Decree 207/2013. (II. 6.) of NMIA

²⁶ For instance Decrees 173/2013. (I.30.), 207/2013. (II. 6.) of NMIA

4.2. Judicial review concerning discretion

The judicial review of the administrative orders is declared as a legal remedy.²⁷ By claiming infringement of law against the decision made by the MC or NMIA the judicial review is assigned to the Capital Administrative and Labour Court. Courts are not entitled to apply additional discretion or examine the whole administrative procedure during the judicial review of a decree made by an administrative agency. Only the legality of the final decision may be reviewed.²⁸ Courts may only examine whether the procedural rules were kept, the exercise of the discretionary power was not exceeded and the final decision is a reasonable and suitable conclusion. The administrative orders issued by exercising discretionary power can be deemed legitimate if²⁹:

- the agency explored the facts of the case in a satisfactorily and detailed way,
- the procedural rules were kept,
- the aspects of the discretion can be determined and established, and
- reasonable discretion can be reconstructed from the reasoning of an order.

Courts do not establish further standpoints, mostly just reflects for the result of the administrative agencies. Final judgements ensure a strong basis for aspects established by decrees, like the requirements³⁰ and content³¹ of the balanced coverage and the provision of the actually existing and known facts.³² The direct or indirect suggestion of social, personal and physiological background also should be examined to determine whether it meets with the requirements of the concept of balanced coverage.³³ These are additional standpoints to be evaluated during discretion.

5. IN LINE WITH CLASSIFICATION

The issue of classification stimulates hot debates around the world. Are the people living in the north different from living in the south from the point of the right to balanced information or mental protection against the harmful effects of media service? Should not they be allowed to watch the same programme to entertain them or to provide them information about the world? The answer theoretically should be yes, but practise indicates differently. Classification conferences are regularly held. According to the report on one held in 2009,³⁴ the same documentary was projected to experts from different parts of Europe and they were asked to classify it. Surprisingly, according to them the film could fit in all of the categories. In the report's writer opinion a cultural and religious trend was realized as experts from Northern Europe classified the film in a weakly restricted category and the experts from southern parts of Europe claimed that film is only for adults, to be shown in late hours. This conclusion may had been made if the research

²⁷ s97 (2) b, Act of APR

²⁸ Case of 2.K.27.419/2012/7.

²⁹ s339/B. Act III of 1952 on Public Procedural Law

³⁰ BH2007. 253

³¹ 2.K.27.165/2012/6.

³² BH2005.80

³³ 2.K.27.165/2012/6.

³⁴ MAJTÉNYI László: Határvidéken - Alapjogi jogalkalmazás a bírói szervezetrendszeren kívül /kézirat/

would have focused on for instance the proportion of the different types of information in the evening news.

6. CONCLUSION – *DE LEGE FERENDA*

Within media law there are fields in which there is no right to exercise discretionary power, namely the issues concerning programme quotas and for public service obligations of media providers with significant power in which time limits are enacted in a percentage or minute amount. Using abstract legal concepts such as balanced coverage it is necessary to entitle the agency with discretion power, partly for avoiding casuistic regulation and to ensure the prevalence of the freedom of information, speech and the press.

In our opinion there are different ways in which development can be established.

The first is better and more regular monitoring. The need arising from the consumers and the demand for an objective and newsworthy, but at the same time sufficiently plural media content require a stricter and more frequent control. The expansion of conscious consumers' complaints and procedures conducted *ex officio* shall be supported to meet the needs of a well-informed public.

The second is a soft law for discretion. As the precedent law prevails only in common law systems the domestic law – and even the *acquis* of the Union – shall present even a soft law regulation to give more detailed standpoints to discretion in this field, though the practice of the agencies follows the former decisions and judgments.

The third is enacting statutory law. As the period and duration of news programmes and its criminal content is regulated by act³⁵, certain other elements of the content – for instance financial matters, foreign and domestic affairs, topical agricultural or cultural issues – should be supported, or even regulated by strict proportions while tabloid news and data without newsworthiness should be avoided, even banned by taking into consideration the freedom of editors and the pluralism of the media.

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³⁵ 38 of Act CLXXXV of 2010 on Media Service and Mass Media

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