The Frequencies of Freedom

The Klubrádió Judgment Enhances the Constitutionalization of EU Media Law

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On 26 February, the Court of Justice of the European Union (CJEU) found that not renewing the license of the government-critical radio channel Klubrádió violates EU law (case C-92/23). The refusal to renew the radio's license by the Hungarian Media Council infringed EU telecom rules, in particular the principles of proportionality, transparency and good administration, as well as the Charter for Fundamental Rights (EU Charter). The judgment constitutionally foregrounded media freedom as a central benchmark for the enforcement of telecom rules. Moreover, it rejected Hungary's argument of formal legal compliance and focused on the holistic silencing potential of the respective decision not to allocate the radio license. Finally, the Court recognised the imperative for a domestic regulatory framework that effectively safeguards media freedom and pluralism.

Biased allocation of radio frequencies and the media capture rulebook

Klubrádió has been a prominent radio station in Hungary, providing a platform for civil society actors, opposition politicians and independent experts. In 2021, its license for the Budapest frequency expired. The Media Council rejected its application for renewal of the license and subsequently declared Klubrádió's application in a new tender procedure invalid. As a result, in February 2021, Klubrádió stopped broadcasting and has since operated solely online.

The Media Council cited a few administrative errors in justification of its decision: Klubrádió failed to send the Media Council monthly information on broadcasting quotas; a description of one of the programmes was missing in the tender application; and there was a five-minute difference in the program schedule indicated on two different forms. While these were minor errors, the Media Council argued that their accumulation amounted to "repeated infringement" that automatically precludes the renewal of a license agreement, as per Hungarian media law.

From a purely formal perspective, the Media Council did nothing more than follow the letter of the law. But when viewed in context, the Media Council's decisions reflect a broader pattern of systemic pressure on independent media in Hungary. Klubrádió had been on the radar of the Media Council since the beginning of the Orbán regime in 2010: it had refused to renew earlier contracts, delayed decisions, and revoked Klubrádió's licenses in the countryside, often relying on bizarre justifications such as the radio channel's failure to sign the empty back pages of the contracts.

These tactics fit perfectly within the media capture rulebook pursued by illiberal regimes: such measures rely not on overt censorship but on subtle strategies to force critical voices out of the public discourse. In his influential Report on media capture, Marius Dragomir argued that capturing media regulatory authorities ensures that regulatory tools are enforced selectively in order to strengthen loyal outlets and undermine dissent. In this light, the Media Council's decisions can be seen as sustained efforts to exclude the last independent political radio station from the public discourse. The European Commission echoed this concern, characterising the decisions as "highly questionable" and "disproportionate and discriminatory", a view that the CJEU ultimately upheld.

The central role of media freedom in the Court's analysis

While concerns relating to media freedom were the primary reason the case reached the EU's political agenda, the legislative hook for the CJEU was the Electronic Communications Code (ECC) and its precursors. The ECC mandates that radio spectrum rights are allocated on the basis of objective, transparent, non-discriminatory, and proportionate criteria (Article 13(1)). In addition, the Commission argued that Media Council's decisions infringed the EU Charter, in particular the right to freedom of expression (Article 11), which gave the CJEU an opportunity to expand on its media freedom case law.

The CJEU's pre-existing jurisprudence on Article 11 of the EU Charter is piecemeal, to say the least. Because the Court can only perform a fundamental rights analysis in situations falling under the scope of EU law, and media law is in principle a matter of national competence, media-related questions only reach the Court indirectly. The CJEU tends to stress that a "fair balance" is to be struck between the right to freedom of expression and other EU Charter rights (see e.g. case C-201/13, para 34), but it has historically rarely performed full-fledged media freedom analyses.

This is where the *Klubrádió* judgment pushes CJEU doctrine into new terrain. The Court foregrounded Article 11 of the EU Charter as a value in its own right, performing an independent media freedom analysis of the Hungarian Media Council's decisions (paras 334-382). The starting point of its analysis is that radio plays a vital role "in shaping public opinion" and as such is a "fundamental channel for the exercise of the right to freedom of expression and information" (para 358). Referring to the European Court of Human Rights' (ECtHR) well-established principle that freedom of expression applies not only to content but also to the means of information dissemination, the CJEU affirmed that spectrum allocation decisions have a "direct impact on the right to freedom of the media" (paras 359-360). Thus, while the EU regulatory framework is compatible with limitations on spectrum rights, these have to meet a strict necessity and proportionality test (para 369). In this sense, the CJEU in effect recognised that standards encapsulated in the EU's telecom instruments, such as the transparent, proportionate, and non-discriminatory allocation of spectrum rights serve not only the competitive internal market in telecommunications services. They are also vehicles for a free and pluralistic media ecosystem upon which democratic societies depend (para 369). In doing so, the Court brought media freedom considerations from the peripheries to the centre.

The rejection of the formal legal compliance argument

The Court unequivocally rejected the argument put forward by Hungary and the Media Council that the contested decisions were merely the automatic legal consequences of the objective application of the authorisation scheme laid down in the Hungarian Law on Media Services. The law precludes the extension of a license contract in cases of repeated infringement, and Klubrádió technically committed more than one infringement. On this basis, Hungary argued that these decisions "cannot be equated with the closure of a media outlet" (para 348). This line of reasoning highlights the difficulties in countering media capture: because such measures leverage regulatory instruments and capacities, they can be framed as neutral legal actions, concealing their silencing effects.

The CJEU affirmed that "any national measure limiting or restricting broadcasters' access to radio frequencies is liable to interfere with their right to freedom of the media", even if such measures are grounded in national law (para 362). Subsequently, it assessed the seriousness of Klubrádió's infringements, despite the fact that this is irrelevant under Hungarian law. The Court emphasised that the breaches in question were mere "clerical mistake[s]" and "minor inaccuracies of a formal nature" (paras 258, 380). Consequently, the Court found that revoking the radio station's license "cannot reasonably be considered" either proportionate or necessary (paras 270, 374).

This reasoning sends an important signal in the context of captured media environments, where formal legality is often invoked to deflect scrutiny while the broader implications of regulatory decisions are swept

under the rug. The Court saw through the absurdity of the Media Council's reasoning and assessed its decisions in light of their effects, recognising them not as neutral administrative acts, but as interventions with far-reaching implications for media freedom.

A subtle shift to positive obligations

While the doctrine of positive obligations has a firm rooting in the case law of the ECtHR, the CJEU has rarely developed it in its media law jurisprudence. With the *Klubrádió* judgment, the CJEU began to test these waters by implicitly recognising that national legal frameworks should not only provide for a fair licensing framework on paper but also one that practically and effectively safeguards media freedom and pluralism.

Hungary repeatedly argued that since Klubrádió continues to operate as a radio channel available on the Internet, the Media Council's decisions did not have the effect of silencing it (para 353). The CJEU rejected this reasoning and focused on the "reality of [the] interference" instead (para 364). The practical consequences of the revocation of Klubrádió's license, including the loss of an established audience and proven business model, in themselves impact its right to media freedom (para 364). This implicit shift from considering whether Klubrádió's speech is technically available to whether its freedom is practical and effective signals the CJEU's growing attention to the positive dimension of media freedom. Its repeated emphasis on the principle of good administration reinforces this approach, highlighting that administrative frameworks have to be applied in a way that does not create unjustified barriers to media activities (para 207).

The Court did not limit itself to reviewing how the Media Council assessed the case, but it also scrutinised the design of the Hungarian legal framework itself. According to the Court, the law in its current form "is liable to lead to the adoption of decisions that are contrary to Article 11" (para 372). To avoid this, the Court found that "it ought to have been possible to rectify the irregularities" in Klubrádió's renewal and tender applications, while minor errors "should not make it impossible for a radio station to pursue its activities" (paras 259, 380). In other words, the legal framework lacked sufficient flexibility and safeguards that would have enabled a more balanced proportionality assessment of Klubrádió's infringements.

This reasoning resonates with the ECtHR's established case law, for example the *Centro Europa* case, where the ECtHR held that "it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market" and that states carry "a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism" (paras 130, 134). Although the CJEU stopped short of explicitly framing its findings in terms of positive obligations, it imported much of the underlying logic.

A blueprint for enforcing media freedom

The *Klubrádió* judgment marks a subtle but important shift in the CJEU's approach to media freedom. By placing freedom of expression and information under Article 11 of the EU Charter at the centre of its analysis, rejecting formalistic justifications for restrictive measures, and scrutinising the practical effectiveness of the national legal framework, the CJEU adopted a more holistic assessment of media freedom. It aligned itself more closely with the jurisprudence of the ECtHR, potentially strengthening the European enforcement of well-established freedom of expression standards. The adoption of the European Media Freedom Act will likely only reinforce this trajectory, providing further legal grounding for the CJEU to develop its media freedom case law.

As for Klubrádió itself, the judgment provides little immediate relief: it does not directly restore its frequency and Hungary has a track record of ignoring CJEU rulings anyway. Failure to align Hungarian media law with the Court's judgment can lead to financial sanctions, but these mechanisms are slow and have yet to make a dent in Hungary's illiberal regime. With national elections on the horizon, the most effective avenue for reforming the media ecosystem lies in the political sphere, while the EU's increasing willingness to make use of its legal tools against media capture

can helpfully complement any political transformation at the national level.

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