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# OPINION OF COUNCIL OF EUROPE EXPERTS

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## on

## the three draft Acts regarding Polish public service media

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## INTRODUCTION

On the 20 April 2016 the package of three draft bills regarding public service media has been submitted to the Speaker of the Sejm (lower chamber of Polish Parliament):

- Draft Act on National Media,
- Draft Act on Audiovisual Contribution,
- Draft Act - Provisions introducing Act on National Media and Act on Audiovisual Contribution.

The hereinafter opinion is a follow up to the *Opinion of The Directorate General Human Rights and Rule of Law, Directorate of Information Society and Action against Crime, Information Society Department prepared on the basis of the expertise by Dr Krisztina Rozgonyi and Eve Salomon on Polish Act of 30 December 2015 amending the Radio and Television Broadcasting Act of 29 December 1992, presented on 3rd February 2016* (interim media reform regime), since the announced by the Polish Government ultimate public media reform package has been finally presented.

The current opinion analyses whether the package of three draft Acts regarding Polish public service media is in line with the Council of Europe standards regarding media freedom, and especially with the:

- Article 10 of the European Convention on Human Rights;
- European Convention on Transfrontier Television and its Protocol;
- Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors;
- Declaration of the Committee of Ministers on public service media governance (15 February 2012);
- Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance;
- Recommendation 1878(2009) of the Parliamentary Assembly on funding of public service broadcasting;
- Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (28 March 2008);
- Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society;
- Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content;
- Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states (27 September 2006);

- Recommendation 1641(2004) of the Parliamentary Assembly on public service broadcasting;
- 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;
- Recommendation CM/Rec(96)10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting.

The analysis focuses on how the proposed provisions affect the democratic governing and controlling mechanisms of the public broadcaster in alignment with CoE standards notably editorial independence and institutional autonomy to public service institutions.

Two experts were appointed by the Council of Europe to provide legal analysis. Council of Europe has received their respective expertise on 18 May 2016.

The draft Acts have been analysed with regard to international good practice as outlined in the normative standards set by the Council of Europe, relevant to the protection of the right to freedom of expression and to other recommendations and declarations which clarify and develop principles, requirements and set minimum standards regarding those fundamental rights as stipulated in the European Convention on Human Rights[1].

According to CoE standards, legal frameworks should guarantee adequate levels of editorial independence and institutional autonomy to public service institutions. Independence as a governing principle and requirement should operate at least three different tiers:

- at formal structures and processes that secure independence and balance accountability,
- at effective management processes of the organisation that secure the fulfilment of the public service remit at the highest professional level while enabling the broadcaster to adapt to the changing demands of its audience and innovate accordingly and provide also for minority and gender representativeness and
- at the definition of the operational culture of the organisation with utmost regard to transparency, openness, responsiveness and responsibility in its interaction with audiences and stakeholders.

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[1] See inter alia Manole and Others v. Moldova (Application no. 13936/02), para 107: "As set out above [...] a positive obligation arises under Article 10. The State, as the ultimate guarantor of pluralism, must ensure, through its law and practice, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. Where the State decides to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service. In this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe provide guidance as to the approach which should be taken to interpreting Article 10 in this field."

## ANALYSIS

### I. ACT ON NATIONAL MEDIA

### 1. The editorial independence

**1.1.** Art. 3.2 of the draft Act on National Media lists the missions the institutions and stresses that these missions have to be fulfilled "in conformity with the principles of impartiality, pluralism, independence and high quality". In the same vein, art. 4 adds that they have to ensure "high professional and ethical standards of journalism" and art. 5.1 underlines that they "shall operate autonomously and develop the content and forms of their communications in accordance with the principle of editorial independence". This is in line with the Declaration on public service media governance[2], according to which "public service media must remain independent from political or economic interference and achieve high editorial standards of impartiality, objectivity and fairness".

However, if editorial independence is recognized in principle, in practice the draft Act creates too many exceptions to this rule.

**1.2.** Art. 13 forces the institutions to broadcast unconditionally all the stances of the Speaker of the Sejm, the Speaker of the Senate, the President of the Republic of Poland and the Prime Minister. Forcing the institutions to broadcast the stances of 4 different representatives of the State without any limitation in their amount, in their length and in their purpose is a strong interference in their editorial independence; so is the fact that the institutions cannot not have any discretion about the scheduling of such broadcasts.
This is not in line with the Recommendation on the guarantee of the independence of public service broadcasting[3], according to which "the cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations".

**1.3.** Art. 14.1 forces the institutions "to present, in a reliable and inclusive manner, the stances of the political parties, trade unions and employers' associations registered in the Republic of Poland on key public matters". This matter should be dealt with through editorial autonomy and journalism ethics.

Moreover, art. 14.2 is formulated in such a way that it restricts the editorial independence of the institutions, giving the feeling that organisations are entitled to have a direct access to programs which should in principle be under the editorial responsibility of the broadcasters (art. 14.2.1) and even giving them the power to choose which representative should be granted such an access (art. 14.2.2).

Art. 15 forces the institutions to also "enable the public benefit organisations to disseminate information, free of charge, about any free activities carried out by them".

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[2] Declaration of the Committee of Ministers on public service media governance (15 February 2012)
[3] Recommendation CM/Rec(96)10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting.

These three provisions combined and the lack of any limitations to these rights to access to airtime might lead to abuses from the beneficiaries with the view of promoting their own interests and agenda. This would not only hurt the editorial independence of the institutions, but would arbitrarily disrupt their programming policy and threaten their overall credibility to the public.

The possibility given by art. 13 to get airtime should therefore be framed in a stricter way, and the possibilities given by art. 14 and 15 should be left to editorial choices of the institutions (or at least formulated in such a way that it does not appear as a right for any organisation or institution to be granted airtime whenever they wish but rather as a general objective of pluralism – an end rather than a means).

**1.4.** According to Council of Europe standards, the difference between "a genuine public service media with editorial and operational independence from the State" and a State broadcaster is that the latter has "strong links to the government, and weaker accountability to the wider audience or civil society" (cf. the Recommendation on public service media governance[4]).

Against this background, the new system of governance put in place represents a move back towards a State broadcaster, with a combination of the significant weakness of the executive director and the management, strong powers to the (President of the) NMC, inconsistent role given to social programme councils which are the only bodies to represent the diversity of the society, abolition of the supervisory role of the independent regulatory authority and absence of accountability to the public.

Art. 13, 14 and 15 should all be amended to reflect the overall right of the directors, as editors-in-chief, to determine editorial matters.

Art. 13 in its current redaction constitutes a direct interference with editorial independence to require the media (or the Press Agency) to broadcast or publish a wide range of statements from a set of specified political office holders. Heads of State should only have the right to airtime during times of national importance or emergency.

Art. 14 and art. 15 should be amended to make it clear that they are always subject to editorial decisions about the use of airtime.

## 2. The public service mission and conservative bias

The Recommendation on media pluralism and diversity of media content[5] states that "Member states should encourage public service media to play an active role in promoting social cohesion and integrating all communities, social groups and generations, including minority groups, young people, the elderly, underprivileged and disadvantaged social categories, disabled persons, etc., while respecting their different identities and needs". In the same spirit, according to the

[4] Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance.

[5] Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content

Declaration on public service media governance[6], "the primary mission of public service media is to support general interest objectives such as social progress, public awareness of democratic processes, intercultural understanding and societal integration, and to achieve this through a varied and high-quality mix of content".

In several articles of the draft Act, the missions of the institutions are expressed such a way that (even if some of them are already present in the Broadcasting Act), the focus is now insistently made on the promotion of patriotic and conservative values: "preserve national traditions, patriotic and human values" (art. 3.2), "contribute to fulfilling the spiritual needs of listeners and viewers" (art. 3.2), "respect the Christian value system" (art. 4.2), "strengthening the national community" (art. 9.2), "counteracting misrepresentations of Polish history" (art. 9.3), "portraying family values and taking steps to strengthen the notion of family" (art. 9.9).

All these focuses suggest a deeply conservative and political agenda for content programming, contrary to CoE standards, including the case-law of the European Court of Human Rights related to article 10 of the ECHR.[7]

Art 3.2 refers to the public service mission preserving "national traditions, patriotic and human values". This is a new requirement from the existing 1992 Broadcasting Act and could be construed as requiring the public broadcaster to support the government. "Patriotic values" is a term that has to be interpreted and could be abused as meaning only those matters which support current government policy. Furthermore, the notion of "human values" has no precise meaning. Therefore, this phrase should be removed.

Art 4.2 says the public broadcasters should "respect the Christian value system". This is also in the current 1992 law, but is contrary to principles of pluralism, diversity and non-discrimination. Although the majority of Polish nationals identify themselves as Christian, there are populations of Jews, Muslims, Hindus and Buddhists in the country. This provision should be removed.

Art. 9.3 the requirement to "counteract misrepresentations of Polish history" should be deleted. It is not for a public broadcaster or a regulator to determine what is or is not "accurate" history. In practical terms, it is impossible to envisage how the public media could account for the fulfilment of this requirement. However, it would be reasonable to include programmes about Polish history in the public service remit.

Art. 9.9 the requirement to portray "family values" undermines pluralism and could disadvantage minority households such as single parents, and LBGT households. This should be removed.

Art. 12.2 permits the public media to use foreign or minority languages in specific circumstances. Broadcasting in minority languages should be encouraged.

There is a clear tension between the primary mission of public service media as reflected in the Recommendation on media pluralism and diversity of media content[8] and the missions formulated

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[6] op.cit.
[7] Manole and Others v. Moldova, op.cit.
[8] op.cit.

in the draft Act. It is recommended to remove mention of broad, differently terms such as patriotism, since this is clearly the type of reference which can be abused in order to stifle the expression of all those who oppose the government. It is also advisable to remove any mission to "counteract" any kind of representations of history: it is not the mission of a public broadcaster take an ideological stand in debates about historical events

Finally, it is recommended to avoid any reference to shaping the opinion. It is not the duty of the public broadcaster to "shape the views of the citizens" as it is mentioned in art. 9.6, but on the contrary to help them form their own opinion (as it is indeed mentioned for example in art. 9.7).

### 3. The executive director

**3.1.** The position of executive director is very important since this single person will replace the current management board and thus will represent the institution.

According to the Recommendation on public service media governance[9], "without demonstrable independence of action and initiative, from government as well as from any other vested interest or institution, public service media organisations cannot sustain their credibility and will lose (or never gain) popular support as a forum for carrying forward the national debate and holding power to account".

The draft Act does not provide the executive director with such independence of action and initiative.

The draft Act should give more management powers to those who are in charge of the daily operations (i.e. the executive director) than to a supervisory body (i.e. the NMC), especially in terms of appointments, in order to meet the Recommendation on public service media governance according to which State involvement "should not normally extend to appointments at executive or editorial management level".

**3.2.** The draft Act does not specify criteria for selection on appointment, unlike the 1992 Act which refers to, "persons competent in management as well as radio and television broadcasting". Clear criteria should be set. Furthermore, no criteria for appointment procedure are set.

**3.3.** The reasons for dismissal are broad and vague, especially compared to the current situation. Combined with the short mandate, this creates a system of accountability to the NMC which does not give any leeway to the executive director.

The grounds for dismissal are too broad and would be likely to result in the editorial direction being directed by the Council rather than the editorial team, contrary to CoE standards. Overall, the draft Act should ensure that the executive director and his/her team have the full set of management powers they need to run the operations and set the make the editorial decisions that their roles require.

[9] op.cit.

Art.25.2.3 allows for the director to be dismissed if the Council does not approve the two-year mission plan or the annual plan for programmes and financing. This gives the Council undue executive control and indeed confuses their involvement and interest.

Under Art 19, the Council, together with the Social Programme Council (hereafter "SPC") and the director, examines the draft plan before they approve it. It is at that point that the Council can discuss with the director any suggestions they may have for changes. Leaving the provision for dismissal is a nuclear option that removes the opportunity for negotiation and discussion and replaces it with threat which severely reduces management's editorial control. In order to protect editorial independence, the Committee of Ministers has advised[10] that staff, including the boards of management, should be safeguarded against possible pressure or interference. In particular, it should not be possible for arbitrary decisions to be taken against them. Any disciplinary decision or decision to terminate employment must be grounded on precise facts which may be contested and appealed in an appropriate court of law. Therefore, the option to dismiss the director in the event of non-approval of the two-year mission plan should be deleted. Instead, it is reasonable to allow for dismissal if there is a significant failure to fulfil the terms of the two-year plan. This is because the executive is responsible for delivery of agreed plans; if there is a significant failure to deliver what has been agreed, then that is an indication that the directors is in gross violation of his/her contractual responsibilities.

Art 25.2.4 should also be deleted, as should art.25.2.5. In line with the Council of Ministers' advice, dismissal should only be for gross breach of the contract terms. A "negative assessment" is too unclear and subjective. The SPC has only an advisory capacity and should have no rights whatsoever to dismiss executive staff. The SPC are not appointed through a transparent, independent process and therefore should not be given any determinative powers.

Art 25.3 – the full Council should always be involved in any decision to dismiss the executive director. In that case, it must be clarified throughout that where the President is otherwise given power to act, it is only with the backing of the full Council.

**3.4.** The length of the mandate of the executive director is too short to give him/her the capacity to develop a sound strategy. A much longer term which gives the time to elaborate and implement a strategic plan for the institution (for example six years as it is the case for the NMC) – is recommended. Replacing existing contracts with two year appointments is unsatisfactory. Two years is too short for senior executives to take long term, strategic decisions and without security of employment makes them vulnerable to politically motivated pressure.

Besides the question of efficiency of such a short mandate, this also raises concerns in terms of independence: the shorter the mandate, the higher the level of political control.

[10] Recommendation CM/Rec(96)10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting, op.cit.

Longer appointments should be made in order to enable senior staff to plan and strategize and to be less subject to political or other interference.[11]

**3.5.** R(96)10 on the Guarantee of Independence of Public Service Broadcasting, specifically asserts that "The rules governing the status of the boards of management of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference."

The National Media Law does not adequately protect management from such risks.

In fact, the mandate of the executive is under such threat, control and scrutiny from the (President of the) NMC that it endangers the independence of the institutions:

- the executive director cannot choose (and cannot dismiss) the deputy-director(s): it is the duty of the President of the NMC;
- the executive director of the national television cannot choose (and cannot dismiss) the directors of the regional branches : it is also the duty of the President of the NMC;
- the executive director cannot fix the remuneration policy of the institution : it is the duty of the NMC.

The Council should not have the power to determine remuneration for all management posts as this is an executive function (art. 27). The executive director is responsible for drawing up the budget and salaries should be part of his/her decision making.

Although it is reasonable for the key relationship to be between the President of the Council and the Executive Director, the Director should have access to all members of the Council (art. 28).

The President of the Council appoints and dismisses directors and their deputies. As the President is a directly politically appointable, this severely risks the ability of the senior management to be seen as politically impartial. The President should not have the unencumbered and sole right to appoint and dismiss senior management. These decisions should be taken by the whole Council.

It is unreasonable for the President of the Council, who is him/herself appointed directly by the Speaker of the Sejm, to have the right to appoint and dismiss executive directors and their deputies.

**3.6.** Rules on recruitment for management positions in the national media institutions, notably art.24.3, suggest that all applications must be filed through the auspices of the relevant Social Programme Council. .

There is no rationale for this and an apparent massive conflict of interest as, in art. 24.5, members of the SPC actually review the applications. Applications should be made directly to the Council. It is also not clear why the SPC members give opinions on the applications when they do not appear to participate in the interview process (which is limited to the Council).

It would be preferable for the interviews to take place with the full Council and perhaps with one or two SPC members as well, following which a decision is taken by the entire interview panel (by

[11] It would be advisable to coordinate the length of the term of the office of executive directors with the term of the office of the members of NMC (compare art. 39.6 of the draft Act on National Media).

majority), and not by the President alone. There is no reason why the President should have the power to make appointments which have not been approved by the majority of those conducting the interviews.

## 4. The National Media Council

**4.1.** It is welcome that the draft Act states that "Members of the Council shall be independent when carrying out their tasks and shall serve the public good" (art. 40). However, several provisions related to the appointment, the composition and the functioning of the NMC contradict this statement rather than reinforce it.

About the appointment, the eligibility criteria are too vague. Moreover, there is no appointment procedure, which means that no citizen can apply for a position of member of the NMC and especially that there is no public scrutiny on the procedure (such as a hearing of the candidates). This opens the door for opaque and politicized nomination process in a body which has a heavy influence on the management of the institutions.

The composition of the NMC is fully politicized (two members appointed by the Speaker of the Sejm, two by the Senate and two by the President of the Republic). Moreover, this politicization is:

- overwhelmingly at the advantage of the majority: the fact one of the two members appointed by the Speaker of the Sejm has to be presented by the main opposition group at the Sejm gives the sign that the five other members will have the backing of the ruling party; the formulation in the explanatory memorandum "the Act ensures the participation of the opposition by allowing them to appoint a person to the RMN" reinforces this feeling;
- completely ignoring all other "opposition" tendencies than the most important one.

Such a system is not in line with the Recommendation on the guarantee of the independence of public service broadcasting[12] according to which "the rules governing the status of the supervisory bodies [...] should be defined in a way which avoids placing the bodies at risk of political or other interference. These rules should, in particular, guarantee that the members of the supervisory bodies are appointed in an open and pluralistic manner and represent collectively the interests of society in general".

**4.2.** The incompatibility rules are too weak. They only refer to executive and administrative bodies, opening the door for the presence of people holding a position in an elected assembly or in a political party.

They cover only situations of conflict of interest "between the national media and another entity from the media sector" (article 39.5.3) which does not appear to cover situations of holding personal (direct or indirect via relatives) interests in the sector.

They do not contain provisions similar to the ones applicable to the members of the KRRiT, who cannot hold positions in "governing bodies of associations, trade unions, employers' associations, as well as church or religious organisations" (art. 8.3 of the Broadcasting Act).

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[12] op.cit.

There is no reason to set up different dismissal rules for the President and for the other members of the NMC, and no reason to make the dismissal impossible for the President.

The way the Act is currently drafted might lead to an interpretation according to which the main decisions are taken exclusively by the President: it is for example the case for the appointments, the dismissals and the relationship with the executive director.

It is strongly recommended, in order to avoid any misinterpretation, to redraft all the relevant provisions of the Act in order to make it clear that all decisions are taken by the NMC in its full composition.

The NMC has been composed in such a way that a representative of the opposition is a member. A collegial functioning should therefore be the rule, otherwise the presence of a representative of the opposition is without any influence on the main decisions.

## 5. The social programme council

It is welcome that the broadest representation of society is sought in the composition of the social programme councils. However, eligibility criteria should be added.

It is also welcome that the draft Act safeguards the autonomy of these councils and stresses that their members shall serve the public good rather than the specific interest of the respective organisations they represent. However, it should also be stressed that the members cannot receive instructions from these organisations.

The role of the social programme councils should be clarified. They are defined as advisory, but sometimes they take part in decision-making processes.

Like for the NMC, it should also be clear that the decisions are taken by the council in its full composition and thus avoid any reference to decisions taken by its President.

## 6. The national regulatory authority (KRRiT)

**6.1.** Several missions given to the NMC are currently exercised by the KRRiT. This is not only the case of the all missions related to the public broadcasters (determining the licence fee, appointing the management board and the supervisory board...).

This is also the case of more general missions related to the organisation of the broadcasting sector (see art. 41.4 - "issues opinions on laws and other normative acts in any field of crucial importance for the operations of the institutions or Fund" - and 41.7 – "collaborates with state bodies and other entities on matters related to its competences"), which are conflicting with the current missions of the KRRiT which are "to draw up, in agreement with the Prime Minister, the directions of the State policy in respect of radio and television broadcasting" and "to act as a consultative body in drafting legal instruments and international agreements related to radio and television broadcasting or on-demand audiovisual media services" (art. 6.2.1 and 6.2.7 of the Broadcasting Act).

Art. 6.2 of the Implementing Provisions repeals the provision in the 1992 Broadcasting Act requiring KKRiT "to draw up, in agreement with the Prime Minister, the directions of the State policy in

respect of radio and television broadcasting. " The explanatory memorandum says this is an obsolete, historical provision but it should be subject to public consultation before being enacted.

The draft Act therefore appears as an attempt to diminish the powers of an independent regulatory authority in favour of a newly created body which is controlled by the majority and whose independence is not enough safeguarded.

**6.2.** Art 7.4 suggests that the National Media Council (as opposed to the National Broadcasting Council) shall supervise the public broadcasters' compliance with the law.

For a wide range of activities and responsibilities set out in the 1992 Broadcasting Act – including those required under the EC's AVMSD – it is the national regulatory authority which has competence.

Indeed there is an expectation under the AVMSD that compliance will be the responsibility of an NRA, and not a broadcasters' own supervisory board. Whilst it is reasonable for the National Council to have responsibility for oversight of delivery of the public service mission, it is not reasonable for it to have more generic regulatory oversight, which should remain the responsibility of KRRiT.

Indeed, art. 16 suggests that KRRiT will maintain a degree of regulatory oversight, in which case, art.7.4 should clarify that the NMC shall only be responsible for oversight of *those legal matters for which it has primary responsibility as set out in this law.* This will avoid duplicate supervision and 'double jeopardy'. The roles and competencies of both bodies must be distinguished, always having regard to the Constitutional and statutory role of KRRiT.

## II. ACT - PROVISIONS INTRODUCING ACT ON NATIONAL MEDIA AND ACT ON AUDIOVISUAL CONTRIBUTION

**Journalists and middle management employees**

Art. 27 of the implementing provisions provides that "the post of any director, deputy director, manager, deputy manager, editor-in-chief or deputy editor-in-chief that was established before the date of conversion shall be terminated on 30 September 2016, unless, by that time, the parties conclude a contract that ensures the continuation of employment".

The Explanatory Memorandum cites other examples where such total terminations have been conducted in the past and states that this provision does not contravene EU employment law. It is outside the scope of this analysis to comment on compliance with EU provisions, but there is no doubt that the summary dismissal of all senior employees will lead to an atmosphere of fear and unwillingness to challenge the view of those in control - who have already been identified as being appointed through an opaque and politicized process. This might also have a chilling effect on freedom of expression, lead to self-censorship and ultimately cause the impoverishment of public debate, which is to the detriment of society as a whole- as highlighted in the Recommendation on the protection of journalism and safety of journalists and other media actors.[13]

[13] Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors

In terms of independence of the public service media, a collective dismissal of all the senior managers and editors gives the sign that instead of solving an alleged political imbalance, the purpose might be to create the conditions for another kind of imbalance. This is reinforced by the fact that there are no criteria mentioned for motivating the continuation or the termination of the current employment relationships.

Without any assessment of the capacity of each individual member of the current management to continue to exercise its function, such a provision therefore appears as arbitrary, weakens the announced intention of the government to guarantee the full independence of public service media and, above all, breaches the Recommendation on the guarantee of the independence of the public service broadcasting[14], according to which "the boards of management of public service broadcasting organisations, or individuals assuming such functions in an individual capacity, should only be accountable for the exercise of their functions to the supervisory body of their public service broadcasting organisation.

Any decision taken by the aforementioned supervisory bodies against members of the boards of management of public service broadcasting organisations or persons assuming such functions in an individual capacity for breach of their duties and obligations should be duly reasoned and subject to appeal to the competent courts".

## III. ACT ON AUDIOVISUAL CONTRIBUTION

The purpose of the draft Act is to replace the current funding system of the institutions (licence fee) by a flat-rate fee paid by the end users to their electricity company.

### 1. Control of the collection costs

An essential element in such a system is the control of the collection costs. A recent EBU study has shown that when the collection is made via a network operator, the cost can vary a lot and become very expensive (from 0,8% to 14,6% of the amount collected).

Therefore it is recommended that the Act creates system which allows an efficient and transparent public control of the collection costs in order to avoid abuses by the collectors and therefore waste of revenues for the public service media. This is partly foreseen by the draft Act which underlines "the need to ensure that the contribution is collected properly and efficiently, that a uniform system of reporting is put in place for the collectors and that checks are carried out on information forwarded to the tax authority" (article 12, last sentence).

This is even more important in a situation in which there currently are a very large amount of electricity companies (around 420), which will not allow for economies of scale in the collection process.

It is not clear from the draft Act what will be the collection costs. Article 13 mentions a monthly remuneration of 0,2 PLN (i.e. 1,3% of the fee – with an exception for the first year : 0,3 PLN i.e. 2% of

[14] op.cit.

the fee), while article 12 states that "the competent minister responsible for public finances shall outline by way of regulation [...] the collector's remuneration amount". The table at the end of the explanatory memorandum adds to the confusion, since it mentions collection costs of 3% for the first year and 2% for the following years. Clarification seems therefore appropriate, as well as a broader assessment of the impact of such a change for the funding of the institutions.

Finally, the draft Act should also be clearer on how and by whom contributions which are not paid or not paid in full will be recovered.

## 2. The Impact assessment on fixing the amount of the audiovisual contribution

The question of the appropriate level of funding is out of scope of the present expert opinion.

What appears important is to use the opportunity of such a legislative move to remedy to the current under-funding of the public service media.

It is recommended to conduct an impact assessment of such a change and of the decision to fix the amount of the contribution to 15 PLN/month. The draft Act provides data about the revenues expected from the new funding system, but does not give any information about how these revenues will be shared between the 20 beneficiary institutions.

## 3. The involvement of the institutions in their funding scheme

Both the draft Act on National Media and the draft Act on audiovisual contribution lack clarity on how the revenues raised by the new funding system will be affected to each beneficiary institution, on how these institutions will be consulted on the level of funding, on how to assess the adequacy between the funding and the remit and on how the institutions can have a long-term view on their funding in order to elaborate strategic planning, decide on investments and safeguard the continuity of public service.

This is not in line with the Recommendation on public service media governance[15] which stresses that "while it inevitably remains the State's responsibility to set both the method and the level of funding, it is nevertheless imperative that the system should be so designed that [...]:

- the public service media is consulted over the level of funding required to meet their mission and purposes, and their views are taken into account when setting the level of funding;
- the funding provided is adequate to meet the agreed role and remit of the public service media, including offering sufficient security for the future as to allow reasonable future planning".

## 4. Burdens put on collectors

The new licence fee system should produce greater certainty and clarity over funding, but the proposals could be more proportionate and less burdensome on collectors. Enforcement provisions

[15] op.cit.

should be clarified. Given the uncertainties over the process, an impact assessment should be undertaken so that any imperfections can be remedied before the Law takes effect.

It is generally good that there will be a system in place to ensure consistent, predictable contributions from the public towards the costs of public service media provision. However, a few points about proportionality:

- No allowance is made for buildings which may have just a single power distribution point but serve a large number of users – e.g. hostels, hotels, student residences, or for places where the public service media will be disseminated in a commercial environment – e.g. bars and restaurants. Consideration should be given to increasing the fee for electricity users who are commercial operators or multi end-user providers.

- The requirements on collectors seem very burdensome, particularly the requirement for monthly reporting and payments twice monthly.

- There are some 420 electricity distribution companies. Some will be larger than others. A flat fee is not necessarily proportionate as it will cost smaller companies more to set up and administer the arrangements for collection.

## 5. Lack of enforcement procedure described in the law

In addition, there are no arrangements for enforcement for non-payment. It would be important to know if this will be done by the tax authorities, and if so, under what provisions and at what additional cost to the tax authorities.