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How the EU Can Defend Media Freedom and Pluralism in Hungary and Poland

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Summary

In recent years, the European Union has suffered from the erosion of media freedom and pluralism, particularly in Hungary and Poland, where this has been part of a broader decline in democratic standards that has reversed gains made from the transitioning from communism. The main problems include the lack of independence of media regulators; public media being turned into propaganda outlets for the government, characterized by reporting bias and vilifying the opposition; private media capture; the state disproportionately funding government-supporting private media, including through state-controlled companies' advertising; and creating obstacles for private media independent of government, including through revoking licenses and threatening new taxes. In Poland, the number of strategic lawsuits against public participation against certain media that criticize the government have also greatly increased.

The EU has been in the prepared to tackle the issue of breaches of media freedom and pluralism chiefly through a combination of political instruments and new legislation, which may eventually embolden the EU institutions to take legal action. However, it is important to ensure any new legislative initiative will have added value. The EU already has avenues for legal actions to protect media freedom and pluralism in member states.

The paper makes the following recommendations.

- The EU should take targeted political action to protect media freedom and pluralism. The Article 7(l) procedure against Poland should be expanded to include media freedom and pluralism issues, as is the case with Hungary. The Council of the European Union should organize regular hearings in as part of Article 7(l) procedures that should include a debate on the annual Rule of Law Reports. The hearings should produce specific recommendations and deadlines for implementation, and be followed up. The EU should also promptly denounce all new instances of media freedom and pluralism attacks in member state
- The European Commission should start infringement proceedings related to media freedom and pluralism in areas covered by EU law. In this regard, it should prioritize that ensuring that the European Parliament elections in 2024 and the municipal elections in Hungary and Poland, likely due in 2024, will be free and fair.
- The EU should strive for a more ambitious Media Freedom Act that would harmonize legal standards for media freedom and pluralism protection in all member states.
- The EU should act promptly and decisively to safeguard judicial independence and other checks and balances in Hungary and Poland to ensure independent control over the implementation and application of EU law, which is indispensable for safeguarding media freedom and pluralism.

Introduction

Independent, pluralistic media are a critical infrastructure of democracy. However, media freedom and pluralism globally today face a combination of threats. This phenomenon is acutely present in some European Union member states, particularly in Hungary and Poland. Both countries have been rapidly and severely regressing on democracy standards, while political and institutional factors there make it more complex than elsewhere in the EU for the media to speak truth to power.

This paper first discusses the assaults on media freedom and pluralism orchestrated by the governments in Budapest and Warsaw, including changes made to media regulators and public media, private media capture, and state favoritism toward pro-government media outlets. These come on top of broader legal and institutional factors that, cumulatively, have contributed to democracy's backsliding. The paper then assesses the EU's response to these developments. In doing so, it considers different ways of approaching the crisis: monitoring; political pressure, including under Article 7(1) of the Treaty on European Union (TEU); legislative action; legal actions, in particular the use by the European Commission of proceedings against infringements of EU law; and financing. The paper concludes with recommendations on what the EU institutions can do to address to safeguard media freedom and pluralism.

Hungary and Poland in the Vanguard

In Hungary and Poland, two former communist states in Central Europe that started democratization in 1989, and then joined NATO in 1999 and the European Union in 2004, nationalist-rightwing governments have carried out deliberate, coordinated attacks on democratic standards and institutions. They have considerably reversed the democratic gains from the transition from communism to democracy, and assaults on media freedom and pluralism have been central in this.

Since 2010, Hungary under the government of Prime Minister Viktor Orbán and his Fidesz party has seen the systemic dismantlement of checks and balances and of the corruption-prevention framework, the weakening of judicial

independence, and the annihilation of media freedom and pluralism. As a result, Hungary has become a plebiscitarian autocracy.¹ In this system, elections take place in a media environment extremely tilted toward the governing party, which has perfected the art of “ruling by cheating.”² Hungary has been demoted from democracy to autocracy in all major democracy rankings.

In Poland, once a regional champion of democratization, Jarosław Kaczyński's Law and Justice (Prawo i Sprawiedliwość—PiS) party, which leads the United Right coalition government since 2015, has carried out an unprecedented assault on the rule of law, notably on judicial independence. In response to the EU's political and legal pressure to restore standards of judicial independence, in 2021, the government used the politically subordinated Constitutional Tribunal to challenge judgments of the Court of Justice of the European Union. It has also used the Constitutional Tribunal to reject some of the European Convention of Human Rights standards on judicial independence.

Freedom House classifies Hungary as a non-democratic hybrid regime³ and Poland as a deeply flawed democracy.⁴ In the World Justice Project's Rule of Law Index for 2021, Hungary ranked 69th (it was 37th in 2015) and Poland 36th (21st in 2015).⁵ Both states have been experiencing a steep decline in media freedom and pluralism. In Reporters Without Borders' 2022 World Press Freedom Index, Hungary fell to the 85th place (67th in 2015) and Poland to the 66th (18th in 2015).⁶ In 2021, the EU-funded Media Pluralism Monitor assessed that the media's political independence and market plurality were at a high risk in both countries.⁷

1 Zsuzsanna Szelényi, [Hungary enters a new era of autocracy](#), Carnegie Europe, April 5, 2022.

2 Andras Sajó, [Ruling by Cheating: Governance in Illiberal Democracy](#), Cambridge University Press, 2021.

3 Freedom House, [Nations in Transit 2022. Country report: Hungary](#).

4 Freedom House, [Nations in Transit 2022. Country report: Poland](#).

5 World Justice Project, [Rule of Law Index 2021](#).

6 Reporters With our Borders, [RSF's 2022 World Press Freedom Index](#).

7 Media Pluralism Monitor, [Monitoring media pluralism in the digital era. Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia, & Turkey in the year 2020. Country report: Poland](#), 2021.

In both countries, the public media are controlled by the governing parties, which also strive to control or restrain private media. In Hungary, a vast majority of private media have been captured by entities close to Orbán and Fidesz. A similar process has started in Poland with the state buying a regional media group and funding pro-government private media. However, there is still in Poland a considerable number of private media independent of the government, including media conglomerates and local, reader-funded non-profits.

Trust in media is low: according to one study, in Hungary 45 percent respondents say they trust media while in Poland the figure is 37 percent.⁸ In 2021, negative attitudes toward Poland's public broadcaster, TVP, rose to their highest level (44 percent) and for the first time outweighed positive ones (40 percent).⁹

Politically Dependent Media Regulators

In Hungary and Poland, the public media regulators are only nominally independent; in reality, they are subordinated to the governing parties and serve their aims. Their appointment mechanisms, the composition of their personnel, and the powers granted to them mean that the management of public media regulatory bodies are shielded from accountability for unbalanced and politicized programming.

Hungary

Hungary's public broadcaster regulator, the National Media and Info-communications Authority (NMHH) consists of its president, the Media Council, and the Office of the Media Council. The authority's president is selected by the prime minister, appointed by the president of Hungary for nine years, and cannot be removed from office. The Media Authority president has extensive powers, including that of appointing the public broadcaster's executive director and managers. The Media Authority controls all of the media sectors' regulatory, senior staffing, financing, and content matters.

Under the 2010 Media Act, the parliament nominates the Media Council members. The Fidesz-dominated parliament

has rejected all candidates supported by the opposition and appointed persons with links to the ruling party and a clear political profile.¹⁰ The Media Council's decisions have contributed to restrictions on media freedom and pluralism. In 2019, after the 2018 elections, it agreed to the merger of 476 media companies into a conglomerate called The Central European Press and Media Foundation (Közép-Európai Sajtó és Média Alapítvány—KESMA), which facilitated pro-government media concentration (see further below for more details). In 2021, the Media Council decided against renewing the license of the independent radio station Klubrádió, a decision that the Metropolitan Court in Budapest approved. European institutions monitoring democracy, the rule of law, and human rights have negatively assessed the composition and activities of Hungary's Media Council. In 2015, the Council of Europe's Commission on Democracy Through Law (also known as the Venice Commission) recommended that the government introduce legal safeguards to ensure a more pluralistic composition of the Media Council.¹¹ This recommendation has not been followed. In 2020, the European Court of Human Rights ruled that the Media Council's decision to prohibit a television channel from describing a political party as far-right breached the European Convention on Human Rights.¹² Earlier this year, the EU Commissioner for Human Rights found that the Media Council members are not independent and deplored that judicial review of their decisions is limited.¹³ This contravenes the EU Audiovisual Media Services Directive and the Council of Europe's standards.¹⁴ In its 2022 Rule of Law Report on Hungary, the European

8 European Broadcasting Union, [Market insights. Trust in media 2021](#).

9 CBOS, [Opinie o stacjach radiowych i telewizyjnych w kwietniu 2021. Komunikat z badań](#), May 2021.

10 Index.hu, [Fidesz to maintain hegemony over Media Council for nine more years](#), December 3, 2019.

11 CDL-AD(2015)015-e Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015)

12 European Court of Human Rights, judgment of April 28, 2020, *ATV ZRT v. Hungary*, Appl. no. 61178/14.

13 European Union Commissioner for Human Rights, [Memorandum on freedom of expression and media freedom in Hungary 2022](#).

14 Recommendation CM/Rec(2000)23 of the Committee of Ministers to member states on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.

Commission recommended the government should introduce mechanisms to enhance the functional independence of the media regulatory authority, and to strengthen the rules and mechanisms to enhance the independent governance and editorial independence of public service media, in both cases taking into account EU standards.¹⁵

Poland

Poland's National Media Council (Rada Mediów Narodowych—RMN) was established in 2016. It is responsible for appointing and dismissing members of the internal bodies and supervisory boards of the public media—TVP, Polish Radio, and the Polish Press Agency. The RMN's decisions are not subject to judicial review. This body is not mandated by the constitution and duplicates the functions of the constitutionally mandated regulator, the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji—KRRiT). The KRRiT supervises public and private media and presents an annual report to the parliament. In 2016, the then still independent Constitutional Tribunal ruled that transferring the oversight of public media from the KRRiT to the RMN was unconstitutional. This ruling has not been implemented, however.

The political pasts and the lack of relevant professional experience of persons appointed to Poland's media regulators raise concerns over these bodies' independence and expertise standards. RMN members can belong to political parties, which is prohibited for the KRRiT members. Both entities have been staffed with people with close links to the governing PiS party and to President Andrzej Duda.¹⁶ The RMN is composed of five people: three appointed by the parliament and two by the president. On July 22, 2022, three former PiS members of parliament were appointed to RMN, perpetuating the ruling party's majority in this body.

The KRRiT has also been politicized. In 2020, under political pressure from the government, it had to reverse its decision to fire Jacek Kurski, a close collaborator of Kaczyński and former PiS parliamentarian, from his position as TVP chairman.¹⁷ The current KRRiT's mandate started in 2022. Four of its five members have links to PiS or Duda, and one is a media expert appointed by the opposition-controlled Senate. The current KRRiT chairman previously headed the government-friendly Polish League Against Defamation, which takes as its mission "to defend Poland's good name wherever the situation requires it," especially by initiating and supporting "actions aimed at correcting false information about the history of Poland, especially the course of World War II, the participation of Poles in it, the attitude of Poles in relation to Jews, and about German concentration camps."¹⁸ He had publicly strongly criticized the private broadcaster TVN on numerous occasions.

Due to the political control over regulators, Poland's public media can disseminate biased narratives and present them as objective information without fear of independent monitoring and fines. Between 2018 and 2020, the KRRiT did not monitor public media programming during the campaigns for the general, European Parliament, and presidential elections. It often does not hear complaints from the commissioner for human rights or citizens about the content in the public media, especially in news programs. Since Russia invaded Ukraine, several complaints have been filled about the biased portrayal of the opposition party leader Donald Tusk in the main public media news program *Wiadomości*.¹⁹

At the same time, the KRRiT has used its powers to penalize independent private media critical of the government. In 2017, it fined the TVN24 news channel—which is part of the TVN group owned by the US company Warner

15 European Commission, [2022 Rule of Law Report. Country Chapter on the rule of law situation in Hungary, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions.](#)

16 Paweł Surowiec, Magdalena Kania-Lundholm, and Małgorzata Winarska-Brodowska, "Towards illiberal conditioning? New politics of media regulations in Poland (2015–2018)," *East European Politics*, 36(1), 2020.

17 Polsat News, "[Premier: decyzja Rady Mediów Narodowych o powrocie Kurskiego do TVP - suwerenna i właściwa.](#)" [Prime Minister: decision of the National Media Council to return Kurski to TVP - sovereign and correct], May 23, 2020.

18 The Polish League Against Defamation, [Who we are.](#)

19 Press.pl, "[16 skarg do KRRiT na Wiadomości TVP I od wybuchu wojny. Głównie na materiały o Tusku.](#)" [16 complaints to the National Broadcasting Council about TVP I news since the war broke out. Mainly on material about Tusk], March 29, 2022.

Bros. Discovery—almost PLN 1.5 million (€310,000) for its coverage of the 2016 protests in the parliament against planned curbs on media freedom. The fine was rescinded in January 2018 after the US State Department said that the decision appeared to restrict media freedom in Poland.²⁰ In 2020–2021, the KRRiT delayed the renewal of TVN24’s terrestrial broadcasting license for 1.5 years without a clear basis. To protect itself against an adverse decision, the company obtained a license in the Netherlands that allowed it to continue broadcasting via satellite.

Biased Public Media Electoral Coverage

In the past two decades, there has been in most EU countries a shift from the complete dependence of public media on the state, which allowed for political and economic influence by governments, to more independence.²¹ In Hungary and Poland, however, a reverse trend occurred. Fidesz and PiS significantly increased political control over public broadcasters, including national and regional public television, radio, websites, and social media. It is no longer a question of direct political pressure being applied on these—they are no longer public but rather party media.

Media freedom is a prerequisite of free and fair elections, and the political bias of public media toward the governing party is a crucial element of structurally rigged elections.²² In Hungary and Poland, the public broadcasters are obliged by domestic and EU law to fulfill their mission by providing diverse programming characterized by truthfulness, pluralism, impartiality, and fair and balanced political coverage. However, they have become tools of pro-government messaging and followed biased anti-opposition editorial lines, including during election campaigns.

Hungary

In Hungary, the state media do not adequately represent the variety of political actors and viewpoints in news programs. Elections observation missions of the Organization for Security and Cooperation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) concluded that the 2018 and 2022 general elections were marred by the absence of a level playing field.²³ The OSCE/ODIHR full election observation mission for the elections and referendum in April 2022 found that “the bias and lack of balance in monitored news coverage and the absence of debates between major contestants significantly limited the voters’ opportunity to make an informed choice.”²⁴ It condemned “the overlap between the ruling coalition’s campaign messages and the government’s information campaigns, giving an advantage to the ruling coalition and blurring the line between state and party.”²⁵

The OSCE/ODIHR also emphasized systemic political bias and a virtual absence of opposition politicians in the programs of the public broadcaster. For example, during the general elections campaign in 2022, Péter Márki-Zay, the opposition’s leader, got five minutes on public television to present his program.²⁶ Pro-Fidesz and anti-opposition commercials in broadcast media and billboard campaigns dominated the public sphere, promoting Orbán’s narrative that the opposition would drag Hungary into war with Russia.

The OSCE/ODIHR also found that Hungary’s media are divided along political lines and operate in an increasingly concentrated market, with only a handful of independent media operating at the national level. Moreover, the advertisement market is dominated by government commercials. In sum, this creates a pervasive campaign platform for Fidesz.

20 US State Department, [Poland: National Broadcasting Council’s Fine on TVN24](#), December 12, 2017.

21 Institut für Europäisches Medienrecht, [Public Service Media according to Constitutional Jurisprudence. The Human Rights and Constitutional Law Dimension of the Role, Remit, and Independence](#), 2nd edition, 2012.

22 On structurally rigged elections components in Hungary, see Kim Lane Scheppele, [“How Viktor Orbán Wins.”](#) *Journal of Democracy*, 33(3), 2022.

23 OSCE/ODIHR, [Hungary. Parliamentary Elections. April 8, 2018. ODIHR Limited Election Observation Mission Final Report](#), June 27, 2018; and [Hungary. Parliamentary Elections and Referendum. April 3, 2022. ODIHR Election Observation Mission Final Report](#), July 22, 2022.

24 OSCE/ODIHR, [Hungary. Parliamentary Elections and Referendum. April 3, 2022](#), p. 1.

25 *Ibid.*, p. 3.

26 Hungary Today, [“Opposition PM Candidate Márki-Zay Allowed at State Television for First Time.”](#) March 16, 2022.

Poland

In Poland, after the mass dismissal of its editors and journalists, TVP became a propaganda outlet for the government. Its news and entertainment programming have contributed to the government-led smear campaigns against judges defending the rule of law, teachers, protesters against curbs on women's reproductive rights, vulnerable groups (such as lesbians, gay, bisexual, and transgender people), and asylum seekers. TVP consistently presents the opposition as dangerous traitors to the state and the nation's interests. In a 2021 survey, 49 percent of respondents said perceived it as the most unreliable among all channels.²⁷ According to a study by TVP itself, opposition politicians featured on the channel for a combined time seven times smaller than did the governing coalition's politicians in the second quarter of 2022.²⁸

According to the Media Pluralism Monitor, the growing partisanship of the public media in Poland influences the quality of information, including during electoral campaigns.²⁹ OSCE/ODIHR election observation missions found that public-media bias tarnished the campaigns for the 2019 local elections and the 2020 presidential election.³⁰ They also concluded that the 2020 presidential election was free but unfair due to, among other things, bias toward the governing PiS or the incumbent President Duda as well as to lack of pluralism in reporting in public media. They found that TVP failed to provide balanced and impartial coverage, supporting Duda and frequently portraying his challenger Rafał Trzaskowski as threatening Polish values and the national interest. Some of the reporting had xenophobic

and anti-Semitic undertones.³¹ The OSCE/ODIHR underscored that the lack of transparency and procedures for appointing and dismissing senior management "could make TVP content more susceptible to government pressure."³² TVP replied that the OSCE/ODIHR conclusions regarding the work of its journalists was biased and harmful. Neither the KRRiT nor the RMN has subsequently addressed the problem of the public broadcaster's election partisanship.

The public broadcasters in Hungary and Poland have routinely presented anti-EU propaganda as objective information and smeared particular political groups in the European Parliament. Since 2011, Hungary's public broadcaster has participated in a smear campaign against members of the European Parliament from other member states who criticize the country's government.³³ Private pro-government media have also "investigated" Hungary's opposition members of the European Parliament during the general elections campaign in 2022.³⁴ After Russia invaded Ukraine in February 2022, complaints were filed in Poland against the public broadcaster for statements about the European People's Party (EPP). TVP suggested that EPP stood for "European Putin's Party."³⁵

In its 2022 Rule of Law Report, the European Commission recommended that the Hungarian and Polish authorities should strengthen the rules and mechanisms to enhance the independent governance and editorial independence of the public media, taking into account EU standards.³⁶

Public Media Financing and Other Forms of Support

The public media in Hungary and Poland are reported to be the primary beneficiaries of state support, receiving

27 CBOS, [Postrzeżenie telewizyjnych programów informacyjnych i publicystycznych](#) [Perceptions of television news and current affairs programmes], 2021.

28 Wirtualne Media, "[W TVP politycy Zjednoczonej Prawicy przez 200 godzin, ci z PO siedem razy krócej](#)" [United Right politicians on TV for 200 hours, those from PO seven times less], August 9, 2022.

29 Media Pluralism Monitor, [Monitoring media pluralism in the digital era. Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia, & Turkey in the year 2020. Country report: Poland](#), 2021.

30 OSCE/ODIHR, [Poland, Parliamentary Elections, October 13, 2019: Final Report](#), February 14, 2020, and [Poland, Presidential Election, June 28 and July 12, 2020: ODIHR Special Election Assessment Mission Final Report](#), Organization for Security and Co-operation in Europe, September 23, 2020.

31 Ibid., p. 20.

32 Ibid., p. 18.

33 D. Pál Rényi, "[The Art of Media War - This is how Viktor Orbán captured the free press in Hungary](#)," 444.hu, February 28, 2022.

34 Konrad Bleyer-Simon, [Smear campaigns are constant components of Fidesz's recipe to stay in power](#), Heinrich-Böll-Stiftung Prague, January 5, 2022.

35 Daniel Tilles, "[Complaint filed against Polish public TV over 'EPP - European Putin's Party' report](#)", Notes from Poland, March 28, 2022.

36 European Commission, [2022 Rule of Law Report. Country Chapter on the rule of law situation in Poland](#).

hefty state subsidies and advertising revenue from government-controlled companies. According to the Media Pluralism Monitor, in Hungary and Poland there is a high risk of politicizing the public media's governance and funding.³⁷

In Hungary, state support provided to the public media has grown to HUF 118 billion per year (approximately €300 million). The politically controlled Media Council approves the annual plan and subsidy policy Media Services and Support Trust Fund and how the public media can use the latter's assets.³⁸

In Poland, under PiS the state increased its spending on public television. In 2020, 77 percent of the expenditure of public television was covered by license fee income or special compensation from state funds for lost revenues due to viewers' non-payment of license fees. The public broadcaster TVP received PLN 5.9 billion in subsidies in 2016–2020 (approximately €1.29 billion) plus additional funds from state institutions.³⁹ In 2022, the public television and radio subsidy is PLN 1.95 billion (approximately €420 million), more than twice as much as in 2017. In 2022, the public news channel TVP Info announced it would spend PLN 600 million (approximately €128 million) on a new building.⁴⁰ No other media in Poland enjoy the privilege of such lavish state subsidies, although the pro-government media also receive significant sums from the public purse. Moreover, TVP benefits from the regulatory framework. In 2022, the KRRiT, citing national security reasons, temporarily exempted it only from switching to a new broadcasting standard. This allowed TVP

to gain viewers while the commercial broadcasters TVN and Polsat lost them.⁴¹

Private Media Capture

In Hungary and Poland, private media ownership has become increasingly politicized. Private media capture means individuals or private businesses directly or indirectly affiliated to people in state institutions or the governing party gaining control of privately owned media, resulting in their having editorial control over a large number of outlets.

This is particularly advanced in Hungary and has led to increased media concentration. In 2016, the political print daily of record *Népszabadság* was closed after it was purchased by Heinrich Pecina, a businessman with links to Fidesz. In 2017, Orbán's ally Lőrinc Mészáros bought stakes in Optimus, the owner of several prominent newspaper publishers. The 476 media outlets under the abovementioned KESMA foundation are for the most part owned by people close to the Fidesz government, and Fidesz allies or think tank associates sit on its board, which is presided by Gábor Liskay, an Orbán associate. In January 2020, the Budapest Metropolitan Court ruled in favor of the Competition Authority's decision not to investigate KESMA's creation. The Competition Authority invoked a particular clause in the competition law to argue that the merger was of strategic national importance. KESMA's establishment and the merger of media outlets under it led to mass layoffs of journalists. In 2020, businessman Miklos Vaszily, who is linked to the government, gained a stake in the renowned news website Index.hu. In July 2020, its editor-in-chief was fired and journalists resigned from their jobs. The new editor-in-chief previously worked for a government-financed outlet. Index.hu's former editors and journalists went on to establish the online portal Telex.hu.

The state is the largest advertiser in Hungary, spending €79 million on advertising in 2020, which is estimated to represent one-third of the whole advertising market.⁴² The

37 Media Pluralism Monitor, [Monitoring media pluralism in the digital era. Application of the Media Pluralism Monitor in the European Union. Albania, Montenegro, the Republic of North Macedonia, Serbia, & Turkey in the year 2021. Country report: Hungary](#), 2022, p. 24; and [Monitoring media pluralism in the digital era. Application of the Media Pluralism Monitor in the European Union. Albania, Montenegro, the Republic of North Macedonia, Serbia, & Turkey in the year 2021. Country report: Poland](#), 2022.

38 Media Pluralism Monitor, Hungary, 2022, p. 24.

39 Bianka Mikołajewska, "[TVP dostała 5,9 mld zł pomocy publicznej w 4 lata. Do tego setki milionów z państwowych spółek i instytucji.](#)" OKO.press, February 12, 2021.

40 Wirtualne Media, "[TVP wyda 600 milionów złotych na nową siedzibę TVP Info](#)" [TVP to spend PLN 600 million on new TVP Info headquarters], August 12, 2022.

41 Press.pl, "[Dzięki pozostaniu w starym standardzie nadawania TVP zyskuje. TVN i Polsat tracą](#)" [Dzięki pozostaniu w starym standardzie nadawania TVP zyskuje. TVN i Polsat tracą], August 12, 2022.

42 International Press Institute, [Media Freedom in Hungary Ahead of 2022 elections](#), March 21, 2022.

National Communications Office, which is part of the Prime Minister's Office, controls the state's advertising expenditures. Orbán's government has disbursed public money on advertisements in pro-government private media, making them indebted to Fidesz, distorting the market, and aiming to create a de facto single-party regime's media system. This has allowed some outlets to operate solely based on state advertising, without market considerations.⁴³

In Poland, PiS has used the state-controlled oil and gas company PKN Orlen as the economic platform to execute a process of media capture.⁴⁴ This has gone under the label of "repolonization" of the media. In 2020, PKN Orlen also acquired a majority stake in the Ruch newsstands operator. In 2021, it bought Polska Press from Germany's Verlagsgruppe Passau, citing the need to strengthen its communications. Polska Press's portfolio included 20 of the 24 regional dailies in Poland, 120 weekly magazines, and 500 online portals. In April 2021, the Court of Competition and Consumer Protection ruled that the approval of the takeover by the Office of Competition and Consumer Protection should be suspended following an appeal by the human rights commissioner. PKN Orlen's CEO, Daniel Obajtek, argued that the court decision was irrelevant as it was handed after the transaction was completed. Kaczyński, who was then deputy prime minister, stated that a court could not block the transaction because there were no legal grounds for it. Despite the court ruling, editors and journalists in numerous Polska Press titles were fired and replaced with people who had worked in pro-government media. On June 7, 2022, the court of second instance dismissed the human rights commissioner's appeal against the takeover.

In Poland, state advertising appears to be mainly directed to government-friendly "identity press" groups that promote right-wing messages consistent with the government's narratives. Public funds are channeled through advertisements and partnerships sponsored by state-controlled companies, creating a tight dependency between the government and the media outlets. For example, the pro-government weekly

magazine *Sieci* received 31 percent of its advertising revenues in 2020 from government-controlled state companies and the daily *Gazeta Polska Codziennie* 29 percent in 2020 and 53 percent in 2019.⁴⁵ These are not the top media in Poland when it comes to circulation. In contrast, one of the most prominent dailies, the liberal *Gazeta Wyborcza*, which Kaczyński considers part of the opposition, has not received such subsidies since 2015. The systemic approach of the government strengthens partisan outlets favorable to PiS and restricts the revenue sources of other private media. This raises concerns over political clientelism, understood as the distribution of selective benefits to individuals or groups in exchange for political support. Poland's private media operate on an uneven playing field, especially, as many private companies are reluctant to place advertisements with independent media that criticize the government.

Obstacles to Private Media Independent of Government

In Hungary and Poland, Fidesz and PiS have also introduced changes to the detriment of the media that are independent of the government.

Not Renewing or Revoking Broadcasting Licenses

Radio and television channels risk their broadcasting licenses not being renewed or being arbitrarily revoked. As mentioned above, in September 2020, Hungary's Media Council decided not to renew the license of Klubrádió, one of the few remaining independent radio stations critical of government, for allegedly repeatedly violating national media laws. The Media Council cited "regulatory offenses." In February 2021, the Municipal Court in Budapest rejected Klubrádió's request to extend its license temporarily, and the station lost its frequency the following month. Klubrádió has since continued to operate online with a limited audience. In April 2022, after Fidesz won the elections for the fourth time, the Media Council refused to renew the license of the non-profit Tilos Rádió, which had been operating since 1990,

⁴³ Ibid.

⁴⁴ Media Freedom Rapid Response, [Democracy Declining: Erosion of Media Freedom in Poland, Media Freedom Rapid Response press freedom mission to Poland 2020 report](#), February 11, 2021.

⁴⁵ Tadeusz Kowalski, [Report on advertising expenditures of state-owned companies 2015-2020](#), February 2021, manuscript on file with the author.

claiming that it had violated regulations on the use of inappropriate language four times over seven years.

As noted above, in 2020–2021, the KRRiT delayed the renewal of the broadcasting license of TVN24, which had to obtain a license in the Netherlands. The KRRiT eventually prolonged its broadcasting license a week after the previous one had expired. On April 29, 2022, a court in Poland ruled that the delay was unlawful. In 2021–2022, the KRRiT similarly delayed renewing the license of another TVN Group channel, TVN7, doing so over a year after its application for a new one.

In September 2021, the PiS-dominated lower chamber of parliament passed a law prohibiting companies from outside of the European Economic Area (which consists of the EU member states plus Iceland, Liechtenstein, and Norway) to own a stake of more than 49 percent in radio and television stations operating in Poland.⁴⁶ The law was broadly perceived as targeting Warner Bros. Discovery, which owns in TVN, the leading television platform for the opposition, thus becoming labelled as Lex TVN.⁴⁷ The European Commission, the European Parliament, the United States government, dozens of private media, and several international and Polish nongovernmental organizations condemned the law. In December 2021, the usually government-aligned President Duda surprisingly vetoed it, although he had expressed support for it.⁴⁸ There is widespread speculation that this followed Duda being informed by the US government about the high risk of Russia's military aggression against Ukraine, especially after when the US director of national intelligence traveled to Poland and met with state authorities.

Deteriorating Working Conditions for Journalists

In Hungary and Poland, the authorities have negatively affected the working conditions of journalists in indepen-

dent media.⁴⁹ The number of strategic lawsuits against public participation (SLAPPs) has increased in recent years against some media outlets. SLAPPs are typically baseless and exaggerated—often civil or criminal defamation—lawsuits used against journalists and other actors speaking out in the public interest to intimidate and silence them and exhaust their financial, time, and emotional resources.

Moreover, media critical of the government face many pre-litigation requests for corrections.⁵⁰ In 2021, in Poland there were instances of journalists covering anti-government protests against curbs on LGBT and women's rights being pepper-sprayed or detained by the police.

In July 2021, international and Hungarian media reported about the alleged illegal secret surveillance of investigative journalists and publishers with the Pegasus spyware in Hungary. In January 2022, the report of the Hungarian National Authority for Data Protection and Freedom of Information (NAIH) following its investigation into the alleged use of the spyware against individuals in Hungary stated that the persons requesting and conducting the surveillance had not violated any Hungarian laws or regulations. The report also emphasized that spying software can be used on the grounds of national security risk. In April 2022, the European Parliament launched an inquiry committee on Pegasus and other spyware used by authorities in EU member states.

In Hungary and Poland, journalists from outlets independent of the government are often denied access to the authorities' official press conferences, or their questions are not answered when they are given access. State institutions and government officials frequently deny interviews to media critical of Fidesz and PiS. Despite both countries having freedom of information legislation, journalists encounter difficulties accessing public information.⁵¹ In 2021, the Polish authorities denied journalists access to the emergency zone bordering Belarus, which media-freedom groups protested. They have also intimidated journalists working near the emergency zone. Furthermore, in 2021, the new first presi-

46 Ustawa z dnia 11 sierpnia 2021 r. o zmianie ustawy o radiofonii i telewizji oraz ustawy o kinematografii [Act of 11 August 2021 on the amendment of the "Broadcasting and the Cinematography Act"], Dz.U. 2021 poz. 1676.

47 Zosia Wanat, "Poland races through media law seen as targeting US broadcaster," Politico, December 15 2021.

48 President of the Republic of Poland, [Prezydent zawetował ustawę o radiofonii i telewizji](#) [President vetoes broadcasting bill], Prezydent.pl, December 27, 2021.

49 Meera Selva, [Fighting Words: Journalism Under Assault in Central and Eastern Europe](#), Reuters Institute, January 22, 2020.

50 On the problem of SLAPPs in Hungary and Poland, see the coming GMF ReThink.CEE paper by Paulina Milewska.

51 Media Freedom Rapid Response, Democracy Declining.

dent of the Supreme Court—who became a Supreme Court judge under the rules changed by PiS—submitted a request to the politically subordinated Constitutional Tribunal to verify the constitutionality of provisions of the Act on the Access to Public Information. The case is still pending.

Threatening Independent Media with Further Restrictions

In addition, the Hungarian and Polish authorities attempt to destabilize and to weaken independent media by further curbs on media freedom and pluralism, including new forms of economic and fiscal pressure.

In Poland, PiS has been debating “repolonization,” which would put limits on the stakes foreign actors can take in media companies, and “deconcentration,” which would limit the number of media outlets a media group can own and the level of capital that foreign companies can invest in the media market.

Fidesz and PiS have also threatened private media with new taxes. In 2014, Hungary’s government proposed a new tax on Internet data traffic. In 2021, Poland’s government tabled a law for taxing media advertising revenues, officially justified as necessary to fund the health system that was being strained by the coronavirus pandemic. This was criticized for disproportionately targeting independent private media. Both proposals were shelved after mass street protests and, in the case of Poland also an unprecedented “blackout day” media protest.

Broader Factors Detrimental to Media Freedom and Pluralism

Broad, entrenched political and legal changes in Hungary and Poland affect the media environment.

In Hungary, changes to the governance system have led to the creation of what has been described as a constitutional “Frankenstate.”⁵² The system is characterized by dismantled checks and balances, aggrandizement of the executive, and governing by decrees, which intensified

during the pandemic.⁵³ Legal safeguards for private companies became more limited due to long-standing political pressure on courts. The National Office for the Judiciary, which is responsible for running the courts, has been criticized by the EU, the Council of Europe, and human rights groups for politicization and nepotism. In April 2022, the European Commission triggered for Hungary a new regulation aiming at protecting EU funds against abuses and fraud, citing concerns over public procurement, conflicts of interest, weaknesses in control and audit systems, problems with independent investigation or prosecution, and an insufficient framework for fighting corruption.

The rule of law backsliding in Poland includes the weakening or removal of structural guarantees of judicial independence, the abuse of the disciplinary system to threaten judges, and the politicization of prosecution, which is under the control of the minister of justice, a position currently occupied by Zbigniew Ziobro, who leads a party in the governing coalition. The government ostentatiously disrespects the judgments of top domestic courts and has abused the subordinated Constitutional Tribunal to challenge judgments of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) regarding judicial independence standards.

In Poland, the state media participate in smear campaigns against LGBT groups, women’s rights activists, asylum seekers, judges, journalists and media, and civil society organizations. In Hungary, a smear campaign against journalists was launched ahead of the 2022 elections.⁵⁴ Space for civil society organizations, including media non-profits, has significantly shrunk in the country. Between 2017 and 2021 nongovernmental organizations receiving donations or grants from abroad were designated as foreign-funded organizations under a law that was dubbed “Lex NGO.” The 2017 law was repealed after the CJEU found it contrary to EU

52 Kim Lane Scheppele, “The rule of law and the Frankenstate: why governance checklists do not work,” *Governance*, 26(4), 2013, pp. 559-562.

53 Gábor Halmaj, “From ‘Illiberal Democracy’ to Autocracy. How Covid-19 Helped to Destroy the Remnants of Democracy in Hungary,” In Jakub Urbanik and Adam Bodnar (eds.) *Waiting for the Barbarians. Law in a Time of Constitutional Crisis*. Verlag CH Beck, pp. 227-240.

54 Human Rights Watch, [Hungary: Smear Campaign Targets Critical Voices](#), March 4, 2022.

law.⁵⁵ PiS has threatened to implement similar legislation in Poland. In 2021, Hungary enacted a new Lex NGO that permits the State Audit Office to selectively audit nongovernmental organizations with a budget exceeding HUF 20 million (approximately €55,000).

The European Union's Response

The European Union's institutions are aware that the media freedom and pluralism crisis is part of a broader rule-of-law backsliding in some member states. So far, the EU has not contained or reversed the negative changes in this respect in Hungary and Poland. Its response to the deterioration in media freedom and pluralism has been different from its reactions to other elements of the rule-of-law backsliding— notably the attacks on judicial independence, LGBT rights, migration law, academic freedom, and civil society organizations. It has focused on monitoring, political pressure, legislative action, and financing, but it has rarely used legal action.

Monitoring

The EU has established comprehensive monitoring and detection of threats to media freedom and pluralism in its 27 member states. The EU-funded Centre for Media Pluralism and Media Freedom in its annual Media Pluralism Monitor identifies risks in member states as well as in candidate countries. The monitor covers four pillars: fundamental protection, market plurality, political independence, and social inclusiveness.

Since 2020, the European Commission has published annual Rule of Law Reports that cover significant developments in all member states. It conceptualizes media freedom and pluralism as part of the rule of law, along with the independence of the judiciary, the anti-corruption framework, and other institutional issues related to checks and balances. The reports focus on legal safeguards to media freedom and pluralism, such as “measures taken to ensure...independence,” on “adequacy of resources of media regulatory authorities and bodies,” and on “enforcement powers.” To assess the state of media freedom and pluralism, the Rule of Law Reports rely on sources such as contributions from the

member states and other stakeholders, country visits, CJEU and ECtHR case law, reports of the EU Fundamental Rights Agency, the Media Pluralism Monitor, the Mapping Media Freedom tool, reports on the implementation of the Audiovisual Media Services Directive, reports of the European Regulators Group for Audiovisual Media Services, reports of other international organizations (Council of Europe, OSCE/ODIHR, United Nations), and civil society contributions. Since 2022, the reports also include recommendations for national authorities. However, they do not include recommendations about specific enforcement mechanisms.

Political Pressure

In 2018, the Council of the European Union, acting on proposals by the European Commission and the European Parliament, launched for the first time the political procedure under Article 7(1) of the Treaty on European Union (TEU). The procedure may be activated in the case of a clear risk of a serious breach by a member state of the core EU values enumerated in Article 2 TEU.⁵⁶ The European Commission did so against Hungary and Poland, citing a serious risk of rule-of-law violations.⁵⁷

The Article 7(1) procedure against Hungary concerns the functioning of the constitutional and electoral system; the independence of the judiciary and other institutions and the rights of judges; corruption and conflicts of interest; privacy and data protection; freedom of expression; academic freedom; freedom of association; freedom of religion; the right to equal treatment; minorities rights; the rights of migrants, refugees, and asylum seekers; and economic and social rights. The procedure also expressly concerns changes

56 Article 2 states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

57 Article 7 TEU envisages three procedures: the Article 7(1) procedure to declare the existence of a clear risk of a serious breach of the values referred to in Article 2 and the adoption of recommendations on how to remedy the situation addressed to the member state; the Article 7(2) procedure to state the existence of a serious and persistent breach of values referred to in Article 2 TEU; and the Article 7(3) sanctioning mechanism.

55 CJEU ruling of June 18, 2020, C-78/18, *Commission v Hungary*.

made to the Press Act and the Media Act, including the rules for electing members of the Media Council; the biased coverage of elections in public and private pro-government media; and smear campaigns and obstacles to the work of independent journalists.

The Article 7(l) procedure against Poland is not as broad. It concerns changes made to the composition and functioning of the Constitutional Tribunal, the National Council for Judiciary, the Supreme Court, and the ordinary courts as well as to the powers of the Public Prosecutor's Office. It does not specifically address media freedom and pluralism issues.

The execution of the Article 7(l) procedure against Hungary and Poland has been widely criticized as largely ineffective. The EU Council of Ministers infrequently holds hearings concerning both countries before the General Affairs Council.⁵⁸ Meanwhile, the governments in Budapest and Warsaw maintain that EU values have not been attacked.

In 2021, the European Parliament's Committee of Civil Liberties called on the European Commission to broaden the scope of the procedure against Poland to include democracy and human rights in addition to the rule of law. In May 2022, the European Parliament urged the Council of the European Union to show "genuine commitment" and make "meaningful progress" to protect EU values and recommended that it organize hearings regarding Hungary and Poland in a regular, structured, and open manner, and that it should include a follow-up with clear recommendations and deadlines for their implementation.⁵⁹ However, the European Parliament does not have a more prominent institutional role in the Article 7(l) procedure.

In 2022, the Article 7(l) procedure has been overshadowed by financial pressure applied by the European Commission against the governments of Hungary and Poland. In the case of Poland, the dialogue between Brussels and Warsaw centered on the delayed approval of the country's post-pandemic national recovery plan and making the disbursement of funds conditional upon Poland meeting specific rule-of-law milestones.⁶⁰ Regarding Hungary, the European Commission has not approved its recovery plan and has activated the 2020 conditionality regulation that establishes the rules necessary for the protection of the EU budget in the case of breaches of the principles of the rule of law.

democratic national recovery plan and making the disbursement of funds conditional upon Poland meeting specific rule-of-law milestones.⁶⁰ Regarding Hungary, the European Commission has not approved its recovery plan and has activated the 2020 conditionality regulation that establishes the rules necessary for the protection of the EU budget in the case of breaches of the principles of the rule of law.

Legislative Action

Media regulation has been traditionally the competence of member states. However, the EU is working on a more comprehensive media freedom and pluralism protection system at the EU level.

In November 2021, the European Commission adopted a package of measures to reinforce democracy and to protect the integrity of elections that includes a legislative proposal on transparency and targeting in political advertising.⁶¹ In April 2022, it also unveiled the framework of its planned directive against strategic lawsuits against public participation. The proposed directive covers SLAPPs in civil matters with cross-border implications. It enables judges to swiftly dismiss manifestly unfounded lawsuits against journalists and human rights defenders. It also establishes procedural safeguards and remedies, such as compensation for damages, dissuasive penalties for launching abusive lawsuits, and protection against a third-country judgment, which would prevent forum-shopping outside of the EU.

The EU's main new mechanism for protecting media freedom and pluralism is the proposed Media Freedom Act (MFA), which builds on the 2020 European Democracy Action Plan.⁶² The act is championed by European Commission Vice-President for Values and Transparency Věra Jourová, who has argued that it aims to create "the

58 There were three hearings regarding Poland in 2018 and 2019, one in June 2021, and one when the French presidency resumed the hearings after the pandemic hiatus. Similarly, after hearings regarding Hungary in 2018-2019, there were two hearings in 2021 and 2022.

59 European Parliament resolution of May 5, 2022 on ongoing hearings under Article 7(l) TEU regarding Poland and Hungary (2022/2647(RSP))

60 Jan Cienki, "[Poland warns it will turn cannons on the EU in the rule of law dispute.](#)" Politico, August 8, 2022.

61 European Commission, Proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising COM/2021/731 final.

62 European Commission, [European Media Freedom Act - Proposal for a Regulation and Recommendation](#), September 16, 2022.

greatest possible distance between politics and the media.”⁶³ According to the draft presented in September 2022, the MFA would require member states to respect the editorial freedom of media. Regarding the private media market, it would introduce a media pluralism test: a requirement that any legislative, regulatory, or administrative measure in member states that could affect the media be duly justified and proportionate. Furthermore, the MFA would introduce requirements for the allocation of state advertising to media, so that it is transparent and non-discriminatory. News media would have to ensure transparency of ownership and to guarantee the independence of editorial decisions, taking into account conflicts of interests.

The draft MFA aims at improving the protection of journalistic sources and editorial independence. It also includes strong safeguards against the use of spyware against media, journalists, and their families. Furthermore, it includes safeguards against the unjustified removal by social media providers of media content produced according to professional standards.

Concerning public media, the MFA would require that member states provide adequate and stable funding to assure their independence; that their leadership is appointed in a transparent, open, and non-discriminatory manner; and that they fulfill their mission of providing pluralistic, impartial programming. The MFA would also entail replacing the European Regulators Group for Audiovisual Media Services by a body with a broader scope: the European Board for Media Services.

The MFA would also be accompanied by non-binding recommendations.

Legal Action

Under Articles 258 and 259 of the Treaty on the Functioning of the EU (TFEU), the European Commission can pursue legal action against member states for failing to comply with their obligations under EU law. The procedure has several steps. The European Commission may refer the member state's government to the CJEU, request interim measures,

or demand financial penalties should the government not implement a judgment of the CJEU.

The European Commission has launched only one such proceeding related to element of media freedom and pluralism crisis in Hungary and Poland. In June 2021, it started an infringement action against Hungary's government over the Media Council's decision to deny Klubrádió an extension of its license. The European Commission argued that the decision was disproportionate, nontransparent, and breached the European Electronic Communications Code.

Financing

In recent years, the EU has committed itself to sustaining a broader enabling environment to ensure the viability of quality media. The Multi-annual Financial Framework (MFF) for 2021–2027, which regulates the EU's annual budget, includes funding for projects promoting media pluralism. The EU's long-term scientific research initiatives Horizon 2020 and Horizon Europe provide research funding to investigate the dynamics of democracy and media. The new Citizens, Equality, Rights, and Values program fund aims at promoting civil society initiatives that would uphold EU values and media non-profits can use this funding. Other MFF programs supporting media pluralism include Creative Europe and Digital Europe. As part of its Media and Audiovisual Action Plan, the European Commission launched an €8 million funding call for projects to support journalism partnerships in member states. It also plans to invest in the production and distribution of audiovisual content in the member states by strengthening equity investment in this area. To this end, it has launched the MEDIA INVEST investment instrument and it also works with European philanthropic foundations. The European Commission has also established the European Newsroom, which networks 16 news agencies from across the EU and the Balkans. The European Parliament has launched a new training program to support young journalists.⁶⁴

In response to weak anti-corruption frameworks and abuses of EU funds in certain member states, the EU has

⁶³ Radio Prague International, “It includes many things that states may not like – Jurová on EU's upcoming Media Freedom Act,” August 9, 2022.

⁶⁴ European Parliament, [Parliament to support young journalists with new training and a program named after President Sassoli](#), May 4, 2022.

expanded instruments to protect its budget. In December 2020, the Council of the European Union and the European Parliament adopted the European Commission's regulation to link the disbursement of EU funds to compliance with the rule of law. This conditionality regulation concerns developments in member states since January 1, 2021. In February 2022, in cases brought by the governments of Hungary and Poland, the CJEU confirmed that the regulation conforms to EU law. In April, the European Commission announced it had activated the regulation against Hungary's government, which has proposed several remedial measures aiming at answering the commission's concerns, including enhanced transparency of public spending that may also increase the transparency of public media funding.

Recommendations

The systemic, interlinked assaults on media freedom and pluralism in Hungary and Poland contribute to their democratic backsliding and represent major challenges for the EU, staining its democratic credentials. There is a risk that negative developments in these areas will spill over into other member states and become normalized. Time is of the essence to better protect media freedom and pluralism, especially in light of the impact that the issues detailed in this paper could have on the outcome of the European Parliament elections in 2024.

Targeted EU political action to protect media freedom and pluralism is needed.

The EU should apply political pressure on those member states' governments that violate media freedom and pluralism. The EU institutions, especially the European Commission and the European Parliament, should unequivocally declare their support for media independence as part of the rule of law, denounce its specific violations, and follow up on the implementation of recommendations in the Rule of Law Reports.

The Council of the European Union, following a proposal of the European Commission, should expand the scope of the Article 7(1) procedure against Poland to cover the media freedom and pluralism issues. It should also organize regular hearings in the Article 7(1) TEU procedures against Hungary

and Poland and follow up on recommendations in Rule of Law Reports concerning media freedom and pluralism in both countries.

The EU institutions should consult with civil society stakeholders to understand the dynamic model of public and private media capture in Hungary and Poland. They should also swiftly condemn attempts by governments or government-linked organizations in both countries as well as in other member states to silence civil society voices, including through SLAPPs.

The EU, in coordination with the United States, should push back against legislation targeted against specific media organizations or sectors, including new levies that disproportionately affect media criticizing the government and that introduce other systemic threats to the financing and operation of independent private media. The denunciations of specific threats and violations by senior political figures such as the European Commission president and commissioners, or the US president, vice-president, or ambassadors to Hungary and Poland, would have a profound impact. Emphasizing that EU and the North Atlantic Treaty Organization are built on respect for the rule of law is important. The experience of Poland's Lex TVN shows that, as key security ally to EU member states, the US government can often be the most influential defender of media freedom and pluralism there.

The European Commission should start infringement proceedings related to media freedom and pluralism in areas covered by EU law.

The EU's law infringement actions and referrals of the governments of Hungary and Poland to the CJEU reversed some elements of and slowed down further democracy's backsliding in the medium term. However, the European Commission has not yet explored the potential of infringement actions to protect media freedom and pluralism, thus under-enforcing EU law in this respect.⁶⁵ The EU institutions

⁶⁵ On under-enforcing of EU law by the Commission more broadly see R. Daniel Kelemen and Tommaso Pavone, "[Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union](#)," December 2021.

should explore legal options already that already exist in areas that are covered by EU law.⁶⁶

Doubts over the fairness of elections to the European Parliament would raise concerns over the democratic character of that body and its legislation. The European Commission is obliged to ensure that the next European Parliament elections in 2024—as well as upcoming local elections in Hungary and Poland likely in 2024—will be free and fair. EU law protects the electoral rights of EU citizens in European Parliament and municipal elections. Article 14(3) TEU stipulates the European Parliament elections must be “free and secret.” As for local elections, Article 20(2)(b) TFEU provides that EU citizens have “the right to vote and to stand as candidates ... in municipal elections in their Member State of residence, under the same conditions as nationals of that State.” Furthermore, Article 39.2 of the EU Charter of Fundamental Rights stipulates that “Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.” This is repeated in the act concerning the election of the members of the European Parliament. Article II of the charter guarantees EU citizens the freedom to “receive and impart information and ideas without interference by public authority.” Electoral disinformation and bias in public media about competing parties and candidates prevent voters from making informed decisions and undermine elections fairness.⁶⁷

Article 30 of the Audiovisual Media Services Directive (AVMSD) requires member states to guarantee that their media-market regulators are entirely independent of political and business influence and exercise their powers impartially and transparently, in keeping with principles of media pluralism, cultural and linguistic diversity, non-discrimi-

nation, and fair competition.⁶⁸ According to the AVMSD, the procedure for appointing the head and members of the regulatory body should be transparent, non-discriminatory, and guarantee their independence. Hungary transposed the AVMSD into domestic law in 2019 as did Poland in 2021. Consequently, the European Commission should explore the potential of EU law infringement proceedings in cases of appointment of nonindependent media regulators. Moreover, when media regulators in member states arbitrarily deny or do not renew licenses for private media, the European Commission should also start law infringement proceedings, using the Klubrádió case as template.

In cases of infringements of EU law concerning developments undermining media pluralism, the European Commission could rely on Article II(2) of the Charter of Fundamental Rights, which provides that “media freedom and pluralism shall be respected” in the EU. It could also rely on Recital 8 of the AVMSD, which states:

It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programs or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and the information sector as a whole.

The European Commission can also reference CJEU case law. The court has held that safeguarding of the freedoms protected under the charter unquestionably constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed in particular.

Moreover, the European Commission can and should rely in infringement actions also directly on Article 2 TEU when it comes to protecting the EU’s core values that include freedom,

66 I am grateful to Adam Bodnar, John Morijn, and Miguel Poyares Maduro for sharing their persuasive arguments on how many potential EU law infringement cases could be constructed. See also Adam Bodnar and John Morijn, “[How Europe can protect independent media in Poland and Hungary](#),” Politico, May 18, 2021.

67 Meijers Committee, [Promoting and Safeguarding Media Pluralism Through EU Law](#), October 2021.

68 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending 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 (Audiovisual Media Services Directive) in view of changing market realities.

democracy, equality, and the rule of law. The European Commission has so far used Article 2 TEU only as a subsidiary ground for review in EU law infringement proceedings.⁶⁹

The substantial, prompt, and coordinated application of political and legal tools could contain and dissuade further severe and systemic assaults on media freedom and pluralism in Hungary and Poland.

The EU should strive for a more ambitious Media Freedom Act that would harmonize the protection of media freedom and pluralism.

The planned Media Freedom Act is an opportunity to address the fragmented regulatory framework across the EU and to harmonize and increase the independence of media regulators in member states.⁷⁰ However, it is important to ensure the act, like any new initiative, will have added value as the EU already has avenues for legal actions to protect media freedom and pluralism in member states. The MFA's draft does well to propose establishing of pan-European group of national media regulator, the European Board for Media Services, that would replace the European Regulators Group for Audiovisual Media Services. This board would be composed of representatives of national regulatory authorities. It is yet unclear, though, how the EU would assess whether national representatives are independent and unbiased. In backsliding democracies such as Hungary and Poland, the media regulators are captured and staffed with government loyalists.

Robust provisions for strengthening the editorial independence of public broadcaster would be a welcome addition to the MFA. Standards for public media governance in Europe have traditionally been set by the Council of Europe's Committee of Ministers in successive recommendations. These standards include merit-based appointments by pluralistic bodies, professionalism of and a clear mandate for

supervisory bodies, and accountability. The MFA would allow the EU to translate those recommendations to law. The MFA could further stipulate that the appointing members of media regulatory bodies should reflect the principle of pluralism.

With the MFA, the European Commission aims at better protecting the market from distortion, including in the autocratizing contexts where governments put new constraints on private media and heavily support financially government-friendly media. The MFA would introduce rules protecting publishers from unjustified, disproportionate, and discriminatory national measures. However, it is still unclear what exactly the media pluralism test for national authorities would consist of and how it would be enforced in member states. The MFA in its current form envisages introducing rules on state advertising. However, rules concerning all financial relations between the state and media should be introduced to address all forms of direct or indirect subsidies privileging pro-government media outlets.

Finally, it is crucial that the EU's deference to the approaches of member states in media regulation should not water down the draft in the EU's legislative process that includes the European Parliament and the Council of the European Union.

The EU should act promptly and decisively to safeguard judicial independence and other elements of checks and balances in Hungary and Poland.

Ultimately, prompt and targeted actions to protect judicial independence and other elements of checks and balances are necessary to protect media freedom and pluralism in Hungary, Poland, and any other member states. Safeguards to media freedom and pluralism in national constitutional, EU law, and international human rights law mean little without free courts and independent tribunals. If citizens do not consider ordinary courts in member states to be independent and impartial, they may question if these apply EU law properly. The domestic courts are at the forefront of protecting the application of EU law in member states. If they are not independent, the EU will face discrepancies between

⁶⁹ Matteo Bonelli, "[Infringement Actions 2.0: How to Protect EU Values before the Court of Justice](#)," *European Constitutional Law Review*, 18-1, 2022.

⁷⁰ European Commission, [European Media Freedom Act - Proposal for a Regulation and Recommendation](#), 16 September 2022.

the new standards it establishes, including in the MFA, and their implementation in member states.

The burden of safeguarding judicial independence in the EU cannot rely on individual judges' personal bravery and professional integrity; it must be soundly and systemically guaranteed. The EU institutions should use all available tools: monitoring, political actions in the Article 7(l) procedure, law infringement actions, the new conditionality regulation, making acceptance of member states' post-pandemic recovery plans and NextGenEU money transfers conditional on meeting the rule of law milestones that have been already

included in Poland's recovery plan and should be added to Hungary's. The EU institutions should not be satisfied with any changes made by either government that are not fully in line with judgments and decisions of the CJEU and ECtHR. It is crucial that the European Commission refer to the CJEU a case concerning Poland the membership of its Constitutional Tribunal and National Council for Judiciary that was selected on the rules amended in 2017—which, according to CJEU and ECtHR, is the crux of Poland's structural problem with judicial independence. It is necessary to support independent judges, prosecutors, and defenders of the rule of law in civil society in Hungary and Poland and to strongly denounce any attempts at their intimidation and harassment.

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