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Prepared on the basis of the expert opinion by Eve Solomon, Tanja Kerševan-
Smokvina and Nataša Pirc Musar**

ON

**/ Institutional Mapping Analysis
In Sphere of Information Policy and Media
In Ukraine**

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Institutional Mapping Analysis in the Sphere of Information Policy and Media in Ukraine

Report
by

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&
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20 September 2016

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A. Executive summary

This report was commissioned by the Council of Europe at the request of the Ukraine’s Parliamentary Committee on freedom of expression and information policy to provide an institutional mapping analysis in the sphere of information policy and media in Ukraine. Methods used include legal analysis, expert interviews and desk research.

The research revealed an unusually complex institutional ecosystem together with broadcasting legislation broken into a considerable number of laws, often too prescriptive and detailed. The result is an inconsistent and incomplete legal and regulatory framework of many ill-fitting pieces and authorities, indicative of over-regulation and bureaucratization. Such an arrangement does not lead to an effectively regulated environment. Conflicting rules, legal loopholes and gaps hinder implementation, reduce transparency and legal certainty, and increase the risk of corruption.

This report is set out as follows:

Chapter D Introduction

The introduction sets out the purpose, scope and methodology of the analysis in the context of broadcast media in Ukraine, with a non-functioning market dominated by oligarchs and overlaid with the fall-out from the continuing conflict.

Chapter E Key Legal Acts

This chapter discusses the sectoral legislation. First, we provide a general assessment of the legislative approach to broadcasting and audiovisual regulation, and second, we elaborate in detail the two main current pieces of law from the sector: the law on television and radio broadcasting and the law on public broadcasting, providing numerous recommendations for change to ensure better compliance with European normative standards.

In developing new broadcasting law, priority should be given to creating a comprehensive and modern law where all the issues are dealt with in a coherent way. For example, the new law should incorporate the entire remit, design and powers of the national regulatory authority, the National Television and Radio Broadcasting Council of Ukraine. The sanctions and sanctioning procedure which apply to the specific circumstances of broadcasting should be clearly defined, giving the regulator tools for effective, impartial and proportionate enforcement of compliance with content rules. These rules should also be set out clearly in the same law and in line with European standards. The lawmakers should take the opportunity to review and consolidate the existing laws and refrain from creating legal wish lists if there is no realistic way (or real willingness) for implementation.

If this is not done, different laws will continue to be amended at different times following different plans and objectives, and different institutions will continue to coexist without

clear division of powers both horizontally and vertically. On one hand power will stay attributed to some of them but without a sufficient degree of responsibility, and on the other hand responsibility will be assigned to others, but without any corresponding power. The lack of a consistent framework will remain, creating difficulties both for public authorities, viewers and listeners, and for the broadcasters themselves.

The report sees the opportunity in the creation of a new audiovisual law of transposing the EU Directive on audiovisual media services into the Ukrainian national law. There is no point waiting until formal ratification of the Association Agreement or a new directive as there is too much uncertainty at present.

Chapter F Key Institutions

This chapter provides a basic overview and reflection of the institutional landscape related to broadcasting and a more detailed insight and recommendations regarding the institutions recognised as the key institutional players in the field.

We recommend that certain overlaps of responsibility are removed to ensure clear regulatory and legal accountability and that the new public service broadcaster is formally created as soon as possible with both *de facto* and *de jure* independence.

In particular, we suggest an overall empowerment of the National Council and elimination of responsibilities for broadcasting from the State Committee. In order to reduce the risk of regulatory capture we advocate reforming the current way of appointment and early dismissal of the Council Members, and to prevent capture at the local level, reforming the institute of National Representatives of the National Council. In the area of spectrum management and oversight, all institutions with similar or complementary remit should converge or be merged with the independent telecommunications regulator in the making. Last but not least, the responsibilities and powers of the Ministry of Information Policy should be concentrated on those exclusively matching its specific remit.

Chapter G Conclusions

The main conclusion is that the institutional landscape covering media and information policy in Ukraine contains numerous bodies with overlapping remits but without clearly delimited areas of responsibility. Similarly, the legal framework governing broadcasting, composed of numerous ill-fitting, frequently amended statutory acts, suggests a high level of over-regulation. This reduces legal certainty for the regulated subjects and poses a risk of corruption, as well as lowering the applicability of the available regulatory instruments and jeopardizing public interest objectives.

The chapter summarises the most important recommendations regarding each analysed item, i.e. the Law of Ukraine on television and radio broadcasting, the Law on public television and radio broadcasting of Ukraine, the National Television and Radio Broadcasting Council of Ukraine, the CMU Regulations on the State Committee for Television and Radio Broadcasting and the issues under authority of the Ministry of Information Policy of Ukraine.

Appendix

The Appendix contains a comprehensive table of the authorities operating in the media sphere, their overlaps and high-level recommendations for change.

B. About the Authors

Eve Salomon is a lawyer and international media consultant with particular experience in media regulation. She is a legal expert for the Council of Europe for whom she has analysed laws for a number of member States, as well as advising on internet governance. Other international work has taken her as far afield as Brazil and Mongolia. She is the author of UNESCO’s Guidelines for Broadcasting Regulation and co-authored their booklet on Freedom of Expression and Broadcasting Regulation.

She is a trustee of Privacy International, and Chair of the board of the Horniman Museum in London. Formerly, she was a member of the UK’s Better Regulation Commission, an independent advisory panel to government that recommended ways to improve regulation and decrease burdens across all regulated sectors. She was also a member of the Gambling Commission, which is the statutory regulator of the gambling industry, and of the UK’s press council, the Press Complaints Commission. Eve chaired the Internet Watch Foundation, the UK’s self-regulatory hotline for the take down of online child sexual abuse content, and was chair of the Regulatory Board of RICS, an international professional membership body working in the built environment.

She started her career as a solicitor in private practice, before joining the Independent Television Commission where she was Deputy Secretary. She then became Director of Legal Services at the UK Radio Authority and then Secretary of Ofcom. All of these are statutory organisations responsible for regulating the communications sector. She has also worked in corporate and regulatory affairs for a number of broadcasting companies.

Tanja Kerševan Smokvina is an international expert in media regulation. She was Principal Adviser to the Director General of the Agency for Communication Networks and Services of the Republic of Slovenia, before founding MeGI, the Media Governance Institute, where she now pursues her consultancy career, alongside lecturing at the University of Maribor. She has provided assistance to international organisations, platforms and bodies, such as CoE, European Audiovisual Observatory, EPRA, OSCE, OSF and European Commission (TAIEX). She has strong experience in projects aimed at capacity building of national regulatory authorities in countries aspiring to EU membership.

From 2011-2013 she managed the EU co-funded transnational cooperation project SEE Digi.TV, aimed at the harmonisation of digital switchover in the Adriatic region. The project joined together 15 regulatory authorities and other institutions from 10 countries. In 2015, she co-ran an external audit of the broadcasting regulatory authority of Ukraine. In 2016, she chaired the ERGA Subgroup 3 setting the Digital European Toolkit, a digital platform for exchanging tools and practices for efficient and flexible regulation.



Council of Europe Project “Strengthening freedom of media and establishing a public broadcasting system in Ukraine”

For 2016-2017, she has been appointed Member of the Committee of Experts on Internet Intermediaries (MSI-NET), a sub-committee of the CoE Steering Committee on Media and Information Society (CDMSI). She holds a PhD in Communications Studies from the University of Ljubljana.

C. List of abbreviations

AVMS(D): Audiovisual Media Services (Directive)
BRT: Broadcasting, Radiocommunications and Television Concern
CEU: Council of the European Union
CMU: Cabinet of Ministers of Ukraine
CoE: Council of Europe
DSO: digital switchover
DTT: digital terrestrial television
EBU: European Broadcasting Union
EC: European Commission
ECTT: European Convention on Transfrontier Television
EPRA: European Platform of Regulatory Authorities
ERGA: European Regulators Group for Audiovisual Media Services
EU: European Union
ITU: International Telecommunication Union
MIP: Ministry of Information Policy
MP(s): Member(s) of Parliament
MS(s): Member State(s)
NTRBCU/National Council: National Television and Radiobroadcasting Council of Ukraine
NCSRCI: National Commission for the State Regulation of Communications and Informatization
NRA(s): National regulatory authority(ies)
NTCU: National Television Company of Ukraine
OSF: Open Society Foundations
OSCE: Organisation for security and cooperation in Europe
OTT: Over-the-top services
PACE: Parliamentary Assembly of the Council of Europe
PM: Prime Minister
RSPP: European Radio Spectrum Policy Programme
SCTRB/State Committee: State Committee for Television and Radiobroadcasting
SSSCIP: State Service of Special Communication and Information Protection of Ukraine
UAH: Ukrainian Hryvnia
UCRF: Ukrainian State Centre of Radio Frequencies
VRU: Verkhovna Rada of Ukraine (the Supreme Council / the Parliament)

D. Introduction

When discussing the alignment of Ukrainian regulation with European standards, one cannot escape the dilemma about how to properly apply the European Union (“EU”) regulatory framework, resulting primarily from the EU's common economic goals and serving the idea of a single market, to the circumstances of the Ukrainian media market. The data show there is currently insufficient funding from advertising to create a functioning competitive media market. As a result, media ownership is often treated as a complementary activity to boost the political influence and business interests of the country's oligarchs, who are the media owners.

Another important factor is that European regulation, including that framed by the Council of Europe's (“CoE”) Convention on Transfrontier Television together with the Committee of Ministers' Declarations and Recommendations, is based on the principles of free movement of television services and freedom of expression. Our research confirmed these are the values that are particularly vulnerable in situations of war and conflict, as is currently the case in Ukraine. For Ukraine it is therefore important not to lose sight of the basic goals and principles of media regulation and to create conditions for their practical implementation instead of just adding more rules to the already overly prescriptive regime with seriously impeded possibility of enforcement.

1. Purpose and scope

The purpose of this report, commissioned by the Council of Europe on the request of the Committee of Verkhovna Rada for freedom of speech and information policy, is to provide an institutional mapping analysis in the sphere of information policy and media in Ukraine, including an expert review of legislation, in order to reveal the out-dated, dysfunctional or conflicting authorities and to present proposals on their possible reform in line with the Council of Europe standards.

The scope of the analysis is purposely limited to broadcasting and audiovisual area and is framed around the key legislation and key institutions:

- a) Key legislation:
 - Law on Ukraine on TV and Radio Broadcasting
 - Law on Public Television and Radio Broadcasting of Ukraine
 - Law on National Television and Radio Broadcasting Council of Ukraine

- b) Key institutions:
 - National Television and Radio Broadcasting Council of Ukraine
 - State Committee for Television and Radio Broadcasting
 - Ministry of Information Policy

The conclusions of this report are designed to inform the Ukrainian policy- and law-makers as they are preparing the bill on audiovisual media services transposing the harmonised EU framework, and their wider efforts related to regulation of electronic media.

2. Methodology

For the purpose of this report, a combined method of legal analysis of statutory acts with interpretative analysis of information gathered by expert interviews and desk research was used. The authors conducted a series of qualitative, unstructured interviews with the representatives of different stakeholders from the Ukrainian media sphere. The laws governing the field and the practices of their implementation were benchmarked against the standards of the Council of Europe and best practices in the European Union.

a) Reviewed documents

The following legal acts and policy documents were recognized as relevant for this report and the authors were provided with their English translations:

- The Constitution of Ukraine,
- The Law of Ukraine on Television and Radio Broadcasting (unofficial translation),
- The Law of Ukraine on the National Television and Radio Broadcasting Council of Ukraine (unofficial translation),
- Law of Ukraine on Public Television and Radio Broadcasting of Ukraine (unofficial translation),
- Cabinet of Ministers of Ukraine Decree of 13 August 2014 No. 341 on Approval of the Regulations on the State Committee for Television and Radio Broadcasting of Ukraine (unofficial translation),
- Regulation on the Ministry of Information Policies of Ukraine of 14 January 2015 No.2 (unofficial translation),
- Scope of activities of the Committee of the Verkhovna Rada of Ukraine on Freedom of Speech and Information Policy (Annex to the Decree of the Verkhovna Rada of Ukraine of 04 December 2014 No. 22-VIII),
- Strategy for the Development of Ukrainian Legislation on the Freedom of Speech and Media in Line with European Standards.

Additionally, the authors examined background information on the following issues:

- Cut-off of Russian television channels,
- PSB Charter, Statute and Regulation,
- Effects of Law of Ukraine on Civil Service, Law of Ukraine On Licensing of Types of Economic Activities, and Law of Ukraine On Basic Principles of State Supervision in the Area of Economic Activities,
- Complaints received by the National Council from January-March 2016,

- Cooperation of the National Television and Radiobroadcasting Council of Ukraine with the Council of Europe,
- State of digital TV broadcasting in Ukraine,
- Media consumption and preferences (extracts from research),
- Project Strengthening freedom of media and establishing a public broadcasting system in Ukraine, implemented within the Council of Europe Action Plan for Ukraine 2015-2017,
- Recommendations on media and elections,
- History and remit of public authorities in the sphere of information policy.

b) Interviewees

The list below sets out the representatives of the stakeholders with whom the authors held expert interviews during the week of July 19-23, 2016 in Kyiv:

1. Uliana Feschuk, Deputy Chair of the National Council
2. Ganna Chumachenko, Head of Legal Department, National Council
3. Tetiana Farmahei, Head of International Cooperation and European Integration, National Council
4. Natalia Stepanova, Head of internal audit department, State Committee
5. Oleksandr Makobrii, Head of section of International cooperation, State Committee
6. Taisia Myrovets, Head of Legal department, State Committee
7. Bogdan Chervak, First Deputy Chair, State TV and Radio Broadcasting Committee
8. Anna Kamuz, Advisor to the Chair of the Parliamentary Committee Viktoria Siumar
9. Tetiana Popova, Deputy Minister, Ministry of Information Policy
10. Daria Yurovska, Deputy Director General of NTCU on television content production
11. Svitlana Ostapa, Deputy editor-in-chief on public relations NGO Detector Media (ex-Telekritika), Member of Supervisory Board of National Public Broadcasting Company of Ukraine
12. Roman Golovenko, Lawyer of NGO Institute of mass information
13. Maksym Ratushniy, Lawyer of NGO Institute of mass information
14. Olena Illyushyna, Chief Lawyer of Television Industry Committee
15. Anatoliy Maksymchuk, Deputy Director General, Starlight media
16. Sergiy Dziuba, member of the National Commission for the State Regulation of Communications and Informatization (NCSRCI)
17. Lilia Malion, Head of International cooperation and European Integration, NCSRCI

Igor Rozkladai, Lawyer of the Media Law institute at the Centre for Democracy and Rule of Law, participated in the mission as national expert.

Under the auspices of the mission the authors took part also in the meeting with donors interested in supporting projects, aimed at building the regulatory capacity of NRA, where they had the opportunity to listen to the presentation of Olha Herasymiuk, First Deputy Chair of the National Council.

E. Key legal acts

This chapter discusses the sectorial legislation. First, we provide a general assessment of the legislative approach to broadcasting and audiovisual regulation, and second, we elaborate in detail the main two current pieces of law from the sector: the law on television and radio broadcasting and the law on public broadcasting.

1. Legislative Approach to Broadcasting

It has been the practice in Ukraine to split up broadcasting legislation into a considerable number of laws, often too prescriptive and detailed. The result is an inconsistent and incomplete legal framework of many ill-fitting pieces, indicative of over-regulation and bureaucratization. Such an approach does not lead to an effectively regulated environment as conflicting rules; legal loopholes and gaps hinder implementation, reduce transparency and legal certainty, and increase risks of corruption.

If a new broadcasting law is to be developed, consideration should be given to writing a comprehensive and modern law where all the issues are dealt with in a coherent way. For example, the entire Law on the National Television and Radio Broadcasting Council should be incorporated into the new broadcasting law. The opportunity should be taken to set out clearly the sanctions and sanctioning procedure which apply to the specific circumstances of broadcasting. Furthermore, the content rules should be set out clearly in a single law and the opportunity taken to bring them up to European standards.

RECOMMENDATION

To take the opportunity of the review of the Audiovisual Media Services Law to consolidate all legislation relating to television and radio broadcasting, including the Law on the National Council, into one law.

2. Law of Ukraine on Television and Radio Broadcasting

This analysis is based on the version of the Law of Ukraine on TV and Radio Broadcasting ("the Law") in force as at 26 June 2016 and follows on from the last expert analysis undertaken through the Council of Europe ("CoE") in December 2011. In June 2014 Ukraine signed an Association Agreement with the European Union under which it committed to aligning its audiovisual law with that of EU standards within two years of final ratification by all EU Member States¹. The Cabinet of Ministers of Ukraine ("CMU") set a deadline of 2016 for development of a new broadcasting law in line with European standards, that is, the European Convention on Human Rights ("ECHR"), the Audiovisual Media Services Directive ("AVMSD"), the European Convention on Transfrontier Television ("ECTT"), the EU

¹ See <http://zakon0.rada.gov.ua/laws/show/847-2014-%D1%80>

Framework Directive on Electronic Communication, Documents of the Council of Ministers of the CoE and PACE, as well as the recommendations of CoE experts.

In 2012 a multi-stakeholder working group was established to prepare a draft law which was eventually registered in Parliament, but was withdrawn following the Revolution of Dignity. Since then, various versions of the draft have been circulated with input from the National Television and Radio Broadcasting Council of Ukraine (“the National Council”), the Parliamentary Committee for Freedom of Speech and Information Policy (“The Parliamentary Committee”), NGOs and private broadcasters. In addition, it is understood that the State Committee for TV and Radio (“the State Committee”) has also been working on a draft. Nonetheless, despite the undoubted hard work and genuine effort which has gone into preparing a draft law, the existing Law of Ukraine which was originally enacted in 1993 (though amended many times since then) remains in force.

This analysis is undertaken with regard to the following normative and legal standards:

Article 10 ECHR is the cornerstone of media freedom in Europe. Over many years, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have developed (and are still developing) numerous recommendations and declarations which have put it into practical effect and have shaped the standards for European media as well as influencing – though not legally binding – the drafting of the ECTT and the AVMSD as well as national media laws.

This set of recommendations and declarations includes in particular:

- Recommendation No. R (91) 5 of the Committee of Ministers to member states on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context;
- Recommendation No. R (96) 10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting;
- Recommendation Rec (2000) 23 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector;
- Recommendation No. R (2000) 7 of the Council of Europe Committee of Ministers on the right of journalists not to disclose their sources of information;
- Recommendation Rec (2003) 9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting;
- Recommendation Rec (2004) 16 of the Committee of Ministers on the right of reply in the new media environment;
- Declaration Decl-27.09.2006 of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states;
- [Recommendation CM/Rec \(2007\)2](#) of the Committee of Ministers to member states on media pluralism and diversity of media content;
- [Recommendation CM/Rec \(2007\)3](#) of the Committee of Ministers to member states on the remit of public service media in the information society;

- [Declaration](#) Decl-31.01.2007 of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration;
- [Recommendation CM/Rec \(2007\)15](#) of the Committee of Ministers to member states on measures concerning media coverage of election campaigns;
- [Recommendation CM/Rec \(2007\)16](#) of the Committee of Ministers to member states on measures to promote the public service value of the Internet;
- [Declaration](#) Decl-26.03.2008 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector;
- [Declaration](#) Decl-11.02.2009 of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue;
- [Recommendation CM/Rec \(2009\)5](#) of the Committee of Ministers to member states on measures to protect children against harmful content and to promote their active participation in the new information and communications,
- Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media recognizing the changes in the media ecosystem, but stressing that the role of the media in a democratic society, albeit with additional tools (interaction and engagement), has not changed, and emphasizing that the media-related policy must therefore take full account of current and future developments, embracing a notion of media which is appropriate for such a fluid and multi-dimensional reality.

2.1. General Assessment

The broadcasting legislation is split-up into a considerable number of ill-fitting laws, some of which are listed in Article 3 of the Law. When the new audiovisual media law is developed, consideration should be given to writing a comprehensive law where all the issues are dealt with in a coherent way. Also, both this law and the Law on the National Television and Radio Broadcasting Council of Ukraine lack penal provisions adjusted to the specific circumstances of broadcasting. This renders the National Television and Radio Broadcasting Council ("the National Council") powerless to deal with violations of the law, as well as allowing other bodies to disregard or violate both laws with impunity.

If a single comprehensive law is not enacted, then – as has been the case so far – different laws will be amended at different times in accordance with different plans and objectives and the lack of a consistent framework will continue, creating difficulties for all the stakeholders. For example, the Law refers to state TV and radio services despite the fact that the Law on Public Service Broadcasting was passed in 2014 and the new public broadcasting company is due to be formally established by the end of 2016 – at which point the only State run broadcasting service will be the foreign television service which was only established in 2015 (and which is formally the responsibility of the Ministry of Information Policies).

Overall, the framework of different legal instruments and competent authorities which control the media legal and regulatory landscape provide such a complex set of “checks and

balances” on the regulatory mechanism but fails to provide effective regulation of the media itself.

RECOMMENDATION

Prepare and enact a single comprehensive Law on Audiovisual Media Services which Combines this Law with the Law on the National Television and Radio Broadcasting Council of Ukraine, relevant sections of the Law on Advertising, the media related parts of laws on Elections, and all other Laws which have bearing on the regulation and operation of audiovisual media services.

2.1.1. Scope and Digital Broadcasting

Scope has to include audiovisual media services including non-linear services. The Law is limited to the traditional forms of electronic mass communication. It does not reflect the changes in this field brought about by modern technologies and, subsequently, the growing convergence of media. The AVMSD covers at least some of these new developments by including non-linear audiovisual media services into its scope.

The law applies to traditional analogue broadcasting with only some elements of digital broadcasting included. These elements create a very basic, but far from sufficient, framework for digital switchover which Ukraine was meant to have completed by 2015, but has not done so. Since then, analogue transmission frequencies are no longer be protected by the International Telecommunications Union which means that signals, particularly in border areas, are not safeguarded.

The law lacks any clear indication of a public policy towards digital switchover. Proper planning must be given to ensure that all existing analogue television broadcasters are able to transfer to digital broadcasting and that additional spectrum is licensed in a fair and competitive manner. Thought also needs to take place to inform the public that their existing analogue television sets will not work in future without the addition of a set-top box. Particular thought must be given to making provision for the more vulnerable members of the public, such as elderly and disabled viewers.

RECOMMENDATION

The law must be revised to take account of pending digital switchover, with a clear plan for migration of all existing television services. Particular care must be taken to reserve capacity for the proposed new public service broadcaster.

2.1.2. Shape of the Broadcasting System

The Law makes a passing reference to Public Service and Community media but focuses largely on private broadcasting and State broadcasting. On the formal establishment of the joint stock company which holds the license for the National Public TV and Radio Company ("the NPTRCU"), the only State broadcaster will be the Foreign Broadcasting Service (UA:TV) which falls under the auspices of the Ministry for Information Policy.

RECOMMENDATION

All references to State broadcasting should be removed from this Law. Full provisions for the licensing and support of community media should be added.

2.1.3. Licensing

The current licensing system, in which each content distribution platform is covered by a different regime, even if it does not rely on radio frequencies (i.e. cable or IPTV), is not compliant with European standards. EU countries, on the basis of the transposed authorisation regime, no longer license operators of television platforms that do not use radio spectrum. A simple notification suffices. Ukraine should consider the option of introducing technology-neutral general licenses for services with significant cultural and societal impact and removing the obligation of services to hold licenses for each platform separately. The specific competitive licensing regime should be preserved for terrestrial broadcasting only, for reasons related to the scarcity of radio spectrum. Due to a series of wrong decisions related to digital switchover, a high priority should be given to getting the process out of deadlock. The decisions should be revised and the new digitization plan should be carried out without any further delay.

The procedures for licensing are too prescriptive in terms of the conditions which apply to licences (for example programme schedules and names of individuals who are members of management), particularly in relation to licences which are not awarded by competitive tender. Programme schedules change constantly, to reflect changing audience tastes and by virtue that bought programmes are subject to time-limited contracts. In any event, licences which are not awarded through a competitive process should be subject to much lighter regulation; they are not taking up valuable spectrum space and should have the flexibility to alter their programming with fewer restrictions applied.

We understand that the new Ukraine Law on Licensing of Types of Business Activities may have a negative effect on broadcast licensing as it seeks to apply standard terms to all forms of licensed activity. Furthermore, we understand from the National Council that they were not properly consulted before this Law was passed. Standard licensing is inappropriate when applied to competitive licensing of scarce resources, such as spectrum used for audiovisual services and which are subject to content obligations. This Law on Licensing has not been reviewed as part of this expertise, but in any event, it should exclude audiovisual media service licensing from its remit.

RECOMMENDATIONS

Amend the licensing conditions to ensure proportionality.

Introduce a simpler registration/notification mechanism for licenses which are not awarded on a competitive basis.

Amend the new Law on Licensing of Types of Business Activities to remove radio and television broadcasting from its ambit. If aspects of that law should, after due consultation, be applied to audiovisual media services, then they should be incorporated into the new Audiovisual Media Services Law.

2.1.4. Liability

The law seeks to place liability for compliance with a wide range of persons and organisations, most worryingly, with all employees of broadcasters. This is wrong: it is the *broadcaster* who is the licensee and who has the direct relationship with the regulator. It is therefore the *broadcaster* who should be held responsible for compliance and who should ensure that all material broadcast meets the obligations of its licence and the law.

Whereas it may be a matter of the employment contract between the broadcaster and its personnel to follow all legal obligations, this should not be a matter of general or broadcasting law. The *only* legal person to whom the National Council should have redress is the licensee – i.e. the broadcaster.

RECOMMENDATION

The law should be amended to make clear that responsibility for compliance lies with the licensee, not with its personnel.

2.1.5. Compliance with EU law

Article 397, with Annex XXXVII of the Association Agreement between the European Union and Ukraine signed in June 2014 provides that Ukraine shall carry out “gradual approximation to the EU law and regulatory framework and international instruments in the area of audio-visual policy” so that the provisions of the AVMSD will be implemented within two years of the entry into force of the Agreement. The Agreement will formally enter into force once ratified by all existing members of the EU, which has been postponed following the Dutch Referendum in April 2016, which called ratification into question. Nonetheless, Ukraine is taking steps to align its legislation with those called for in the Acquis, including in the audiovisual sphere.

The AVMSD is currently under review, but certain general provisions will be likely to continue to be applicable even after any revisions are agreed. In this regard, there are a number of provisions which the Ukrainian audiovisual law will need to include which are absent from the existing Law on Television and Radio Broadcasting.

By requiring from the Member States to collaborate with each other and with the European Commission, especially via their independent regulatory bodies, the AVMSD recognised the existence and the role of national independent regulators. The reviewed directive will further enshrine regulatory independence into EU law by ensuring that they are legally distinct and functionally independent both from the industry and government, operate in a transparent and accountable manner, set out in a law, and what is also very relevant for the Ukrainian case – have sufficient powers.

In addition to the normative requirements the AVMSD endorses promotion of media literacy and supports self- and co-regulation and it is expected that this will be further stressed in the reviewed directive. In the Recommendation 2009/625/EC of 20 August 2009 on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society the EU Commission invited Member States to develop and implement co-regulatory initiatives leading to the adoption of codes of conduct by the European media; to promote and finance research, studies and projects on different aspects of media literacy in the digital environment; and to promote inclusion of media literacy in the education curriculum and as one of the key competences for lifelong learning.

Radio spectrum in the European Union is managed by state administrations of Member States in accordance with international standards and ITU agreements, but Member States are expected to adhere also to the objectives of relevant EU policies. Namely, the reviewed EU regulatory framework for electronic communications introduced an instrument of EU radio spectrum policy, according to which the European Commission may submit legislative proposals to the European Parliament and EU Council to establish long-term radio spectrum policies. On 14 March 2012, the European Parliament and Council approved the first Radio Spectrum Policy Programme (RSPP), covering all types of radio spectrum use that affect the internal market and setting general regulatory principles, aiming at efficiency and flexibility of spectrum use.

In Ukraine each content distribution platform is characterized by a different licencing regime, even if it does not rely on radio frequencies (i.e. cable or IPTV). The EU Member States, on the basis of transposed authorization regime, do not licence operators of television platforms that do not use radio spectrum. A simple notification usually suffices. Similarly, there’s no different licensing of content providers for each distribution platform. The only exemption is the terrestrial one, for the reason of scarcity of radio frequency resources, where Member States can impose specific criteria and procedures to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives.

In most EU countries the licenses for content services are limited to radio and television services. The technology neutral approach to content regulation introduced by the AVMSD extended the regulation characteristic of television services to online and on-demand services, but imposed lighter regulation for non-linear audiovisual media services. As the directive stressed that no provision requires the introduction of a licensing regime for non-linear services, most countries opted for a regime based on notifications for VOD and catch-up TV services. The applicable regime therefore depends on linearity or non-linearity of the services, i.e. whether the service is provided for a simultaneous viewing or for a personalized selection of programs at a time chosen by the viewer. Instead of adding another form of licensing to the already complex licensing regime, Ukraine should introduce technology-neutral general licences for services with significant cultural and societal impact and abandon the obligation of services to licence for each platform separately.

In the absence of an adequate sanctioning system for breaches of broadcasting legislation, the National Council uses the possibility of non-renewal of a license after its regular termination as an enforcing mechanism, while a licence withdrawal is practically impossible, even in cases where a broadcaster seriously breaches the law. The conditions for withdrawal are fulfilled only after the regulator issues a set of less severe sanctions, which is however not possible, due to the absence of governmental approval of the fining methodology proposed by the Council. The legal conditions for the annulment of the licence cover only situations in which the licence holders do not start to broadcast within one year of granting the licence, situations backed by a court decision, and cases when the licensees request the annulment by themselves, which happens very rarely.

In order to align the law with EU standards, the Ukrainian legislators will need to look into conditions for early termination and prolongation (renewal) of a licence and make the licensing regime both effective and flexible enough for Ukraine to be able to manage the radio frequency spectrum effectively, to make sure that the criteria to grant individual rights of use are complied with for the duration of the licence, and to respond adequately to the EU radio spectrum policy initiatives (e.g. on spectrum use in UHF band 470-790 MHz).

RECOMMENDATIONS

1. The audiovisual law shall include:
 - Fuller provisions on Ukraine’s jurisdiction over audiovisual media services as set out in Article 2 of the AVMSD
 - Extension of the Law to cover on-demand audiovisual media services (and relevant provisions as set out in Articles 12 and 13 AVMSD)
 - Clear provisions prohibiting any incitement to hatred on the grounds of race, sex, religion or nationality (Article 6 AVMSD)
 - Provisions on accessibility of audiovisual services to people with a visual or hearing disability (Article 7 AVMSD)
 - Provisions on product placement and undue prominence (Article 11 AVMSD)
 - Provisions on the televising of major events and short news reports (Articles 14

and 15)

- Provisions on European and independent production quotas (Articles 16 and 17)
 - Ensuring the right of reply accords with Article 28 AVMSD)
 - Provisions guaranteeing the independence of the regulatory authority (Article 30).
2. Furthermore, the Law on Advertising should comply with the provisions set out in Articles 9, 10, and 19-26 of the AVMSD.
 3. The licensing regime should be simplified so as to abandon different policies for different distribution platform, except the terrestrial one, where the special requirements are justified. It should also be made more effective by making sure that the regulator has the powers to actively enforce the compliance with the licensing conditions.

2.2. Detailed comments on the law

Article 1. Definitions

These should be reviewed to ensure consistency with the definitions in the AVMSD.

Article 2. Scope

Article 2.2 should reflect the jurisdictional provisions set out in Article 2 of the AVMSD.

Article 3. Broadcasting legislation

This article fails to mention some other laws applying to broadcasting, including the Law on Advertising, as well as the Law of Ukraine on Protection of Economic Competition law, mentioned later in the law itself (see Art. 8) and the Law on Principles of the State Language Policy (mentioned in Article 10). To avoid such inconsistencies, the legislator should use generic terms and not necessarily refer to concrete legal acts (e.g. law governing audiovisual services, law governing establishment and functioning of the regulator etc.).

Article 4. Main principles of state policy

The obligations and policy are ones which have been adopted by Parliament and for the most part remain applicable regardless of who is forming the government.

Art. 4.1 should be rephrased as a principle of promoting Ukrainian culture and audiovisual production. Ukraine has ratified the European Convention on Transfrontier Television, with its commitments to free and unobstructed transborder flow of television programme services. “Protectionism” vis-à-vis other States-Party to the Convention is incompatible with this principle.

Article 6. No abuse of freedom by broadcasting organisations

Art. 6.1 This provision contradicts Art. 5 para. 2, namely that broadcasters will be independent in deciding on the contents of their programmes. It puts every broadcaster under an obligation to report any official announcement of any government coalition party, however unimportant and however unrelated to the interests of the audience (e.g. a broadcaster in one region will have to report announcements concerning entirely different regions). This gives political parties in government – and only them – an automatic claim to airtime on all broadcasting stations, as well as an opportunity to demand that all radio and television stations must cover all their meetings, press conferences and other events. In this way, all radio and television stations would become mouthpieces of the parties in power.

This provision should be revised to say that broadcasters should provide reliable information on events in public life, covering both the ruling and opposition parties, as well as non-governmental and civil society organizations.

Art. 6.2 prohibits, inter alia, broadcasts of any film or TV programme (other than information or analysis) which has been made with the involvement of any person on a proscribed list (List of Persons Who Pose a Threat to National Security). This is in addition to the prohibition on programmes which promote aggression against the State. It is very questionable whether this prohibition in relation to performers, writers, producers, directors is proportionate under Art. 10 of the ECHR as it restricts freedom of expression without any regard to the content of the material which is banned. Whilst there may be some justification for restricting the on-screen presence of popular actors who are known to support what is seen as aggression against the Ukrainian state, it is difficult to understand the justification for extending the ban to individuals whose contributions are off-screen (and where the programme content is otherwise compliant in all respects).

Article 7. Public administration and regulation

This article sets out that Parliament shall establish public policy on broadcasting and its legislative framework; the Cabinet of Ministers shall ensure the public policy is implemented by directing and coordinating the activities of ministries and other executive authorities in this sphere; that “the central executive body” (presumably the State Committee for Television and Radio Broadcasting) is responsible for ensuring establishment and implementation of state policy on broadcasting and the National Council is the only regulator in this sphere. This hides a complex picture as indeed all of these bodies have some responsibility for developing policy, but only the National Council has the competence and resources to implement any of it.

In addition, **Article 8** refers to antimonopoly provisions in the broadcasting sphere where the Antimonopoly Committee has competence.

Article 9. Protection of interests of the state and domestic television and radio production

Art. 9.1 requires at least 50% of TV and radio content to be of domestic audio-visual product (or Ukrainian music in the case of radio). A new law, in force in November 2016 requires those radio stations broadcasting songs to ensure that 30% of them are Ukrainian.

Should Ukraine already now want to align its broadcasting law to EU law it has to be noted that a 50% quota for domestic audiovisual productions bears a considerable risk of violating EU law. No EU member state has such a high quota for domestic audiovisual productions. Domestic programme quotas can be justified if they serve cultural aims. These aims have to be expressed clearly in the law and should be reflected in broadcasters’ license conditions. But the quotas must not be used to prevent non-domestic producers from selling their products on the domestic market. A rather high domestic programme quota could be an indication for such an intention. The European Court of Justice has not yet decided which exact percentage is admissible. However, in this connection it is interesting that France lowered its quota from 50% to 40% after talks with the EU Commission.

Art. 9.2 prohibits any denial or justification of a wide range of historical periods and events, including the communist regime from 1917-1991 and individuals and bodies that served during that period. It is questionable whether this is proportionate under Art. 10 of the ECHR; perhaps during a time of active aggression, but not more generally. Historical denial is one thing, but taking a view (“justification”) and expressing an opinion is exercising the right to freedom of expression.

Art. 9.3 requires the National Council, when issuing licence tenders to “protect public interests and domestic broadcasters”. It is not clear what this means in practice, but it seems very protectionist and possibly against the single market aspirations of the European Union.

Articles 11-13 on structure, establishment and state run broadcasting organisations

Art. 11 refers to both the NPTRCU and municipal broadcasting organisations. These will cease to exist with the creation of the public joint-stock company. Confusion remains over the possibility of state broadcasting as contained in Art. 12.2 which provides for them in certain circumstances. Also Art. 13 needs to be deleted.

Article 12. Establishment of broadcasting organisations

Art. 12.2 prohibits the establishment of or participation in the ownership of a broadcasting organization by religious organizations. It is likely that the ECHR would consider this disproportionate in the case of multi-channel services. Whereas it may be reasonable to prohibit religious ownership of analogue services the total ban for satellite, cable and digital programme services should be reconsidered.

Article 16. Municipal broadcasting organisations

Art. 16 refers to municipal broadcasting organisations (local government) and should be deleted. Community broadcasting needs to be developed a bit more than what is set out in: Art. 18 (which is translated as public broadcasting).

Article 21. National television and radio information space development plan

Art. 21.2 The Development Plan should consist of three parts, the third dealing with detailed arrangements for the digital switch-over. This is in fact indicated in Art. 22, para. 7.

Article 22. Establishment and development of broadcast channels, networks and telecommunication networks

Art. 22.7 says that transition to DTT shall be carried out in accordance with the Development Plan, which is written annually by the National Council. However, radio frequency resource allocation is done under the law “on Radio Frequency Resource of Ukraine”.

Article 23. Licensing of broadcasting

Art. 23.2 prohibits licensing of foreign TV and radio broadcasting organizations which is contrary to EU law. This also contradicts Art. 12.3 which provides that foreign ownership *is* permissible (subject to the exceptions set out in Art. 12.2) and subject to the Commercial Code of Ukraine. If this provision is meant to apply only to terrestrial licenses, it should say so, but nevertheless it remains likely to be contrary to EU law.

Art. 23.3 requires licenses for satellite, cable, and wire services. In most European countries, these services do not require a licence per se; simple registration should suffice.

Art. 24 Application for issue (extension) of a broadcast licence

A major element of applying for a licence or renewal is providing ownership information. In the case of non-competitive licensing, the National Council still has the power to ‘decide’ whether to licence (within one month)– but no grounds for deciding not to. This is different from the transparency of ownership provisions. Here, the National Council should either be satisfied, or not. This is different from deciding whether or not to licence. If the transparency obligations are met, there should be no discretion not to licence.

In fact, the grounds for not granting a non-competitive licence are contained Art. 30.2: breaking the ownership rules, lying about ownership, the re-application is too soon after a licence has been revoked, or, (in 30.2.d) the applicant doesn’t have the economic, financial or technical capability to broadcast. In fact, 30.2.d. should be repealed as these should not be considerations for a non-competitive licence. These licences do not carry *obligations* to broadcast and are merely permissive, unlike competitive licence applications.

Article 28. Programming philosophy of a broadcasting organisation

Art. 28.2 ‘Foreign’ audiovisual product should be changed to ‘European’ and ‘non-European’ in compliance with the Convention on Transfrontier Television. See also our comments on Art. 9 (1).

As referred to above, programme schedules should not form part of a licence condition, as they will change from season to season according to contractual negotiations. While it is reasonable to ask for an indicative schedule as part of the licence application, licensees should not be expected to deliver according to such a tentative schedule. Rather, it is the genres and quality of programmes which can be judged for regulatory purposes.

Art. 28.3 It is unreasonable to expect non-competed for awards which will often be for retransmitted material to carry a mixed schedule including news, current affairs, culture, arts, science, education and entertainment. While it is may be reasonable to expect broadcasters who are using analogue terrestrial spectrum to broadcast such a wide range of programming, it is less reasonable when licensing cable, satellite and digital services. We would also question the viability of expecting such a wide range of programming on all radio services.

Art. 28.4 We would question the viability of expecting such a high ratio of European and Ukrainian programme product, and of Ukrainian music. These ratios are higher than that expected by European law and are perhaps unrealistic in a country that doesn't have a highly developed and mature broadcasting production base. Furthermore, a 50% quota for music of Ukrainian composers and performers in **all** radio programmes would be detrimental to documentaries, reports, features etc. on political, cultural and social issues.

Art. 28.5 See previous comments on the wording of programme content standards. The prohibition on “scenes appealing to sexual instincts” goes much further than the European Convention, which, while prohibiting pornography, allows adult material subject to there being sufficient safeguards concerning minors.

Art. 28.6. “Obscene words” should be detailed to ensure that both broadcasters and audiences are aware of the extent of the rule and to avoid arbitrary decisions by the National Council.

Article 31. Fee for issue, extension and renewal of a broadcast licence and issue of a duplicate of a broadcasting licence and of a programme service provider licence.

Art. 31.2 (second sentence) The National Council, and not the Cabinet of Ministers, should be responsible for developing the fees for licensing, with the Cabinet of Ministers having a role only to confirm the fees as part of the annual budget approval process. This is the case in nearly all European laws. Making this the responsibility of the Cabinet of Ministers undermines the independence of the licensing system, and the National Council. Consideration should be given to the fees for licensing, renewals, etc. to be remitted directly to the National Council to go towards its funding. The importance of developing a degree of independent funding of the Council is discussed in the analysis of the Law on the National Council. This would be a means to developing funding of the Council on a costs recovery basis.

Article 38. Public registration and keeping of the Public register of broadcasting organisations of Ukraine

It is not clear what the purpose or value of registration is for organisations which do not hold a broadcast licence.

Article 48. Registration of audiovisual works and keeping of copies

Art. 48.4 The retention of recordings for only 14 days (if no complaint is filed) is not long enough. With digital recording, it is not burdensome or expensive to keep recordings for considerably longer; at least 3 months. A significant set penalty should be payable for failure to keep or produce recordings on request.

Article 49. Distribution of official communications

Art. 49 1, and 4-6 These paragraphs need to be repealed as the public broadcaster has no such obligations to transmit so much official communication. Its obligations are covered in the public service media law.

Article 51. Broadcasting under special circumstances

These provisions should be set out in this law. It should be noted that it is especially important during emergencies, including where martial law is declared, that broadcasters are able to provide accurate news and information.

Article 53. Advertising

All of the National Council's responsibilities regarding advertising (for example, monitoring the amount and distribution of advertising) should be stated in this law and the regulator should be empowered for effective enforcement of compliance with advertising quotas and other standards (sanctioning powers).

Article 54. Sponsorship

The same applies to sponsors. All provisions regarding the responsibilities of the National Council should be set out here.

Article 55. Announcement of broadcasts

Art. 55.2 Obligations concerning announcements should be included in this law and not in the Law on Advertising.

Article 56. The rights of broadcasting organisations

The right to access to information should be set out in the law on access to public information. The right should also be subject to reasonable limitations, for example, there should be no absolute right to obtain commercially sensitive information from commercial bodies.

Article 57. Editorial byelaws of a broadcasting organisation

This article sets out what in effect is a self-regulatory mechanism. We would question whether this works in practice. We see the potential problems being a lack of consistency between broadcasters, poor compliance, and lack of enforcement if the byelaws are breached. Internationally, the practice is for content matters to be subject to *external* regulation (e.g. by the National Council), although broadcasters may add to the core content rules by committing to their own additional editorial guidelines. This is, however, an excellent opportunity for co-regulation.

Article 58. Rights of creative personnel and television and radio journalists

Although this article sets out a number of rights of creative personnel and journalists, it is unclear who has responsibility for enforcement and therefore how these personnel and journalists can ensure that broadcasting organisations comply.

Article 59. The duties of television and radio broadcasting organisations

Art. 59.1.c. This sets out a requirement to disseminate unbiased information, but in practice, this is not enforced. It should be, either through a co-regulatory mechanism, or in the absence of such an arrangement, then directly by the National Council.

Art. 59.1.l. Broadcasters are required to retract any inaccurate or defamatory information. It is not clear whether this is subject to the provisions for the right of reply (Article 64), or whether this can only be enforced through a court decision. This should be clarified.

Article 60. The duties of the members of production personnel

These are all matters of employment law, not broadcasting law. Most importantly, it is the responsibility of the broadcaster, as licensee, to comply with these provisions, not individual employees. **As such, the National Council should have responsibility for dealing with complaints, ensuring compliance and applying penalties for breaches of Art.60.1.**

Article 62. Protection of public morals and the rights of minors and young people

Art. 62.1 The legislation on the protection of public morals as they refer to broadcasting should be included in this law.

Article 63. Impermissibility of distortion of information

Art. 63.1 Although allowing previews may be good practice, it can interfere with editorial freedom. It is also utterly impractical when it comes to live broadcasts (which applies to most of radio).

Art. 63.2 Settling matters in court is expensive and prejudices the individual member of the public as against the broadcaster. Consider giving the responsibility to the National Council.

Article 64. Right of retraction

Several of the provisions of Art. 64 do not comply with European standards for exercising the right of reply, or are rather unusual:

Art. 64. 1 needs a re-formulation as the right of retraction *should not be provided where the information distributed degrades the* honour or dignity of a person if there has been no misrepresentation of the facts. There should be no right of retraction against value judgements or opinions which are based on facts.

Art. 64.3 The time-limit of 14 days for filing the complaint seems to be too short, especially for persons concerned living abroad. Art. 28 (3) AVMSD requires that Member States ensure "that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States". For example, the German State Treaty for the ZDF

(Second German Television) requires that the complaint is filed "with undue delay, at the maximum within two months".

Art. 64.5 There should be no obligation on broadcasters to allow contributors to preview the final product (see Art.63.1 above).

Art. 64.10 We are not aware of any other European country which grants a right of reply for a complainant to appear in person. This should be deleted.

Articles 64 and 65. Right of refutation and right of reply

It is not clear what role the National Council has, if any. The Council told us it can only act as a mediator between a complainant and the broadcaster, and encourage dissatisfied complainants to go to court. As broadcasters do not have to retain recordings for longer than 14 days, this is clearly unsatisfactory. The National Council should have a determinative role in matters of the right of reply as part of their obligation to ensure compliance with the provisions of Article 60.1.

Article 70. Control and supervision of observance of the legislation by broadcasting organisations and programme service providers

Art. 70.1 The National Council has control of monitoring and ensuring compliance with rules on sponsorship and distribution of advertising, but no mention is made of the amount of advertising or its content. The National Council is also responsible for legislation on protection of public morals, and the legislation on elections. However, there are no clear provisions on how the National Council is to ensure compliance. We were told by the Council that the Food Safety and Consumer Rights Agency can impose sanctions for surreptitious advertising (“jeansa”) or wrongly placed advertising (especially alcohol advertising) so the Council turns to them when it finds breaches of these rules.

Art. 70.7 By contrast, if the National Council discovers a violation of the cinematography law or domestic film quotas, they refer it to another central executive body. This imposes a significant monitoring burden on the National Council; they should not be responsible for monitoring output over which they have no powers of enforcement and sanction.

Article 71. Liabilities for breach of the broadcasting legislation

Art. 71.1 Only licensees (i.e. broadcasters and programming service providers) should be held liable for breaches of the broadcasting law, and nobody else (*not* individuals of any description if they are not licensees).

Article 75. Execution of a decision on imposing sanctions

Art. 75.1 A decision on the imposition of a sanction shall be handed over or mailed to the head of the licensee. This provides too much allowance for the licensee who can be unavailable or claim not to have received it. Proof of posting should be sufficient.

3. Law on Public Television and Radio Broadcasting of Ukraine

The Law on Public Television and Radio Broadcasting of Ukraine was adopted by the Verkhovna Rada in 2014 (“the Law”). Since then, a number of amendments have been added. This analysis considers the Law to assess its compliance with European standards, in particular the European Convention on Transfrontier Television and the European Convention on Human Rights, to which Ukraine is a signatory. In addition, the Law has been analysed with regard to international good practice, and in particular the following Committee of Ministers of the Council of Europe Recommendations: R(96) on the Guarantee of Independence of Public Service Broadcasting, CM/Rec(2007)3 on the Remit of Public Service Media in the Information Society, CM/Rec(2012)1 on Public Service Media Governance which follows from the Declaration of the Committee of Ministers on Public Service Media Governance dated 15 February 2012.

Ever since 1990, post-communist governments in Central and Eastern Europe have begun the reform of broadcasting by introducing private commercial broadcasters and by transforming State broadcasters into public service broadcasters. Ukraine is one of the last countries in Europe to pass a law on public service broadcasting (Belarus is still outstanding) and remains with Russia as the only two countries to have passed a law which has not yet been fully implemented. This has been a major international concern for well over a decade and an issue that Ukraine is under international obligation to implement:

As far back as 2003, the Parliamentary Assembly of the Council of Europe (“PACE”) said “It is of great importance to establish an objective and functioning public broadcasting system in Ukraine:”²

- The launch of public broadcasting became an obligation of Ukraine to the Council of Europe under PACE Resolution 1466 (2005) “Honouring of obligations and commitments by Ukraine”³ where the Assembly called upon Ukraine to transform the state broadcasters into public service broadcasting channels in line with relevant CoE standards.
- PACE Recommendation 1722 (2005) refers to Resolution 1466 and invited the Ukrainian authorities “to submit to Council of Europe experts: draft legislation concerning: creation of a public service broadcasting /.../”.
- In reply to the abovementioned Resolution and Recommendation, the Committee of Ministers of the CoE adopted a decision supporting “the observations made by the

² Para 14, Resolution 1346 (2003) available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17147&lang=en>

³ Para 12.4 at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17377&lang=en>

Assembly regarding Ukraine in its Resolution 1466 (2005), to which Recommendation 1722 (2005) refers.”⁴

- The President of Ukraine issued a decree which approved the Action Plan for the Honouring by Ukraine of its Obligations and Commitments to the Council of Europe on 20 January 2006⁵ which included a promise to “create conditions to ensure pluralism in the coverage by the mass media of events and processes taking place in Ukraine and abroad, and to that end: follow up in the Verkhovna Rada of Ukraine the Draft Law on the Amendments to the Law of Ukraine "On the System of Public Broadcasting" (subparagraph 12.4 of the PACE Resolution 1466)”.
- Under the EU-Ukraine Association Agenda of 2013, an agreed priority was “cooperating on the development of a system of public broadcasting, including by exchange of best practices, the adoption of a legislative framework and its implementation in accordance with European and international standards”.⁶
- The Council of Europe Action Plan for Ukraine 2015 - 2017 sets public broadcasting as one of its key priorities in the media sphere: "Co-operation activities hitherto in the field of media in Ukraine have focused on improving the legal and institutional framework regulating the media, establishing a genuine public broadcasting service and contributing to raising professional standards in journalism. Assistance and support was ensured to facilitate the implementation of the recently adopted Law on Public Broadcasting.”⁷

⁴ (CM/Del/Dec(2006)952 13 January 2006) see https://wcd.coe.int/ViewDoc.jsp?id=955579&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383#P13_452; and [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2006\)952&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2006)952&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)

⁵ <http://old.minjust.gov.ua/6985>

⁶ http://eeas.europa.eu/ukraine/docs/eu_ukr_ass_agenda_24jun2013.pdf

⁷ [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=GR-DEM\(2015\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=GR-DEM(2015)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)

3.1. Thematic Priorities for Amendment of the Law

There are a number of issues which require additional amendment to ensure that the Law meets with European standards and good practice.

3.1.1. Public Service Remit

CoE CM/Rec(2007)3 on the Remit of Public Service Media in the Information Society sets out various elements of the public service remit:

- a. A reference point for all members of the public, offering universal access
 - a. News, information, educational, cultural sports and entertainment programmes aimed at the entire population and which offer added public value compared to the offerings of other content providers.
 - b. Public service media should be made available on all significant distribution platforms, and funded to be so.
 - c. Both generalist and specialist programmes should be offered, for all generations
- b. A factor for social cohesion and integration of all individuals, groups and communities
 - a. Public service media should be adapted to the digital world and promote social cohesion at local, regional, national and international levels
 - b. Content should be created by and for all social groups and generations, including minority groups, disadvantaged groups, disabled people, and so on with attention to gender equality issues. Special attention should be paid to filling the market gap of provision for these groups.
 - c. Public service media should promote and contribute to inter-cultural and inter-religious dialogue.
 - d. Digital inclusion should be promoted.
- c. A source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards
 - a. Public service media should provide independent and impartial news and current affairs content on both traditional and new media services.
- d. A forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals
 - a. Open debate should be promoted, with a platform for public debate. Public service media should be a platform for disseminating democratic values.
 - b. Public service media should foster citizens’ interest in public affairs and encourage them to play a more active part in elections and in public life.

- c. Public service media should play a leading role in public scrutiny of national and international governmental organizations.
- e. An active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage.
 - a. They should invest in new, original content and support the creation and production of domestic work, reflecting local and regional characteristics.
 - b. They should support music, arts and theatre and play a central role in education, media literacy and life-long learning.
 - c. They should be active in the preservation of cultural heritage and develop digitized archives.
 - d. Public service media should promote respect for cultural diversity and protect the cultural heritage of minorities and communities.

For the most part, these elements of the public service media remit are missing from the Law. It is particularly important that, in the digital age, the NPTRCU has a major role to play in the provision of information services, and not just traditional television and radio (see further below under Scope).

Generally, obligations on the programme content of the new public services are not well fleshed out. One national TV channel is to focus on social and political matters, and the other on cultural and educational programming. It is not clear where sport fits in, or entertainment. There is no description of the programming of other, regional television services which one would expect to focus on local matters. As an example where this is done, see Polish PSB PTV, where there is a requirement for 4 hours a day of local (news and information) programming. There is no mention of expansion into additional digital or online services.

3.1.2. Legal Establishment

The Law as proposed to be amended will set up the NPTRCU as a public joint stock company where the government holds 100% of the shareholding. Ukrainian company legislation sets a number of parameters on public joint stock companies, some of which, in the context of public service media, are inappropriate. In particular, other laws give the shareholder of a public joint stock company the power to approve:

- the principles (code) of corporate management;
- the decision (conclusions) of the Audit Commission;
- the Regulation on the Supervisory Council and the Board and introducing amendments thereto;
- the financial plan and financial and economic performance report;

These powers by a State/government body are a violation of the principle of independence of the public service media. **Therefore, the various other laws which set these powers should each be amended to make a specific exclusion for the public joint stock company of the NPTRCU.**

A “shareholder” has to be appointed to act on behalf of the public. In order to best avoid any possibility of individual Ministerial or Executive Agency interference in the public service media, **it is recommended that the shareholder of the joint stock company for the NPTRCU be the Cabinet of Ministers.** This is because it is the Cabinet of Ministers that best represents the “public” of Ukraine in its most general and generic sense.

3.1.3. Scope

There is no reference to must-carry in the Law. However, as a public broadcaster, NPTRCU services must have access to every household in Ukraine through effective application of must-carry rules on every available platform.

Internet. One of the most important strategic changes required of the Law is the need to legislate for the present (and future) information age. With Ukrainian internet usage 66%,⁸ the Law must provide for public service *media* and not merely “broadcasting”.

3.1.4. The Supervisory Council

The size of the Supervisory Council is very large by European standards,⁹ and under the current Law could grow as Parliamentary factions and groups change. The allowance for new groups and factions to appoint new members to the Supervisory Council should be removed as it merely serves to politicize the membership of the Supervisory Council. Instead, the number of members should be fixed (at the current 17), with each member entitled to serve their full four-year term regardless of any changes in the make-up of the Verkhovna Rada.

In order to avoid the entire Supervisory Board being replaced every four years, the initial members should be appointed on staggered terms (i.e. some for 2 years, some for 3 and some for 4).

The eligibility criteria for membership of the Supervisory Board need to be set out in greater detail to ensure that its members are competent to do the important job of the Board. There should be appropriate representation of men and women and significant minority groups on the supervisory body. Conflicts of interest should extend to close family. Recommendations are set out in the detailed section below.

⁸ See slide 8 <http://www.inau.org.ua/download.php?c7f2e63cb07488f5da3ad93defcb4f5d>

⁹ According to the EBU, most public broadcasting supervisory boards have between 8 and 12 members.

3.1.5. Funding

“Securing and safeguarding independence is a primary role of any framework of public service media governance, and this is why independence has been at the heart of all of the relevant Council of Europe standards.”¹⁰ The Recommendation goes on to say that the method of funding “cannot be used to exert editorial control or threaten institutional autonomy, either of which would undermine the operational independence of the public service media.”

To comply with this standard, there are two provisions in the Law which need to change. First, there should be no access to “local” funding, just State (and commercial) funding. This is in line with the organisational arrangements where a single NPCTRU is responsible for national and local/regional broadcasting. The State should be a funder for this, and not local authorities or government agencies as they would then be in a position to influence editorial content. Furthermore, the State Committee should have no role whatsoever in allocating funds or maintaining budgets of local/regional broadcasters; as a State body its involvement in any aspect of public service broadcasting is a clear breach of Council of Europe standards.

Additionally, the provisions giving the Cabinet of Ministers control over the use and maintenance of NCPTRU assets should be deleted as this would undermine the operational independence of NCPTRU and could lead to a position where the Cabinet of Ministers exerted political influence over content (for example, by refusing to maintain assets until and unless changes were made to content).

3.1.6. Accountability

“Public service media should be subject to constant public scrutiny and be accountable and transparent when performing their functions as they have the obligation to serve the public in all its diversity.”¹¹ Through the Charter, the NPTRCU should have clear obligations to publish its Annual Review and its annual plan, as well as its financial performance. It should be required to undertake public consultations on all major proposals.

3.1.7. Management Board

The Management Board has day-to-day responsibility for running the operations of the NPTRCU. Nonetheless, the criteria for selection for Management is similar to those for the Supervisory Board, with no requirements for actual relevant experience of running media services. **The wording now excludes existing senior staff from eligibility to run the new public service broadcaster. This must be remedied** and can be by a simple amendment.

¹⁰ Para 22 of Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance

¹¹ Article 1.4 Declaration of the Committee of Ministers on Public Service Media Governance dated 15 February 2012.

3.1.8. Audit Commission

The number of members of the Audit Commission and the criteria for eligibility should be stated.

3.2. Detailed Comments on the law

Article 1. Legal basis of the activity of Public Television and Radio Broadcasting of Ukraine

The NPTRCU is established as a public joint stock company which will encompass all existing State (including local) broadcasters: television (national and regional) and radio. It includes Ukrtelefilm, which the analyst understands has been excluded from the NPTRCU until it is reformed. **Therefore the sub-paragraph referring to Ukrtelefilm should clarify this.**

The Law should make it clear that there can be no distribution of profits to the shareholder; any profits must be reinvested by NPTRCU to improve or extend its services.

Article 2. Legislation in the NPTRCU field

No comment

Article 3. Principles of the NPTRCU activity

Paragraph 3 provides that the NPTRCU will operate to “spread family values” and “strengthen the role of a traditional family in development of the Ukrainian society”. Care must be taken to ensure that this does not undermine the rights of households that do not conform to “traditional family” norms. This is particularly so in a country with one of the highest divorce rates in Europe and an estimated 20% plus single-parent households.

Article 4. Main tasks of the NPTRCU

The first paragraph of Article 4 should be extended to ensure compliance with the European Convention on Transfrontier Television. Article 7.3 of the Convention requires, “The broadcaster shall ensure that news fairly presents facts and events and encourages the free formation of opinions.” This requirement should be included in the Act, with further discussion of how the NPTRCU will do this in both the Charter and Editorial Charter.

It is noticeable that religious programmes, current affairs and documentaries are all missing from the list in paragraph 4, which should all be included. These should be added to the Law and can be addressed in more detail in the Editorial Charter.

Paragraph 7 refers to “promoting the international image of Ukraine.” This is now the role of the newly established State broadcaster: the Ukrainian international TV channel. **The paragraph should therefore be deleted.**

Article 5. NPTRCU broadcasting

NPTRCU should also be required to provide key services online. See CoE Rec(2007)3 on the remit of public service media in the information society.

Article 6. NPTRCU

The Charter should also include additional details of the programme remit of NPTRCU and each of its services, as well as provisions setting out in greater detail how the NPTRCU will be accountable. These should include requirements that:

- the Annual Report be published and include a full account of how the NPTRCU has fulfilled its remit, including how it has implemented the programme plan in accordance with the Editorial Charter;
- the NPTRCU should consult publicly on any major proposal for change;
- the programming policy will be reviewed annually. The NPTRCU should publish each year how it intends to implement the policy and will report on how it has performed against its intentions in each annual report;
- the Editorial Charter will ensure that reporting will be fair and unbiased. On all matters of political, social or other controversy, whenever one point of view is given, opposing opinions will also be aired, either by relevant spokesmen, or by presenters and journalists themselves. The annual report will include an assessment of how this has been implemented; and
- any proposed changes to the Charter will be subject to public consultation.

Article 7. Supervisory Council

2.(3) The Chairman should be selected from those members of the Supervisory Board who have been nominated by NGOs, and not by the parliamentary factions. This is important to ensure that there is not undue political interference in the work of the Supervisory Board.

2.(5) The annual report should include detailed accounts of how the NPTRCU has implemented the annual plan, and how this satisfies the Editorial Charter.

2.(8-1) It is not clear from this article the extent to which the Supervisory Council has power over individual pay and conditions. Other than the high level budget figures, the Supervisory Council should not be responsible for setting the pay and conditions of staff; this is a management issue that should be the responsibility of the Management Board. The Supervisory Council agrees the overall budget, but it should be management who determines pay within that budget.

3. The Law should add, to make it clear, that the Supervisory Board cannot interfere in editorial decisions. See CoE Recommendation R(96)10, Part III.

Article 8. Composition and formation of the Supervisory Board

8.1. It is not clear why NGOs in the activity of “local self-government” is included. Care must be taken to ensure that no group which is associated with local politics or local state administration is involved in the selection of members to the Supervisory Board.

8.5. Overall, the arrangements for ensuring that there is always one more member of the Supervisory Council appointed through the NGO process than there are members appointed by the Parliamentary factions is commendable. However, the process as written in the Law means that the numbers will keep changing as Parliamentary factions/groups change. This is not acceptable. The process serves to confirm that Ukraine’s Parliament is still not comfortable with the idea of an *independent* public service media as it wants to ensure that the Supervisory Board contains *representatives* from all political groups.

Individuals who are appointed to the Supervisory Council should be appointed on merit, not on the basis of political allegiance. ***Each individual should have the necessary qualifications and expertise to add value to the Supervisory Council and they should be appointed on fixed terms, regardless of any changes in the Verkhovna Rada or government.*** They should not step down if “their” faction ceases to exist, and new factions should not have the right to appoint new members. To continuously shift the membership of the Supervisory Council politicizes the Council, contrary to Council of Europe standards.

The number of members of the Supervisory Council should be fixed. The Law assumes 17 members, which is very large compared to other European countries. Nevertheless, if there are currently 17 members, then the Law should be amended to set this figure.

8.6. The terms of office should be staggered to ensure that the entire Supervisory Board does not get replaced. Institutional memory is important and it is best international practice to ensure that board appointments are spaced out so that only a number of members retire at any one time. It is suggested that of the original set of appointees, 6 members are appointed for 4 years, 6 for 3 years, and 5 for 2 years (all subject to one reappointment of 4 years). The selection of who shall serve for which initial term can be done by lottery.

8.7. Serious consideration should be given to paying the members of the Supervisory Board for their participation. If they are not paid, they will be less likely to take the job seriously and do the work that is required. They will also be more open to corruption. By way of

example, the members of the Supervisory Board of Polish TV are paid an average state salary in accordance with the number of days worked.

As a general comment, the appointment of men and women should be balanced (see CM/Rec (2012)1 Art.27)

Article 9. Requirements for the Supervisory Council members

9.1. See Coe CM/Rec (2012)1 Article 27 which states that there must be “clear criteria for the appointments that are limited, and directly related, to the role and remit of the public service media.”). These criteria are not “clear criteria for the appointments that are limited, and directly related, to the role and remit of the public service media”. It is recommended that all proposed nominees should have professional experience of at least 5 years in any of the fields of: broadcasting, programme or film production, journalism, law, economics, finance, accountancy, education, management, psychology, religion or the arts, or any other field directly relevant to the supervision of public media.

Article 10. Termination of powers of a Supervisory Council member

No comment.

Article 11. Meetings of the Supervisory Council

No comment.

Article 12. The Board

12.3 (second paragraph) The annual general report should also include detailed accounts of how the NPTRCU has implemented the annual plan, and how this satisfies the Editorial Charter.

12.3(1) The Law should make clear that it is the Management Board (and not the Supervisory Board) that exercises editorial control.

12.5 The Law should add that the Board Chairman acts as editor-in-chief of the NPTRCU.

12.3(6) This clause must be amended to enable individuals with experience of working in broadcasting to be appointed to the Board. It should read as follows: “The Chairman of the Board and the members of the Board are subject to the restrictions provided in sub-sections

(1) (2) and (4) of part two of Article 9 of this Law”. In other words, Article 9.2.(3) must be excluded.

To comply with CoE CM Recommendation R(96)10 Part II, paragraph 3, the termination of appointment of the Chairman or any member of the Board must be subject to duly reasoned arguments and may be appealed to the court.

Article 13. Audit Commission

This Article should be amended to include:

1. The qualification criteria for the Audit Commission members. They should be professionally qualified in finance or accounting and be able to fulfill the duties set out in Article 13.2;
2. The number of members on the Audit Commission;
3. Whether someone can sit on both the Audit Commission and the Supervisory Board. if someone on the Supervisory Board is suitably qualified, it may be sensible to have dual membership;
4. The remuneration payable.

Article 14. Funding sources of the NPTRCU

14.2 Funding from the State budget, as provided for in Article 14.3, is acceptable given that commercial funding is also available for NPTRCU. However, the references to funding from *local* budgets should be deleted. As local/regional broadcasting will fall within the overall responsibility to NPTRCU, there should be no separate availability for local government funding as this is likely to result in political interference with local programming. This has been the experience with the Polish public broadcaster, PTV, where the Polish National Regulatory Authority is currently investigating cases of local interference as a direct result of funding from local government sources.

14.3 Funding from the State will be at least 0.2% of the total expenditures of the State budget for the previous year. This will be in addition to advertising revenue and a licence fee. However, for the first few years of operation, it is highly recommended that more than 0.2% of the State budget is allocated to the NPTRCU. Besides, the expenditures of a state budget can be calculated in many ways and therefore the method of calculation shall be specified. According to the European Broadcasting Union, looking across Europe, an average of 0.39% of the State budget should be allocated to public service media.¹² The situation in Ukraine makes this particularly urgent: it will take a number of years for NPTRCU to develop a viable advertising revenue stream, and it will take several years for a licence fee to be

¹² An EBU comparison with other countries in Europe shows that national radio/TV broadcasters relying by more than 70% on State budget funding receive on average 0.39% of the national government expenditure. The countries looked at were Georgia, Hungary, Andorra, Cyprus, Estonia, Spain and Belgium (Wallonia).

established and effectively collected in Ukraine. In the meantime, Ukraine is facing a crisis with Russia that is exacerbated by an intense information war. The most effective way of combating this information war would be to properly fund the NPTRCU so that it can quickly establish itself as the true voice of the whole Ukrainian peoples.

Article 15. NPTRCU assets

Art. 15.2 The Cabinet of Ministers should not be able to “control the use and maintenance of the assets transferred to the NPTRCU” as this gives the Cabinet of Ministers the ability to exert considerable control over the running of the NPTRCU. The important point is that NPTRCU cannot alienate property; how it uses its property and arranging for its maintenance should be entirely its prerogative. This paragraph puts a considerable restriction on the proper powers of independence of the NPTRCU and in order to comply with Council of Europe standards on the independence of public service media **must be deleted**.

Article 16. Audit

2. The Regulations on the NPTRCU Audit Commission should specify that the Audit of the NPTRCU may not be conducted by a member of the Audit Commission (or his/her firm) as this would constitute a conflict of interest.

Article 17. Broadcasting license

No comments.

Article 18. Programming policy

The programming policy should be reviewed annually. The NPTRCU should publish each year how it intends to implement the policy and will report on how it has performed against its intentions in each annual report.

Article 19. Editorial Charter and Council

The Editorial Charter should include a provision ensuring that reporting will be fair and unbiased. On all matters of political, social or other controversy, whenever one point of view is given, opposing opinions will also be aired, either by relevant spokesmen, or by presenters and journalists themselves. The annual report will include an assessment of how this has been implemented.

Article 20. Broadcasting official messages

The provision for free airtime should be limited to times of emergency or national threat. In addition, free airtime should be given to major political parties and candidates during election periods, in accordance with the relevant election law.

Section IV. Final and Transitional provisions

The proposal to introduce community broadcasting under the principles of public broadcasting is welcome and in compliance with Council of Europe standards.

F. Key institutions

This chapter provides a basic overview and reflection of the institutional landscape related to broadcasting and a more detailed insight and recommendations regarding the institutions recognised as the key institutional players in the field.

1. Institutional ecosystem in broadcasting

In the case of Ukraine, there is no one overall section of government with responsibility for state policy on broadcasting; the role is shared between the Cabinet of Ministers, the Ministry for Information Policy, the Parliamentary Committee for Freedom of Speech and Information Policy, and the State Committee for Television and Radio Broadcasting. No body coordinates efforts emerging from these various actors. A single Ministry or Ministerial committee should be given overarching responsibility for proposing policy.

The composition of the Inter-Agency Coordinating Group on introduction of digital TV and radio broadcasting indicates that there are at least 8 state institutions with certain responsibilities in broadcasting, plus 3 more from the realm of armed forces and security services that have been probably recruited to the group due to issues related with digitalisation of the territories around the occupied areas:

1. National Council of Television and Radio Broadcasting of Ukraine,
2. State Service of Special Communications and Information Protection of Ukraine,
3. Ministry of Information Policy of Ukraine,
4. National Commission for the State Regulation of Communications and Informatisation,
5. The State Committee of Television and Radio Broadcasting of Ukraine,
6. General Staff of the Armed Forces of Ukraine,
7. Service of Security of Ukraine,
8. Office of the National Security and Defence of Ukraine,
9. State Enterprise “Ukrainian state Centre of Radio Frequencies”,
10. Broadcasting, Radiocommunications & Television Concern of Ukraine,
11. State Enterprise “Ukrainian Scientific Research Institute of Radio and Television”.

This rather untypical composition of an inter-institutional platform for coordination of digital transition reflects both the complexity of the Ukrainian institutional framework and the special situation of a country in conflict.

The group was established by the instruction of the Vice-Prime-Minister of Ukraine (formerly Minister of Culture), Mr. Vyacheslav Kyrylenko. It is notable that the Ministry of Culture is absent from this list. In EU Member States culture ministries are commonly responsible for media policies at the ministerial level, while in Ukraine the stakeholders seem to recognise the role of the Ministry of Culture only in relation to policies developed for pursuing cultural objectives in media. When asked which ministry is responsible for

media, the interviewees mostly pointed to the Ministry of Information Policies, but stressed also its limited mandate, both in terms of duration and scope.

Another characteristic of the Ukrainian institutional ecosystem is its fragmentation and scatteredness of responsibilities with lots of overlapping on the one hand, and the lack of power for effective implementation on the other. In every area there are a number of authorities sometimes with similar, even identical competencies or expected to share them and jointly regulate the area or certain aspects of it. It looks as though the policy is to give everybody the same responsibilities in the hope that one of them will pick it up. As a matter of fact, it happens quite often that nobody does, but even if one does, it is rarely in a position to bring the process to the end independently and effectively, since often (an)other institution(s) is(are) entitled to make a decision or approve it.

To illustrate the above, the National Council cooperates with the following governmental and parliamentary bodies:

- Cabinet of Ministers of Ukraine (CMU): according to the Article 72.10 of the Ukrainian Law on Broadcasting the fines scheme is set by the regulatory body with advice and consent of the CMU;
- Ministry of Justice of Ukraine: approval and registration of the regulatory acts of the National Council;
- Ministry of Finance of Ukraine: advice on budgetary issues;
- State Regulatory Service of Ukraine: can cancel the acts that do not comply with the laws of Ukraine;
- Ministry of Information Policy of Ukraine, State Service of Special Communication and Information Protection of Ukraine: developing information strategy policy, defining the concept of informational security, fine-tuning messages of governmental authorities, and counteracting propaganda from the Russian Federation;
- Ministry of Economic Development and Trade of Ukraine – State Inspection on Consumer Rights Protection, authorized to consider violations of advertisement legislation; the National Council submits to them monitoring results about violations of advertisement legislation;
- National Commission for the State Regulation of Communications and Informatisation (NCSRCI): operates the Register of operators and telecommunications providers and the Register of licenses issued for the radio frequency resource of Ukraine, and has about 8000 staff;¹³
- Ukrainian State Centre of Radio Frequencies (UCRF), Ukrchastotnagliad, the Ukrainian frequencies supervisory centre: close cooperation with the National Council in licensing;

¹³ Members of the Commission are appointed by the President of Ukraine. The 2003 Law on Communications does not guarantee the independence of the Commission. This must be revised if the authority is to become an IRA in the sphere of electronic communications as stipulated by the EU law.

- Ukrainian state special communication commission who owns the television transmission network;
- Ministry of Culture (Ukrainian State Film Agency): the National Council submits to them results of monitoring of films with identified violations of public rental license;
- State Committee on Television and Radiobroadcasting: close cooperation in reform of the National Public Broadcasting Company of Ukraine to public service broadcaster;
- Central Election Commission: the National Council submits them monitoring results of media performance in pre-election time;
- Committee of Verkhovna Rada for freedom of speech and information policy: cooperation in adaptation of media legislation to the EU standards; the Committee consults on similarly, if the Council needs certain legal instrument, they ask the Committee to take the necessary actions;
- Ukraine Parliamentary Commissioner for Human Rights (Ombudsman) who advises the National Council on its regulatory acts. Furthermore, the Ombudsman sends the Council details of breaches of privacy by broadcasters for sanction (but the Council has no current ability to sanction as the necessary legislation has not yet been passed);
- Information and Communication Committee of Verkhovna Rada;
- Committee for Culture and Spirituality of Verkhovna Rada;
- State Fiscal Service;
- State Treasury Service;
- Accounting Chamber of Ukraine;
- Pension Fund, Statistical Department: accounting reporting.

A brief thematic look at areas where responsibilities either overlap or fall between with indicated different players:

- **Legislative initiative:** MPs, Parliamentary Committee, Cabinet of Ministers (drafts prepared by the State Committee), President;
- **Policy development:** Parliamentary Committee, State Committee, National Council, Ministry of Information;
- **Licensing:** National Council, National Commission for the State Regulation of Communications and Informatisation, Ukrainian state Centre of Radio Frequencies;
- **Content Regulation:** National Council, Ministry of Culture: Ukrainian State Film Agency, Ministry of Economic Development and Trade of Ukraine: State Inspection on Consumer Rights Protection, Central Election Commission, self-regulation (various initiatives, mostly run by NGOs, e.g. on portrayal of child abuse victims, journalists’ ethics CTEE);
- **Public Service Media:** State Committee, Ministry of Information, National Council;

- **Frequency management and technical standards:** National Council, State Service of Special Communications and Information Protection of Ukraine, National Commission for the State Regulation of Communications and Informatisation State Enterprise “Ukrainian state Centre of Radio Frequencies”, Broadcasting, Radiocommunications & Television Concern of Ukraine, State Enterprise “Ukrainian Scientific Research Institute of Radio and Television”, State Committee;
- **Information security:** Ministry of Information, State Committee;
- **Digital Switchover:** State Committee, National Council, State Service of Special Communications and Information Protection of Ukraine, Ministry of Information Policy of Ukraine, National Commission for the State Regulation of Communications and Informatisation, the State Committee of Television and Radio Broadcasting of Ukraine, General Staff of the Armed Forces of Ukraine, Service of Security of Ukraine, Office of the National Security and Defence of Ukraine, State Enterprise “Ukrainian state Centre of Radio Frequencies”, Broadcasting, Radiocommunications & Television Concern of Ukraine, State Enterprise “Ukrainian Scientific Research Institute of Radio and Television”, CMU, Minister of Culture;

In the expert interviews, we uncovered another area where the lack of clearly identified responsibility has led to abuse: “pirate” (unlicensed, illegal) radio. The NCSRCI told us that it would be the responsibility of the National Council, but they would need to liaise with the UCRF to identify whether the frequency used for illegal broadcast was one that was allocated for broadcasting purposes. If it used a frequency allocated for satellite broadcasting, then the NCSRCI could deal directly. Once initial responsibility had been established, the next problem would be enforcement: an order to stop broadcasting and to seize equipment would have to be issued by the Court and executed by the police. No body seemed to have the authority to take the issue to court, although it had been discussed with the Minister of the Interior. Even though illegal devices are identified on a monthly basis, the lack of co-operation and political will (as between the UCRF the relevant State Oversight body and the Ministry of the Interior) meant that nothing was done – even where legitimate licensed broadcasters were having their services interrupted by “pirates”. To further complicate the picture, a major broadcaster told us that they would expect the NCSRCI to take action to stop interference from “pirates.”

The dispersion of power, characteristic for the Ukrainian media governance system, would be welcome if it prevented concentration of power, but its main result is blurred responsibilities and ineffectiveness of the involved bodies. The high number of bodies participating in regulation of media does not indicate a strictly and effectively regulated environment, but rather an over-regulated one, where the responsibility can be easily shuffled from one body to another and even the sincere regulatory efforts rarely reach the objectives due to legal inconsistencies, ambiguities and loopholes. Additionally, this creates less transparency and legal certainty for the subjects of the regulations, the broadcasting

market players, and more opportunities for arbitrariness and corruption on the side of the state bodies involved in regulation.

RECOMMENDATIONS

1. A single Ministry or Ministerial committee should be given overarching responsibility for proposing policy on audiovisual media.
2. A clear division of responsibilities and powers among different institutions should be set, avoiding duplication and sharing.
3. Where possible and reasonable, bodies addressing the same sector on the same level should merge into a single body to prevent overlapping, increase efficiency, and reduce administrative burdens.
4. The outdated, dysfunctional and conflicting legal institutes should be abandoned to make room for a less prescriptive, more flexible and targeted, risk- and evidence based regulation.
5. Revise the law so as to allow the National Council to perform its regulatory remit, fully, effectively and independent, including a clear mandate to issue warnings and financial penalties where appropriate.
6. Develop a national policy for promotion of media literacy across all segments of society with the goal of building the capacities for active, critical and creative use of media and raising the awareness of viewers and listeners regarding their media rights and safe use of media services.
7. Support the self-regulatory initiatives, either as a complement to the statutory regulation or its replacement in the areas where justified and aligned with the public policy objectives, provided, however, that the regulator retains full backstop powers for cases where self-regulation fails.

2. National Television and Radio Broadcasting Council of Ukraine

This analysis is based on the version of the Law of Ukraine on The National Television and Radio Broadcasting Council of Ukraine (The *Vidomosti Verkhovnoi Rady* (VVR), 1997, No. 48, p. 296 as amended) and follows on from the independent audit of the National Council undertaken by one of the authors through the Open Society Foundations (OSF) in October 2015.¹⁴

¹⁴ Kersevan Smokvina, T. and A. Krajewski. 2015. The Audit of the National Council of Ukraine for Television and Radiobroadcasting. Unpublished document.

The chapter provides analysis of the regulatory environment and comments on the law. It consists of three parts:

1. Principles and best international practice which should be considered and applied to the creation and operation of a broadcasting regulatory authority;
2. General assessment, containing general recommendations as regards the present law;
3. Detailed comments on particular articles of the law.

2.1. Setting up an independent regulator

It is accepted best practice throughout the world that as an independent broadcasting industry develops, so too must an independent regulatory system to licence and oversee this industry. The development of democracy requires the availability of a variety of sources of information and opinion so that the population can make informed decisions at times of elections. Throughout the world, television and radio are now the main sources of news and information. To enable proper debate for the proper operation of democracy there needs to be a plurality of service providers to enable access of viewers and listeners to a wide range of sources of news and information.

If decisions on who shall hold a broadcast licence are left as the preserve of government, there is unlikely to be – or to be seen to be – a fair, equitable range of service provision. Indeed in many countries where the government (or a government controlled regulator) determines new licences, those broadcasters – unsurprisingly – tend overtly to support the government. While this might be of superficial attraction to governments, it undermines the democratic process and – if there is a change of government – can lead to agitation and unrest.

Proper delegation of responsibilities to an independent regulatory body set up by statute not only creates faith in the fairness of the licensing process, but also removes governments from the potential political turmoil which can be associated with the grant of licences. There are clear benefits of releasing broadcasting from executive control, but still subject to clear and proportionate legislative constraint.

These principles were adopted by the Committee of Ministers in Recommendation 23(2000) wherein Member States of the Council of Europe were asked to guarantee genuine independence for their broadcasting regulatory authorities.

2.1.1. Creation and Remit

The first matters to decide are the scope of broadcasting regulation and those issues which will remain the preserve of the government, and those which will be the responsibility of the independent regulator.

It is common for governments to retain Ministerial responsibility for broadcast frequency planning and allocation, within ITU and regional agreements, often within a single government department which manages all spectrum. However, increasingly, ‘converged’ regulators are being created which although typically combine broadcasting with telecommunications, also include spectrum management.

Nonetheless, the reality is that many governments are reluctant fully to delegate responsibility for spectrum management to an independent body. After all, spectrum is a valuable public resource, and has to be managed carefully. Conflicts may well arise between a government’s need for, say, broadcast radio spectrum to be reserved for use by the military, or emergency services, and the desires of a growing commercial radio industry. And other balancing acts will have to be made: it may become necessary to weight the ‘value’ of spectrum used for public service broadcasting purposes against the monetary benefits to the Exchequer of selling spectrum for commercial purposes. So it is reasonable for governments to wish to retain control of spectrum management.

However, what can happen as a result of tight government retention of control is a conflict between the broadcasting regulator and the spectrum manager. If each and every time the broadcasting regulator wishes to award a broadcast licence they, or the prospective licensee, must get consent from the spectrum manager, this can in effect give the (government) spectrum department ultimate control on who can hold a broadcast licence. There are various ways to avoid this. First, the award of any separate spectrum licence should be *automatic*, if a broadcasting licence has been granted, subject only to clear technical considerations. There should be no discretion given to the spectrum manager which could undermine the broadcasting licensing procedure. Second, the decisions on *where* licences will be provided should be left to the broadcasting regulator. This does not necessarily mean that the broadcasting regulator should have in-house expertise to undertake frequency planning; this can be done by the spectrum manager. However it is the broadcasting regulator who is best placed to decide which parts of the country should be served by a radio or television service, subject only to technical frequency constraints. And this leads to the third mechanism for ensuring a proper separation of duties between the broadcasting regulator and the spectrum manager: the two bodies must develop a good working relationship. This may sound axiomatic, but all too often there is political in-fighting and competition between the two bodies. It is worthwhile for a full Memorandum of Understanding, or other template for a working relationship, to be drawn up and to be given approval at relevant Ministerial level.

Beyond the planning and management of spectrum, it is also common for governments to retain certain powers in relation to competition issues, or at least to make them the preserve of a specialist competition regulator, rather than a dedicated broadcasting regulator. Where there are two regulatory bodies with concurrent responsibilities for

competition matters, they must be clear where the duties of each begin and end. Where competition issues arise relating to the broadcasting industry, it is sensible for the relevant competition regulator to seek advice – or at least background information and comment – from the broadcasting regulator. The sectoral regulator is likely to have a more expert understanding of the broadcasting industry than a generally focussed competition body.

Broadcasting-related intellectual property issues are sometimes the preserve of a broadcasting regulator, although more often than not, countries leave disputes over defamation, copyright, trademarks, etc. to the general application of law. Intellectual property matters can be very complex legally, and it is unlikely to be cost-effective for a broadcasting regulator to develop and retain the necessary in-house expertise to deal with disputes. However, it is reasonable for the broadcasting regulator to take account of court judgements against a licensee – be they over intellectual property disputes or serious contractual matters – when assessing whether the licensee should be considered for an extension or renewal of its licence.

Other than these issues, the dedicated broadcasting regulator is normally tasked with choosing who will be entitled to a broadcast licence, applying the licensing regime, and ensuring that licensees comply with content requirements. It is best practice for these matters, at least at the highest levels, to be enshrined in statute, although detailed standards are often left to secondary legislation or Codes and Guidelines to be issued by the regulator.

The clear advantage of having these matters set out in statute is to provide clarity, not only to the industry, but also to the general public, who will know what to expect with a degree of certainty.

2.1.2. Appointment and termination

Another key matter which – to comply with best practice – must be set out in legislation is the manner in which members of the regulatory authority are to be appointed, and the terms of their appointment, in such a way as to safeguard their independence, in particular from political forces and economic interests.

There is no ‘right’ way to go about the appointment of members to a regulatory authority. However, what should be avoided is an appointments process which is based on political favour, or left solely to Presidential, Ministerial or Governmental discretion. There are many different models to choose from, all intended to ensure the creation of a politically balanced, independent board.

In each country, careful consideration has to be given as to the mode of appointment – what process will deliver the best group of members, who will be able to act independently, and who will have the trust and respect of the industry, the general public, and politicians?

What helps in this process is setting a clear job specification: what set of skills and experience is needed on the authority? Selecting the right people not only ensures the authority is equipped to do its job, but avoids accusations of ‘jobs for the boys’. Also, membership of the regulatory authority ought generally to reflect – or be representative of – the composition of the nation in terms of gender, ethnic make-up, religious orientation, etc.

However, a word of caution: whilst authority members should be representative of the general public, they should not be appointed to *represent* specific sectors or groups. Each member must be capable of considering the balance of public interest when making decisions, and not act according to party or other sectoral lines. For example, a female member, while being in a position to consider what women’s positions might be on a particular matter, should not be appointed to argue the case for women as against men.

The process of appointment should be as transparent as possible, in order to avoid any accusation of bias or political favouritism. Regulating broadcasting should be treated like any other job: it is vital to be clear from the outset what criteria a post-holder should have before making any appointment. Having a ‘job description’ will not only make the appointments process easier and more transparent, but also help to ensure that the people who are appointed are suited to do the job.

Rules should also be defined to protect the authority members from interference from political or economic forces. It is fairly axiomatic that members (and their close family) should not hold political offices, or have any financial interests in any part of the sector they will be regulating. Some countries believe that members should not be permitted to take any on other work or have any other earned income during their tenure on the authority, in order to protect them from potential monetary influence. This clearly depends, though, on the size of the job to be done; if the job of the member is not full-time, then other safeguards need to be put in place to ensure that no conflicts of interest arise.

As well as defining the terms of appointment, the terms of dismissal should also be set out in statute to avoid an irate government using the threat of dismissal as a political lever. Dismissal should only be possible in limited circumstances, namely physical or mental incapacity, regular non-attendance, insolvency or bankruptcy, conviction of a serious criminal offence, or clearly breaking the rules of appointment (for example by not declaring a conflict of interest).

2.1.3. Funding

Another vital element to ensuring independence is providing a secure means of funding of the regulatory authority. In order to avoid government authorities applying political pressure on the regulator through funding mechanisms, arrangements for funding should be specified in law in accordance with a clearly defined plan, and with reference to a transparent budgeting process.

Internationally, the accepted best method for arranging funding of the broadcasting regulator is by having the regulator’s costs paid by the industry it regulates through licence and other fees. However, this will only work in countries where the broadcasting industry is sufficiently large and profitable to be able to afford to pay for its regulator. In countries with a small or immature broadcasting market, at least a proportion of the costs of regulation must be met from the public budget.

Especially where funding is, at least in part, directly from central state budgets, care must be taken to ensure funding is safeguarded against actual or potential political pressure. It is strongly advisable to set out in the founding statute of the regulatory authority how the annual budget of the regulator is to be assessed and approved.

2.1.4. Accountability

But independence from government requires clear mechanisms whereby the regulator can demonstrate accountability for its actions, and to justify its receipt of public funds. This can include a requirement in law for the regulator to publish its annual report and accounts, and a means by which the authority must account for itself to Parliament – often by means of the Chairman or the whole Board attending a special meeting or committee of Parliament to answer questions. This should not be taken as an opportunity for political pressure to be applied, but to ensure that the authority is managing itself properly with due efficiency and value for money.

Another means of demonstrating public accountability can be for the regulator’s meetings to be held in public, and/or for minutes of its meetings to be published. A variation on this theme is for certain significant matters – for example, licensing decisions – to be heard at public meetings. Clearly any public communication of the regulator’s affairs must have due regard to matters of commercial confidentiality, for example it may be inappropriate for full financial details of licence applicants’ companies to be revealed in public.

So, the duties and powers of the broadcasting regulatory authority, as well as the ways of making them accountable, the procedures for the appointment of members, the criteria for the termination of their appointment, and the means of their funding should all be clearly defined in by law.

2.2. General Assessment

2.2.1. Creation of an Independent Regulator: its remit and powers

The National Council has been set up by a special law as a state authority, with appointments made 4 by the Verkhovna Rada and 4 by the President of Ukraine. In the

Constitution of Ukraine¹⁵ the Council is mentioned twice, but only in relation with the powers of the Ukrainian Parliament and the President of Ukraine in appointment of the Council’s members.

The independence of the National Council is recognized by the law, i.e. listed among the principles that should guide the Council's work, but the ability to effectively perform its regulatory remit (one of the main indicators of independence of a NRA) is hardly there. The Council’s responsibility is often limited to oversight without the power of enforcement, either because of the lack of effective sanctions or because the procedures require decisions of other bodies. As it is true that punitive mechanisms are not at the forefront of modern regulation and the regulators increasingly put the emphasis on achieving compliance in a conciliatory way, so it is true that the regulators mostly uphold the ability to use punitive measures when needed.¹⁶ In case of the National Council, their inability to impose fines is seriously affecting the regulator’s power to effectively enforce compliance with the sector policy and law.

Among the areas traditionally in the domain of regulation, three of them stand out from the rest in terms of their social and political relevance combined with the lack of effective mechanisms of compliance: broadcasting during election campaigns, protection of minors, and advertising standards. In all these areas the National Council performs only a monitoring function without the possibility of sanctioning the identified violations or enforcing the rules. The council submits its findings to other, mostly governmental bodies and leave them to decide whether to apply any measure or not.

The execution of the Council’s decisions towards the licensees and in policymaking often depends on other institutions. The withdrawal of a broadcasting licence needs to be approved by the court and the Council’s regulatory acts require the approval of up to five bodies on the ministerial level. Since the National Council is not an organ of executive power, but has a special status, the obligation of registration of the National Council’s acts with the Ministry of Justice unnecessarily prolongs the process but also creates an opportunity for its obstruction. Since the legal framework empowered the Council to elaborate mechanisms for the exercise of its powers, it should also ensure a reasonable duration of the procedures and prevent the chance for governmental interference. With this arrangement it usually takes more than 3 months for the regulations of the Council to be adopted, in some cases even much more, especially in case of regulations facing opposition from the industry – as was the case of the fine methodology, which was waiting for the approval of the Cabinet of Ministers from 2006 until mid-2015, was then approved in a modified version and cancelled after only a few months of being in force.

¹⁵ Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on June 28, 1996, amended by the Law № 2952-VI dated 01. 02. 2011 and the Law № 586-VII dated 19. 09. 2013;<http://www.legislationline.org/documents/section/constitutions/country/52>, accessed on August 8, 2016.

¹⁶ See Machet, 2016: Compliance and Enforcement Policies, Strategies and Methods of NRAs put to test Background Comparative Document, Plenary 2, 43rd EPRA Meeting, 25-27 May 2016, http://epra3-production.s3.amazonaws.com/attachments/files/2858/original/BCN_Compliance_enforcement_final.pdf?1463756793, accessed on August 8, 2016.

In terms of sanctions, the Council can apply a warning, fines, and file case to the court for annulment of broadcasting licenses. The latter is not possible without the previous application of all less serious sanctions envisaged by law and therefore – according to a court decision – cannot be implemented until the fines regime is approved. The Council itself has no power to suspend licenses. Suspension is a serious sanction and should only be used in circumstances where there is an on-going breach that cannot be remedied quickly (but can, given the time to do so). Although rarely used, it is nonetheless a powerful tool for a regulator and should be included within the National Council’s armoury. Throughout all these years the regulator relies only on warnings and a rarely used possibility of non-renewal of the license in case of persistent breaches. A serious shortcoming of this approach is that there is no difference in applied measures in relation to the severity of the infringements.

This may partly change if the Parliament adopts the amendment to the Broadcasting Law regarding sanctions of the National Council, which was endorsed in the first reading on September 8, 2016. The draft law proposes to include the regulations on fines and violations in the law "On Television and Radio Broadcasting" which is a better solution than the Resolution of the Cabinet of Ministers. The envisaged fines are 5%, 10% and 25% of the licence fee. The largest fine (25%) shall be set for the severest violations, regardless of whether the "warning" sanction was applied before. Smaller fines (10% and 5%) shall be imposed for less serious violations if infringement continues after a warning. The scheme of fines proposes the highest sanction for breaches from the domain of speech (calls to violent overthrow of the constitutional system of Ukraine or launch of wars and aggression, incitement to hatred, and propaganda), while for violations of licence conditions the lowest sanction is envisaged. The list of violations covered by the suggested regime misses those related to advertising rules and election broadcasts. Furthermore, given the level of fees even 25% of the licence fee is not a very high sanction. Therefore, while the introduction of a fine scheme is a long-awaited improvement, neither the figures alone nor the included infringements may be enough to deter broadcasters who believe they have more to gain by breaching the rules.

In the absence of standards or provisions regulating the procedure of coordination of the Council with the Government, the chances of the Council to succeed with their proposals of the measures, which are essential for implementation of their competences, are fully left to the will of the state executive power. Judiciary authorities represent another channel of potential control or obstruction of the exercise of the Council powers, as they can overturn the Council decisions. This instrument is normally a guarantee of rule of law, however, in circumstances where state institutions are influenced and independence of judiciary questionable, it can be also used against the regulator, as a means preventing execution of its decisions.

Monitoring duties performed by the National Council for other government bodies, such as the Ministry of Economy of Ukraine – State Inspection on Consumer Rights Protection, and the Ministry of Culture – the Ukrainian State Film Agency, put a significant burden on the

National Council, while also leaving it without the remedies for the detected anomalies. The solution could be either to complement their monitoring competencies with enforcement measures or to delegate both dimensions to another body. For instance, while we would find it reasonable to transfer the sanctioning powers for violations of law on advertising directly to the National Council, we would suggest removing their obligation of monitoring of public rental license by broadcasters, as the Council should not be an agent of property rights of film owner or distributor. However, monitoring of applying visual labels signalling the recommended age of film audience should be continued within the National Council and be further upgraded into a comprehensive system of protection of minors in line with the harmonised European framework and best practices.

RECOMMENDATIONS

1. To take the opportunity of a review of the Law to reconsider how to constitute the National Council as an independent regulator. This will necessitate proposing and agreeing a new method of appointment of members which avoids any political involvement in the appointment process to ensure that members are not representing political interests.
2. The funding arrangements for the National Council should be reviewed to give it some autonomy from political pressure. In particular, licence-related fees from broadcasters should be paid directly to the National Council and go towards the direct costs of regulation. This is what is proposed for the new Telecommunications regulatory authority and should be replicated for the National Council. It is, however, reasonable for other (non-regulatory) costs such as the creation of a national archive to be funded directly from the State budget. However, in order to avoid direct political pressure being applied through the annual budget-setting process, consideration should be given to setting the budget on, say, a tri-annual basis.
3. Remove the obstacles to effective enforcement of broadcasting regulation and support the creation of an efficient sanctioning system, allowing for a more flexible, gradual, and proportionate response to infringements.
4. Revise the law so as to allow that the regulatory decisions regarding the regulated entities are treated as delivered, if they stay over a defined period of time (e.g. 2 weeks) at the post office and the addressee was properly noted about them.
5. The bureaucratic procedures relating to regulatory acts by the National Council are far more onerous than elsewhere in Europe. In particular, the requirement for the Ministry of Justice to register the Council’s regulatory acts provides a clear opportunity for state/political intervention in the activities and role of the National Council. These provisions should be comprehensively overhauled to reduce the opportunity for delay and interference with the Council’s exercise of its legal duties.

2.2.2. Members of the National Council: appointment and termination

The Constitution of Ukraine defines the prerogatives of the Ukrainian Parliament (Verkhovna Rada) in appointing one-half of the composition of the Council, while the President of Ukraine appoints the other half of members. Correspondingly, the Law on National Council of Ukraine on Television and Radio broadcasting determines that the National Council consists of eight members and that it is plenipotentiary when at least six of them are appointed. The National Council is currently composed of seven members. The fourth seat from the President share remains unoccupied and this is not the first time the Council acts without a full cast. From one angle, this is a good solution, preventing the deadlock in the case of incapacity of adoption of decision due to the even number of members. On the other hand, this arrangement affects the chances of achieving quorum during sessions, and can represent a mechanism of pressure.

The right to propose candidates to be Council members belongs to deputy/parliamentary factions in Verkhovna Rada of Ukraine and/or associations of citizens in the media industry. When considering the presentations of the candidates, the Verkhovna Rada takes into account the conclusions and recommendations prepared by a competent parliamentary committee. For voting, which takes place on every candidate separately, a normal majority of 226 deputies' votes is required.

The procedure for the members who are appointed by the President of Ukraine is much less elaborated. The President appoints his share of members by a decree and also sets up the Council's statute by decree.

The National Council's Chairman, the First Deputy Chairman, Vice Chairman and Responsible Secretary are elected by members of the council in a secret vote. The Chairman and the First deputy cannot be nominated by the same body.

The current method of members' appointment inevitably leads to appointments being made on the basis of political affiliations, with the presumption being that members of the National Council will take decisions on political grounds. Not only is this contrary to international standards of best practice, but it will lead to very real practical difficulties: public outcries at the politicisation of the licensing process, a lack of impartiality of the coverage of news and political events, and – in the case of a change of government – irreconcilable conflicts with the National Council itself. Indeed, it has been the practice for each new government to review the membership of the National Council and to replace members with those of its own choosing. This completely undermines any efforts made by the National Council to establish its independence as best it can.

Under the current arrangements, all the members of the National Council are appointed at the same time, with their terms running concurrently. This means that they – if no one is dismissed earlier – will all be leaving at the same time, with no on-going experience on the Council.

Renewing the entire board is not good practice as expertise will be lost, leading to inconsistent regulation. Furthermore, the current method of appointment of members is highly politicised. Should there be a change in government, there are inevitable clashes between the new government and the National Council with mass dismissals and new appointments by the new Parliament and President. There should be no general right for members of the National Council to be dismissed with a change in either the Parliament or the President, or on a review of the National Council’s annual report; the length of terms of appointment should be inviolate and members should only be dismissed because they are no longer capable of acting.¹⁷

Appointees to the National Council should not be politically partisan, but should be appointed entirely on merit. The legislation should state explicitly that members do not represent any specific interests but are appointed to act as they personally consider best.

Having said that, consideration should be given to ensuring that the membership of the National Council is representative of the general population of the Ukraine. This would involve ensuring that women, and members of significant minority groups are appointed, coming from a representative geographical spread across Ukraine.

In order to ensure that members are free from economic pressures, as well as political ones, provision should be made to ensure there are no conflicts of interests regarding close family members. This means that they, too, must divest themselves of any financial interest in a broadcasting company.

RECOMMENDATIONS

1. Members’ appointments and retirements should not be concurrent. This would involve staggering the length of the terms of appointment for the initial group of members.
2. Members should not be able to be dismissed by the Parliament or President before the expiry of their term unless the Member is no longer fit to act as a result of incapacity, arrest, or irreconcilable conflicts of interest.
3. The law should make explicit that members of the National Council do not represent any political or other interest but are appointed on their own merit and to act as they consider best under the terms of the legislation.

¹⁷ See further discussion on the grounds for early termination of the term of office of the Council Members in the section 3.2.4. Accountability.

4. Membership should be widely drawn to ensure it is truly representative of the Ukraine, including women, minority groups and geographical spread.
5. The provision relating to members’ conflicts of interest should be extended to include close family.
6. The quorum should be reduced to five (from six), with decisions taken by a majority.

3.2.3. Funding, staffing and organisation

The National Council is financed entirely from the state budget. Its funding is seemingly stable; the Council has been getting yearly around 20 million UAH in the last few years and 28,5 million UAH for 2016/2017, but due to a significant devaluation of the currency and increased costs the funds are big enough only to cover the salaries of the employees and the basic operation costs. The available funds do not allow any investments in research of the regulated markets, training of the staff or updating technical equipment. Out of the usual five budget programs only "implementation of control in the field television and radio broadcasting" is currently being implemented. The salaries of members of the Council and the staff are low. The average monthly income is \$150, which is 5-15 times lower than for comparable positions in the industry, which represents a risk in terms of professional quality of personnel and in terms of its vulnerability to corruption.

The best funding arrangement to safeguard the independence of the Ukrainian regulatory authority would be a balanced combination of self-funding through industry fees and the public resources. Additional financing by the industry fees would allow bigger independence in setting the work program and allocating more resources on the much needed research and other activities supporting the evidence based approach in policy and decision making processes. Since the industry revenues are not stable enough, as they depend on the condition of a small media market (in terms of advertising budget), they should not replace the state funding, but complement it. The industry fees should be fair, reasonable, transparent, proportionate, and practical to implement, and should not represent an excessive burden to the industry. Independent audits and regular reporting system to relevant bodies should ensure transparency.

The National Council has so far been able to create and execute its own recruitment policy independently. The employees of the Council are a part of the civil service of different ranks, which is quite common, although not the best practice in terms of guaranteeing the regulator’s independence and ability to offer the staff comparable working conditions as in the industry they regulate. The current Law on Civil Service is being proposed to be amended in such a way as to remove from the National Council the power to appoint and remove the Chief Administrative Officer. This would be an unacceptable infringement on the independence of the National Council and should be strongly resisted.

The number of employees (230) places the National Council among the better-staffed broadcasting regulators in Europe. Given the comparable remit and competences of the regulators, the current human resources of the Council – if assessed from the perspective of headcount – should therefore suffice for effective implementation of the delegated tasks. However, as regards the organizational structure and distribution of staff by divisions, a disproportionate number of people is allocated to supporting operations, processing of documents and preparation of meetings. Another large group of staff, representing 30 percent of the regulator’s human resources, are the National Representatives and members of their local offices spread across the country.

The first imbalance can be solved by informatisation of documents handling and optimization of work processes. Reduction of human input spent on supporting operations would make room for a different organisation with more resources invested in the core regulatory activities. This should also lead to reduction of administrative burdens of the regulated entities.

Much of the National Council’s monitoring and compliance work is delegated to the Representatives. It is highly unusual to see this degree of delegation and decentralisation and this can hardly be explained by the number of broadcasters present in different regions. Together they exceed 1500, but the number of active broadcasters is lower, and with an adequate technical solution a centralised access to the broadcasts for the oversight purposes would be possible. Delegating locally increases the risk of “regulatory capture” (inappropriate closeness between the regulator and the industry) and corruption, and makes it difficult, if not almost impossible to ensure consistency and a fair application of rules.

Whilst it may be reasonable to maintain a (small) number of regional offices undertaking a liaison and communication role with licensees, all regulatory functions should be centralised. With technical upgrade of monitoring system and optimization of supervision proceedings, the National Council would ensure a more uniform implementation of regulations, reduce the potential risk of unequal treatment of broadcasters in relation with the area in which they operate, and decrease the costs.

RECOMMENDATIONS

1. Reduce the number of Representatives and limit their role to a liaison and communications function. All regulatory functions (monitoring and managing compliance) should be centralised to ensure consistency and fairness.
2. The current Law on Civil Service is being proposed to be amended in such a way as to remove from the National Council the power to appoint and remove the Chief Administrative Officer. This would be an unacceptable infringement on the independence of the National Council and should be strongly resisted.

3. The Council should seek to optimize its work processes in order to reduce the human resources invested in supporting operations and make room for a different organisation with more resources dedicated to the core regulatory activities.
4. Revise the law so as to grant the Council administrative and financial autonomy.
5. Consider introduction of a mixed model of financing.

3.2.4. Accountability

The law requires that the meetings of the Council are open to public. The stakeholders can contribute to discussion on topics from the meeting agenda, which is usually available on the Council's website a week before the meeting. The draft decisions and summaries of the documents related to the agenda are also available in advance. The agenda usually consists of 50-60 issues divided into three main clusters: licensing, monitoring and internal issues. The adopted decisions have to be published the day after the meeting and the meeting minutes in five days. The frequency of the meetings is one per week.

According to the law all acts of National council, which are not of regulatory character, must be made public on the official web site of National Council not later than a next day after their acceptance. Another means created for increasing the Council's transparency is the Public Council of the National Council, composed of media experts, lawyers, academics and journalists. And the Law on access to public information offers other instruments supporting transparency of the Council's operations.

The law further stipulates that the National council publishes its annual report on the activity by the 1st of February and sends it to the Verkhovna Rada and President of Ukraine. The law is specific about what the yearly report has to cover: a plan of development of the national television and radio information space, its implementation, changes and future aims; report on the granted licenses and their terms of them; telecasts; advertisement and sponsoring issues; foreign capital in broadcasting organizations; founders (proprietors) of broadcasting organizations, estimation of the state of competition and level of monopolization of TV-radio-information market; and conduct of broadcasters during elections and referendums.

As we have seen, the term of the National Council membership is set to five years, with possibility of one repeated appointment. There are, though, several chances for the early dismissal, one of them being the annual consideration of the annual report on its activity to Verkhovna Rada of Ukraine and President of Ukraine.

Either of them can adopt a decision on an early termination of a member, a few members or the whole Council on the grounds of dissatisfaction with the annual report. Other options of

earlier termination of members’ mandate include more objective grounds, such as member’s resignation, reaching the retirement age, termination of citizenship of Ukraine or permanently living abroad, being sentenced by court, sickness confirmed by court, absence in Council meetings for more than two months, and death. Additional clause recalls holding other positions in public and non-state organs, organizations, establishments and enterprises. The decision on early termination of the Council’s membership under these conditions has to be adopted by the Chairman of the Council or three members and may be challenged in court. The Verkhovna Rada or the President appoints new members of the Council in two months after termination of membership of previous members.

The Article 16 of the law on the National Council, allowing the President and Verkhovna Rada to individually dismiss members of the National Council if in the light of the annual report their work has been found unsatisfactory, significantly lowers their independence from nominating bodies, and should therefore be removed or revised.

RECOMMENDATION

Revise the law so as to prevent the risk of politically motivated early termination of the term of office of the Council Members.

2.3. Detailed Comments on the law

Preamble

The Council is referred to clearly as a *State* authority. As outlined above, regulatory bodies which have responsibility for broadcasting should be constituted as *independent* of the State and of political influence and interference.

Chapter I

GENERAL PROVISIONS

Article 1. The Status of the National Council

No comment

Article 2. Legislation of Ukraine on the National Council

As stated above, the fact that there are a multitude of laws which apply leads to confusion and inconsistency. In particular, this law on the National Council should be merged with the TV and Radio Broadcasting Law.

Article 3. Principles of the National Council’s Activity

The principles of freedom of expression and access to information should be listed as paramount.

The National Council is directed to be based on the principle of independence, but by the methods of funding and of appointment of members to the Council makes independence extremely difficult if not impossible.

Chapter II

COMPOSITION OF THE NATIONAL COUNCIL AND PROCEDURE FOR ITS FORMATION

Article 4. Composition of the National Council

In order for Ukraine to have an independent regulator in line with European standards, a means of appointment will need to be decided which removes the process from political control and ensures that members are appointed on merit, and not with a view to their political allegiances.

With eight members (and the chairman not having a deciding vote), it is not clear how a deadlock would be dealt with.

If all members are appointed at the same time, for the same length of time, then all members will be replaced together. It would be better to have staggered terms of office to ensure there is consistency and experience on the Council at all times.

Article 5. Appointment of Members by the Verkhovna Rada of Ukraine

The Verkhovna Rada should have no right to terminate the appointment of “their” appointed members as this seriously undermines the independence of the National Council.

As the date of termination of the five-year term is well known in advance, there is no reason for there to be any hiatus between one member leaving and a new one starting; advertisements for new members could be made a few months before the termination date of a retiring member

The current system for appointment by the Parliament allows for nominations through national NGOs and Parliamentary factions. These are considered by the Parliamentary Committee on Freedom of Speech and Information Policy who provides its recommendations to the Parliament. It is not known whether these recommendations tend to be followed.

The Verkhovna Rada then votes giving priority ratings to the candidates. Any individual who gets votes from the majority is elected. In theory this could be a method which results in a range of good appointments free of political bias, but the system could fall apart if there is a clear majority faction in Parliament. Consideration should be given to undertaking a thorough review of this process and how the results work in practice, with the possibility of changing the appointments process to avoid any actual bias.

Article 6. Appointment of Members by the President of Ukraine

Under the Constitution of Ukraine, the President has the right to make appointments to the National Council and this right shall continue unless and until the Constitution is changed.

However, it is reasonable for a process to be put in place which selects the best candidates for the President to choose from. The selection process should be undertaken on the basis of clear, transparent criteria and should avoid the nomination of individuals on political grounds.

As the date of termination of the five-year term is well known in advance, there is no reason for there to be any hiatus between one member leaving and a new one starting.

Article 7. A National Council Member

Para. 1

While the experience and background sought is good, consideration should be given to requiring membership to include women, individuals from the main minority groups in the Ukraine, and from across the geographical mass of the Ukraine. Additionally, individuals who are serving politicians (either at national or local level) should be expressly excluded from eligibility for membership to the Council.

Para. 3 The intention appears for Council members to be employed full-time and not to be engaged in other employment. Therefore, exclusions for scientific, teaching and creative activities should be limited to very part-time ones only.

The law specifically gives no exemption to Council members working in TV and radio organisations, yet at least one member of the National Council regularly appears on television as a broadcaster. Any individually agreed exemption should be formally documented in the Council’s minutes, with full reasoning given, and provisions for excluding any such active member from discussions or decisions which could affect the television company for which the member works.

Although financial interests of Council members in broadcasting organisations is addressed, there is no provision to address interests of close family members. It would be all too easy for a member to transfer their shares in a broadcasting company into their wife’s name, for example. While this would comply with the letter of the law, it would certainly not comply with the spirit.

Article 8. Pre-term Termination of the Authority of a National Council Member

Neither the Verkhovna Rada nor the President should have the right to terminate a member’s appointment “based on the results of the examination of the report of the National Council” as this allows for political manipulation of the Council. Paragraph 9 of Article 8 should be deleted.

Bankruptcy should be added to the list of reasons for termination when this institute is defined¹⁸ as any member who has been declared bankrupt has demonstrated an inability to deal with financial affairs and is open to corruption.

¹⁸ Draft law was registered in 2015 http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56011

Article 9. The National Council Chairman

It is noted that, unusually, the Chairman does not have a casting vote in the event of a deadlock vote of 4-4. If this has been a problem in practice, consideration could be given to giving this extra power to the Chairman.

Article 10. First Deputy, Deputy Chairman, Executive Secretary of the National Council

There seem to be a number of checks and balances included in the system of appointments and operation of these posts, which suggests that the operation of the National Council may be very politically influenced.

Article 11. National Council Representatives in the Autonomous Republic of Crimea, Regions, Cities of Kyiv and Sevastopol

Much of the National Council’s monitoring and compliance work is delegated to the Representatives, and the Representatives’ offices encompass a large proportion of the Council’s staff. It is strongly recommended that these tasks are centralised in order to ensure consistency and a fair application of rules. Furthermore, delegating locally increases the risk of “regulatory capture” (inappropriate closeness between the regulator and the industry) and corruption.

It is highly unusual to see this degree of delegation and decentralisation. Whilst it may be reasonable to maintain a (small) number of regional offices undertaking a liaison and communication role with licensees, all regulatory functions should be centralised.

Article 12. The National Council’s Apparatus

The current Law on Civil Service is being proposed to be amended in such a way as to remove from the National Council the power to appoint and remove the Chief Administrative Officer. This would be an unacceptable infringement on the independence of the National Council and should be strongly resisted.

Furthermore, the wording does not seem to provide for a clear definition of the status of the Members of the National Council. To guarantee their independence the members of the national regulatory authority should not be civil servants. There are a number of Laws in Ukraine which apply to all civil servants (including the Law on Civil Servants) and which can undermine the independence of the National Council. As is the case in a number of other European countries, certain terms of service may apply to members of the National Council as they apply to civil servants (e.g. pay or pension rights), but a distinction should be made about their status to ensure that National Council members are not themselves servants of the state.

Chapter III

AUTHORITY OF THE NATIONAL COUNCIL

Article 13. Supervisory Authority of the National Council

Part of the National Council’s responsibilities relate to supervision of compliance with relevant legislation on advertising and sponsorship. It would be helpful if the provisions

were all set out in the same broadcasting law. Similarly, the Council has responsibility for overseeing compliance with legislation regarding protection of public morals. The high-level standards which apply to television and radio content should be contained in the audiovisual media law, not in a separate piece of legislation. As well as allowing for broadcasting-specific concerns to be addressed, it makes it easier for broadcasters to be fully aware of their responsibilities if their legal obligations are all in one piece of legislation.

The National Council has responsibility for supervising compliance in a number of areas, but is not empowered to take any action to sanction for lack of compliance:

- Advertising and sponsorship (a report on which is included in the Council’s annual report to Parliament)
- Election broadcasts (a report on which must be published by the Council after an election)
- Technical quality
- Cinematography
- Protection of public morals.

As a result, the current National Council is reluctant to deal with issues on advertising, protection of minors, election broadcasting or fairness and balance in news. These are all fundamental matters of content regulation and it is insupportable that a regulator is not given sufficient authority and powers to deal effectively with content.

It is not clear what compliance is required of broadcasters in the sphere of cinematography. Again, any provisions should be set out in the broadcasting law. If the requirements refer to intellectual property rights, it might be sensible to review how this works in practice. It is generally the case that broadcasting regulators do not have the resources or expertise to deal with copyright issues, and that this is best left to the courts under the general law.

The sanctions which the National Council can apply should be set out clearly in this law.

Article 14. Regulatory Authority of the National Council

It is always vital for the broadcasting regulatory authority to have good working relations with the spectrum manager, as conflicts between these two bodies will lead to disputes over licensing and the allocation of frequencies. It might be worth reviewing how the relationship is working in practice and see whether the division of responsibilities needs to be further clarified in the law.

Similar considerations apply to the regulation of competition. It is not clear how the National Council and the Antimonopoly Committee are to manage overlapping responsibilities. Other than ensuring that licences are awarded in conformity with the ownership restrictions, it is not clear what else the National Council can do to “ensure or promote” competition or to “create conditions to prevent elimination, restriction or distortion of competition.”

Article 15. The National Council’s Authority with regard to Organisation and Prospects of Television and Radio Broadcasting

The law is not clear how the National Council is to participate in the development of state policy on broadcasting. Generally, best practice internationally is for the regulator to *implement* the policy, which is developed by the State. Separating policy making from implementation ensures that the regulator retains its independence and acts as an unbiased arbiter. It is, however, reasonable for the regulator to use its expertise to inform the government of the state of the broadcasting industry (as is in fact included in this Article) and to comment on the practicalities or otherwise of proposed policy.

In the case of Ukraine, there is no one overall section of government with responsibility for state policy on broadcasting; the role is shared between the Cabinet of Ministers, the Ministry for Information Policy, the Parliamentary Committee for Freedom of Speech and Information Policy, and the State Committee for Television and Radio Broadcasting. No body coordinates efforts emerging from these various actors. A single Ministry or Ministerial committee should be given overarching responsibility for proposing policy.

The fifth sub-paragraph of this Article refers to the technical design of multichannel networks. It is not clear how the National Council can do this without the cooperation of the various other state bodies responsible for spectrum allocation and management.

The penultimate sub-paragraph refers to the maintenance of recordings of output by broadcasters. There appear to be two purposes for this: to create a national archive, and for regulatory purposes. Details of requirements for the creation of an archive should be set out clearly – and separately – from those relating to regulatory purposes.

Article 16. Accountability of the National Council

Para. 5

The ability of the State to force the resignation of the entire National Council represents an unacceptable power of political intervention. The only reasons why any member of the Council (let alone the entire Council) should have their appointment terminated early are those set out in Article 8. This paragraph should be deleted.

Article 17. Acts of the National Council

The bureaucratic procedures relating to regulatory acts by the National Council are far more onerous than elsewhere in Europe. In particular, the requirement for the Ministry of Justice to register the Council’s regulatory acts provides a clear opportunity for state/political intervention in the activities and role of the National Council. These provisions should be comprehensively overhauled to reduce the opportunity for delay and interference with the Council’s exercise of its legal duties.

Article 18. Principles of Television and Radio Broadcasting Licensing

No comments.

Article 19. State Registration of Television and Radio Organisations and Programme Service Providers

There is no reason to register – or licence – programme service providers. Anyone should be entitled to make programmes under the principle of freedom of access. Responsibility for compliance with all relevant regulations and laws lies with the broadcaster, not the programme maker.

Article 20. State Archives of Television and Radio Broadcasting of Ukraine

Careful thought must be given to provisions relating to state archives. It costs a considerable amount of money for broadcasters to send tapes of all of their programmes for an archive; is it really desirable for all output to be retained? Perhaps only certain key programme strands (news, current affairs, documentaries, cultural programmes) bring value to an archive.

Article 21. Sanctions for Violations of Legislation on Television and Radio Broadcasting

No comment.

Article 22. Securing Rights of Television Viewers and Radio Listeners

Para. 2

It is not clear to what purpose the National Council is to put its research. Nor is it clear that any of the budget heads for funding in Article 25 cover research. Popularity of programmes is usually a matter for the broadcasters themselves, especially if they are commercially funded and need to demonstrate to advertisers that their services attract audiences.

Chapter IV

ORGANISATION OF ACTIVITY OF THE NATIONAL COUNCIL

Article 23. Rules of the National Council

No comments.

Article 24. Meetings of the National Council

Para. 2

As recommended above, decisions on whether or not content has breached the relevant standards should be centralised (and not undertaken at the level of the Representatives). These should be added to the list.

Para. 4

A quorum of six (out of eight) members is set, which seems extremely high, especially when (as now) only seven members are appointed. This should be reduced to five.

Para. 6

Again, in practice this might prove difficult to achieve and lead to a lack of decision-making due to deadlocks. Alternatives to consider would be that decisions are taken by the majority of those present, and of giving the Chairman a casting vote.

Article 25. Financial Provision of the National Council

Ukraine should be seeking full cost recovery of regulation. Therefore, the price paid by broadcasters for licensing and annual licence fees should accurately reflect the costs of the National Council in doing the licensing work and on-going compliance. If the fees are set by the Cabinet of Ministers, it should be done on the recommendation of the National Council.

The five budget programmes listed do not cover all of the National Council’s responsibilities (for example, research and the supervision of election broadcasting). Due to the difficult financial situation in the country, only one budget programme is currently being implemented. The license fees are directly feeding the state budget and their amount varies substantially over the years. Irrespective of the collected fees, the National Council is getting the same amount (covering just salaries) from the state budget. Since in practice difficulties have been found, this provision should be reviewed.

Setting a budget on an annual basis can lead to potential problems of political pressure and control, especially if a new government takes power that has not chosen the members of the National Council. Consideration should be given to allocating a budget in accordance with a future work plan, perhaps covering up to three years in advance.

Article 26. Seat of the National Council

No comments.

Chapter V

FINAL PROVISIONS

No comments.

3. State Committee for Television and Radio Broadcasting

The Decree by Cabinet of Ministers of Ukraine of 13 August 2014 On approval of the Regulations on the State Committee for Television and Radio Broadcasting of Ukraine describes the State Committee for Television and Radio Broadcasting (“the State Committee”) as the principal executive body for the formation and realisation of state policy for broadcasting, information and publishing. This analysis will concentrate on the Regulations on the State Committee insofar as they pertain to broadcasting, in line with Council of Europe published standards.

3.1. Audiovisual media policy and legislation

It must be noted again that it is usual in a European context for media policy to be a Ministerial responsibility whereas in Ukraine the responsibility is more dispersed. Note, for example, that the Council of Europe regularly holds a Conference for Ministers responsible for Media and information society. Similarly, they represent their country in the bodies and decision making processes of the Council of the European Union and their Ministries communicate with the European Commission and take part in the Contact Committee

established to monitor the implementation of the Audiovisual Media Services Directive and the developments in the sector. Ukraine does not have a Minister with this responsibility. Instead, both the State Committee and the National TV and Radio Broadcasting Council (“the Council”) have authority to participate in the development and implementation of state policy in the sphere of broadcasting.¹⁹ Furthermore, proposals for policy in the media sphere can be proposed through the Cabinet of Ministers, or legislation introduced directly by the Parliamentary Committee for Freedom of Speech and Information Policy (“the Parliamentary Committee”), by individual parliamentarians or by the President.

3.2. Information Security

A degree of overlap also exists directly between the State Committee and the Ministry for Information Policy. This newly formed Ministry has responsibility for “safeguarding the information sovereignty of Ukraine, in particular in terms of distribution of socially important information inside and outside Ukraine, as well as providing functioning of the state information resources.”²⁰ Article 4(3) of the Regulations gives the State Committee responsibility for elaborating “the due measures to prevent internal and external informational influence which presents a threat to the information security of the state, the nation and a person”. To further complicate the picture, the official Scope of the Activities of the Parliamentary Committee also includes “information and information security state policy.” Article 4(5) also gives the State Committee responsibility, in cooperation with other state bodies, the tasks of providing information security. It is unclear how the State Committee undertakes this task as the list of staff departments within the Committee do not appear to include technical operational staff.²¹

3.3. Audiovisual media independence

Various responsibilities of the State Committee conflict directly with Council of Europe principles requiring the independence of audiovisual media. This is because the State Committee is established as a central executive body; the Chairman of the State Committee and his/her two deputies are appointed by the Verkhovna Rada on the nomination of the Prime Minister.

The following articles are all examples of the responsibilities of State Committee which give it power to interfere with public service media in a way which deprives the media of independence. They are all remnants of Ukraine’s old Soviet-style state television and radio broadcasting system which are no longer applicable following the establishment of the National Public Television and Radio Company of Ukraine (“the NPTRCU”):

Article 4(6): developing proposals to improve the system of state administration of television and radio broadcasting

¹⁹ See Article 15 of the Law On the National Television and Radio Broadcasting Council of Ukraine.

²⁰ See <http://mip.gov.ua/en/content/pro-ministerstvo.html>

²¹ See http://comin.kmu.gov.ua/control/publish/article/main?art_id=98493&cat_id=98492

Article 4(11): promoting the development of national mass media

Article 4(17): promoting the establishment and activity of Public TV and Radio, implementing DTT and radio broadcasting.

Article 4(24): providing methodological support and coordinating the work of state TV and radio companies

Article 4(25): ensuring the implementation of digital technologies in state broadcasting companies

Article 4(26): monitoring the content of state broadcasting companies.

Article 4(27): proposals on establishing a network of foreign correspondents and news agencies for the state broadcaster.

Article 4(33): undertaking measures on state financial support of mass media.

Article 4(37): organizing the enterprises of its responsible institutions (including state broadcasters), adopts their statutes, and appoints and dismisses their executives.

Article 4(38): administering state property within its sphere of control (including state broadcasters).

Article 5(4) and (5): organizing financial planning, controls financial and material resources, and ensuring effective use of budget funds (of *inter alia* the state broadcaster).

In terms of the future, it may be reasonable to consider transferring some staff from the State Committee to the NPTRCU to share their financial and budgetary expertise.

3.4. Audiovisual media regulation

The following are regulatory roles that should belong solely to the National Television and Radiobroadcasting of Ukraine (“the National Council”), which has been established as the independent regulatory authority in the field of audiovisual media services:

Article 4(10): requires the State Committee to evaluate market development within broadcasting. There is no evidence that this is done, and if so, that it is shared with the National Council.

Article 4(14): guaranteeing the observance of the state language policy in broadcasting.

Article 4(15): (in cooperation with other state bodies) take measures to increase the quality of national television programs and protect society from any audiovisual content which threatens public morality.

3.5. Training

Article 4(16) requires the State Committee to provide professional development training courses to the workers of mass media. This should be the responsibility of the media companies (including the public media) themselves.

3.6. Technical standards

There are also overlaps on the technical side in relation to transmission standards and the introduction of digital television:

Article 4(18): ensuring the unity of measurements, metrological control and supervision.

Article 4(19): developing and submitting proposals regarding spectrum resource for broadcasting.

Article 4(20): participating in the development of state standards for digital TV and radio.

RECOMMENDATIONS

1. Responsibility for information security should rest solely with the newly formed Ministry for Information Policies, which was set up for that purpose. **Articles 4(3) and 4(5) of the Regulations should be deleted.**
2. All responsibilities in the audiovisual media sphere should be removed from the State Committee as soon as the joint stock company forming the NPTRCU is established. As a direct executive body of the state, the State Committee should not be appointed as the shareholder of the NPTRCU as the risks are too great that it will continue to exercise its historical role in relation to state TV and radio, with its legacy from the Soviet era. The shareholder of the joint stock company should better represent the public, as is the case in other European countries, and should be the Council of Ministers. **All Articles listed in paragraph 3.3 above should be deleted from the Regulations.**
3. As part of the removal of responsibilities for audiovisual media services, overlaps with the National Council should be removed. **All Articles listed in paragraph 3.4 above should be deleted from the Regulations and any funds given to the State Committee for market analysis should be transferred to the budget of the National Council.**
4. Training should be the direct responsibility of the broadcasters, including the NPTRCU. **All Articles listed in paragraph 3.5 above should be deleted from the Regulations.**

5. Technical standards should not fall within the remit of the State Committee, but should be the responsibility of a regulator in the sphere of electronic communications. **All Articles listed in paragraph 3.6 above should be deleted from the Regulations.**
6. **A single overarching body, established to oversee the timely and efficient switchover to digital television, should include the National Council, the bodies responsible for management of spectrum and operation of terrestrial network, the Ministry of Culture and the Ministry of Finance, among the others, but should not include the State Committee.**

4. Ministry of Information Policy of Ukraine

The Ministry of Information Policy of Ukraine (“MIP”) is a new ministry, established in 2015, with a relatively modest state budget of 3.8 mio UAH, plus additional 108 mio for UA:TV in 2016, and small staff of about 20 people. Its Deputy Minister Tetyana Popova, with whom we conducted an expert interview on 20 July 2016, resigned on 3 August 2016 citing her anger at the politicians behind the Myrotvorets website²² and the lack of action in investigating attacks on journalists.

This analysis concentrates on the Regulation on the Ministry of Information Policies of Ukraine (version No.2 of 14 January 2015) insofar as it pertains to broadcasting, in line with Council of Europe published standards.

The Regulation states that the MIP is the central executive authority with responsibility for a number of areas related to information policy. According to President Poroshenko, the main function of the ministry is to combat biased information against Ukraine.²³ The MIP’s website says that “the MIP is the main body of the central executive power system in the field of safeguarding information sovereignty of Ukraine, in particular in terms of distribution of socially important information inside and outside Ukraine, as well as providing functioning of the state information resources.”²⁴ However, the info graphic on the MIP’s website lists “professional development of public media and press services” among the four main areas of the ministry’s activities.²⁵ Also according to the Regulation, the role of the MIP extends somewhat beyond its primary remit, in particular “ensuring reforms of mass media on dissemination public necessary information” (article 3.2), which overlaps with the role of the independent regulatory authority. There are additional overlaps between the role of the MIP and other executive agencies in the field of information security.

A degree of overlap exists directly between MIP and the State Committee for Television and Radio Broadcasting (“the State Committee”). **Article 4(3)** of the Regulations for the State Committee gives the State Committee responsibility for elaborating “the due measures to prevent internal and external informational influence which presents a threat to the information security of the state, the nation and a person”. **Article 4(5)** also gives the State Committee responsibility, in cooperation with other state bodies, the tasks of providing information security. To further complicate the picture, the official Scope of the Activities of

²² Earlier this year Myrotvorets website published a list with names and contact details of several thousands of Ukrainian, Russian and Western journalists who had been accredited to work as journalists during a certain period in the self-claimed people’s republics in Eastern Ukraine, and accused all of them of acting in collaboration with terrorist organizations. As a result, human-rights activists and international observers have been worried about retaliation, whereas the Ukraine’s interior minister, Arsen Avakov, backed Myrotvorets, castigating the journalists as ‘liberal-separatists (Natalia Ligachova and Galina Petrenko. 2016. Is there a deterioration of press freedom in Ukraine?, in Detector.media, 16 August 2016, <http://detector.media/community/article/117851/2016-08-16-is-there-a-deterioration-of-press-freedom-in-ukraine/>).

²³ <http://en.interfax.com.ua/news/economic/238615.html>

²⁴ <http://mip.gov.ua/en/content/pro-ministerstvo.html>

²⁵ http://mip.gov.ua/files/isu_01_en.pdf

the Parliamentary Committee on Freedom of Speech and Information Policy also includes “information and information security state policy.”

One of the main functions of the MIP is to oversee UA TV the recently re-established (it was originally created in 2003) foreign television service that is state run. With the transfer of the former state National TV and Radio Broadcasting Company (and its regional counterparts) into the new public media company NTPRCU, together with the privatization of all state press, UA TV will remain the only state television in Ukraine. Yet, this major function is given low priority in the Regulation, only appearing in Article 4.23.

RECOMMENDATION

The MIP Regulation should be amended to concentrate its remit and functions in media specifically on the state media for which it is directly responsible (i.e. UA TV) and not give the MIP any wider scope in relation to mass media.

G. Conclusions

This chapter provides main recommendations for each item of the detailed review. Further suggestions regarding the institutional framework are available in the appendix.

1. Law of Ukraine on Television and Radio Broadcasting

The broadcasting legislation is split-up into a considerable number of ill-fitting laws. When the new audiovisual media law is developed, consideration should be given to writing a comprehensive law where all the issues are dealt with in a coherent way. Also, both this law and the Law on the National Television and Radio Broadcasting Council of Ukraine lack penal provisions adjusted to the specific circumstances of broadcasting. This renders the National Council powerless to deal with violations of the law, as well as allowing other bodies to disregard or violate both laws with impunity.

If a single comprehensive law is not enacted, then – as has been the case so far – different laws will be amended at different times in accordance with different plans and objectives and the lack of a consistent framework will continue, creating difficulties for all the stakeholders.

Main Recommendations:

- Prepare and enact a single comprehensive Law on Audiovisual Media Services which combines this Law with the Law on the National Television and Radio Broadcasting Council of Ukraine, relevant sections of the Law on Advertising, the Laws on Elections, and all other Laws which have bearing on the regulation and operation of audiovisual media services.
- The law must be revised to take account of pending digital switchover, with a clear plan for migration of all existing television services. Particular care must be taken to reserve capacity for the proposed new public service broadcaster.
- All references to State broadcasting should be removed from this Law. Full provisions for the licensing and support of community media should be added.
- Amend the licensing conditions to ensure proportionality.
- Introduce a simpler registration/notification mechanism for licenses which are not awarded on a competitive basis.
- Amend the new Law on Licensing of Types of Business Activities to remove radio and television broadcasting from its ambit. If aspects of that law should, after due consultation, be applied to audiovisual media services, then they should be incorporated into the new Audiovisual Media Services Law.
- The law should be amended to make clear that responsibility for compliance lies with the licensee, not with its personnel. As such, the National Council should have responsibility for dealing with complaints, ensuring compliance and applying penalties for breaches of Art.60.1.
- To meet EU standards, the new Audiovisual Services Law should include:

- Fuller provisions on Ukraine’s jurisdiction over audiovisual media services as set out in Article 2 of the AVMSD,
- Extension of the Law to cover on-demand audiovisual media services (and relevant provisions as set out in Articles 12 and 13 AVMSD),
- Clear provisions prohibiting any incitement to hatred on the grounds of race, sex, religion or nationality (Article 6 AVMSD),
- Provisions on accessibility of audiovisual services to people with a visual or hearing disability (Article 7 AVMSD),
- Provisions on product placement and undue prominence (Article 11 AVMSD),
- Provisions on the televising of major events and short news reports (Articles 14 and 15),
- Provisions on European and independent production quotas (Articles 16 and 17)
- Ensuring the right of reply accords with Article 28 AVMSD),
- Provisions guaranteeing the independence of the regulatory authority (Article 30),
- The Law on Advertising should comply with the provisions set out in Articles 9, 10, and 19-26 of the AVMSD,
- The licencing regime should be simplified so as to abandon different policies for different distribution platform, except the terrestrial one, where the special requirements are justified. It should also be made more effective by making sure that the regulator has the powers to actively enforce the compliance with the licencing conditions.

2. Law on Public Television and Radio Broadcasting

Main Recommendations:

- Obligations on the programme content of the new public services need to be expanded to, inter alia, include sport and entertainment. Regional services need programme descriptions and local content requirements.
- Provisions in Ukrainian company legislation relating to public joint stock companies need to be amended to remove the shareholder the power to approve the NPTRCU:
 - Principles (code) of corporate management; decisions (conclusions) of the Audit Commission;
 - Regulation on the Supervisory Council and the Board and introducing amendments thereto;
 - Financial plan and financial and economic performance report.
- A “shareholder” has to be appointed to act on behalf of the public. In order to best avoid any possibility of individual Ministerial or Executive Agency interference in the public service media, it is recommended that the shareholder of the joint stock company for the NPTRCU be the Cabinet of Ministers. This is because it is the Cabinet of Ministers that best represents the “public” of Ukraine in its most general and generic sense.
- The allowance for new groups and factions to appoint new members to the Supervisory Council should be removed as it merely serves to politicize the membership of the Supervisory Council. Instead, the number of members should be fixed (at the current

17), with each member entitled to serve their full four-year term regardless of any changes in the make-up of the Verkhovna Rada.

- In order to avoid the entire Supervisory Board being replaced every four years, the initial members should be appointed on staggered terms (i.e. some for 2 years, some for 3 and some for 4).
- The eligibility criteria for membership of the Supervisory Board need to be set out in greater detail. There should be appropriate representation of men and women and significant minority groups on the supervisory body. Conflicts of interest should extend to close family.
- There should be no access to “local” funding, just central State and commercial funding.
- The State Committee on TV and Radio Broadcasting should have no role whatsoever in relation to the NPTRCU.
- The NPTRCU should publish its annual review and its annual plan.
- The Law must be amended to allow senior staff to have relevant experience in the media sector.
- The number of members of the Audit Committee and their eligibility should be stated.

3. Institutional ecosystem

The institutional landscape covering media and information policy in Ukraine is littered with numerous bodies with overlapping remits but without clearly drawn areas of responsibility. Similarly, the legal framework governing the broadcasting area, composed of numerous ill-fitting, frequently amended statutory acts, suggests a high level of over-regulation, on one hand reducing legal certainty for the regulated subjects and posing risks of corruption, and on the other, lowering the applicability of the available regulatory instruments and jeopardizing the public interest objectives. As a result, effectiveness relies on goodwill and co-operation between institutions. Fortunately, co-operation is in good supply but without clearcut authority, certain issues fall between the regulatory gaps.

For example, digital switchover (already over a year over the deadline agreed through the ITU for analogue switch-off) has not happened because there was no overall co-ordinating body with responsibility for ensuring it happens. It appears that a new group, initiated by Vice Prime Minister (former Minister for Culture), has been formed to remedy this gap. Another (related) area where the lack of clearly defined responsibilities and abundance of involved institutions is resulting in inefficiency is broadcasting spectrum oversight. The absence of clarity prevents effective ensurance of compliance in the use of radio frequencies and limiting harmful interference from pirate stations. For better enforcement, more legal certainty and lower administration burdens, the bodies responsible for frequency management and oversight should merge into a single body.

3.1. National Television and Radio Broadcasting Council of Ukraine

The National Council, defined by the law as an independent “state” regulatory authority, operates in an extremely challenging environment, characterized by a complex institutional ecosystem. The performance of its regulatory functions is in a significant part dependent on

other institutions, as they need to be approved or executed by government bodies (e.g. enforcement of sanctions for breaches of advertising rules or violations of the rules governing election campaigns) or court (withdrawal of broadcasting licences), in certain situations more than one (up to five, i.e. for approval of a bylaw prepared by the Council).

In cases that are traditionally in the domain of media regulators, such as protection of minors, monitoring of media coverage of elections and advertising standards, the National Council performs only the monitoring function without the possibility of sanctioning the identified violations or enforcing the rules. Besides, all the Council’s secondary acts have to go through state registration, which can take unreasonably long. This arrangement is not productive, cumbersome and it prevents effective regulation. The institution, recognised as the regulator, is both faced with a significant workload on behalf of other institutions, and on lacks any remedies for the detected anomalies and for enforcing compliance.

The risks of external influence, both from politicians and the industry on the Ukrainian national regulator continue to be high. One source of undue impact is linked to the appointment procedure which should be revised to allow a less political approach and based on competences, skills and integrity of the candidates. Another problematic area is the potential for premature termination of the term of office, where the President and the Parliament retain an unhealthy high level of discretion. Their right to individually dismiss members of the National Council if on the occasion of the review of the Council’s annual report their work has been found unsatisfactory significantly affects the Members’ independence from the nominating bodies.

In aspects related to finances, the Council faces two main challenges. The financing model of the Council depends exclusively on the state budget and the regulator does not have a decisive say on its size. For years, the budget has only been big enough to just cover the salary expenses and has prevented the Council carrying out certain statutory duties. For example, research activities in support of the decision-making processes have not been possible. Additionally, the average monthly salary of both members of the Council and the staff, a few times lower than for comparable positions in the industry, represents a risk in terms of professional quality of personnel and of its vulnerability to corruption and regulatory capture.

Main Recommendations:

- Review the method of appointment of members of the National Council which avoids any political involvement in the appointment process.
- The funding arrangements for the National Council should be reviewed to give it some autonomy from political pressure. In particular, licence-related fees from broadcasters should be paid directly to the National Council and go towards the direct costs of regulation. Consideration should be given to setting the budget on, say, a tri-annual basis.

- Remove the obstacles to effective enforcement of broadcasting regulation and support the creation of an efficient sanctioning system, allowing for a more flexible, gradual, and proportionate response to infringements.
- Revise the law so as to allow that the regulatory decisions regarding the regulated entities are treated as delivered, if they stay over a defined period of time (e.g. 2 weeks) at the post office and the addressee was properly noted about them.
- The bureaucratic procedures relating to regulatory acts by the National Council are far more onerous than elsewhere in Europe. In particular, the requirement for the Ministry of Justice to register the Council’s regulatory acts provides a clear opportunity for state/political intervention in the activities and role of the National Council. These provisions should be comprehensively overhauled to reduce the opportunity for delay and interference with the Council’s exercise of its legal duties.
- Members’ appointments and retirements should not be concurrent. This would involve staggering the length of the terms of appointment for the initial group of members.
- Members should not be able to be dismissed by the Parliament or President before the expiry of their term unless the Member is no longer fit to act as a result of incapacity, arrest, or irreconcilable conflicts of interest.
- The law should make explicit that members of the National Council do not represent any political or other interest but are appointed on their own merit and to act as they consider best under the terms of the legislation.
- Membership should be widely drawn to ensure it is truly representative of the Ukraine, including women, minority groups and geographical spread.
- The provision relating to members’ conflicts of interest should be extended to include close family.
- The quorum should be reduced to five (from six), with decisions taken by a majority.
- Reduce the number of Representatives and limit their role to a liaison and communications function. All regulatory functions (monitoring and managing compliance) should be centralised to ensure consistency and fairness.
- The current Law on Civil Service is being proposed to be amended in such a way as to remove from the National Council the power to appoint and remove the Chief Administrative Officer. This would be an unacceptable infringement on the independence of the National Council and should be strongly resisted.
- The Council should seek to optimize its work processes in order to reduce the human resources invested in supporting operations and make room for a different organisation with more resources dedicated to the core regulatory activities.
- Revise the law so as to grant the Council administrative and financial autonomy. Consider introduction of a mixed model of financing.
- Revise the law so as to prevent the risk of politically motivated early termination of the term of office of the Council Members.

3.2. State Committee for Television and Radio Broadcasting

Main Recommendations:

- Responsibility for information security should rest solely with the newly formed Ministry for Information Policy, which was set up for that purpose. Articles 4(3) and 4(5) of the Regulations should be deleted.
- All responsibilities in the audiovisual media sphere should be removed from the State Committee as soon as the joint stock company forming the NPTRCU is established. As a direct executive body of the state, the State Committee should not be appointed as the shareholder of the NPTRCU as the risks are too great that it will continue to exercise its historical role in relation to state TV and radio, with its legacy from the Soviet era. The shareholder of the joint stock company should better represent the public, as is the case in other European countries, and should be the Council of Ministers. All relevant Articles should be deleted from the Regulations.
- As part of the removal of responsibilities for audiovisual media services, overlaps with the National Council should be removed. All relevant Articles should be deleted from the Regulations and any funds given to the State Committee for market analysis should be transferred to the budget of the National Council.
- Training should be the direct responsibility of the broadcasters, including the NPTRCU. All relevant Articles should be deleted from the Regulations.
- Technical standards should not fall within the remit of the State Committee, but should be the responsibility of a regulator in the sphere of electronic communications. All relevant Articles should be deleted from the Regulations.
- A single overarching body, established to oversee the timely and efficient switchover to digital television, should include the National Council, the bodies responsible for management of spectrum and operation of terrestrial network, the Ministry of Culture and the Ministry of Finance, among the others, but should not include the State Committee.

3.3. Ministry of Information Policy of Ukraine

Main Recommendation:

- **The** MIP Regulation should be amended to concentrate its remit and functions specifically on the state media for which it is directly responsible (i.e. UA TV) and not give the MIP any wider scope in relation to mass media.

Appendix. List of authorities

	Body	T: Type A: Accountability D: Dependency	Appointment	Law or other regulation and responsibilities	O: Overlapping R: Recommendations ²⁶
1	Verkhovna Rada of Ukraine (Parliament)	T: Political body A: No	Parliamentary election	<p>Constitution of Ukraine, ua, en (non-final version) On the Rules of Procedure of the Verkhovna Rada of Ukraine (text ua, abstract, en):</p> <ul style="list-style-type: none"> - Adopts laws and decrees, Parliamentary control, e.g. via MP's requests - Appoints 4 members of the National Council - NTRBCU (art. 85 of Constitution) - Appoints Ombudsman - Appoints Head of the State Committee - SCTR (upon the President's proposal) <p>Number of MP's: 450 (de-jure). Normal voting: 226 voices. Constitutional majority (constitutional amendments, overcoming the veto): 300 voices. All drafts must be signed by Head of the Parliament, otherwise can be blocked for years.</p>	
2	Committee for Informatization and Communications	A: Parliament D: Independent in their decisions. But could be limited by factions.	Board of coalition (informal decision) + Decree of the Parliament	<p>On Committees of the Verkhovna Rada of Ukraine (ua):</p> <ul style="list-style-type: none"> - Drafting law proposals - Organizational (e.g. pre-discussion of candidates of the bodies appointed by the Parliament) - Control (e.g. interaction with Ombudsman and other state authorities) 	
3	Committee on Freedom of Speech and Information Policy	A: Parliament D: Independent in their decisions. But could be limited by factions.	Board of coalition (informal decision) + Decree of the Parliament	Same as above	
4	Committee on Corruption Prevention and Counteraction	A: Parliament D: Independent in their decisions. But could be	Board of coalition (informal decision) + Decree of the	Same as above + providing expertise on the topic of corruption risks in draft laws	

²⁶ Where relevant/applicable.

		limited by factions.	Parliament		
5	Ukraine Parliamentary Commissioner for Human Rights (Ombudsman)			Law of Ukraine on the Ukrainian Parliament Commissioner for Human Rights: Advises the NTRBCU on its regulatory acts. Furthermore, the Ombudsman sends the NTRBCU details of breaches of privacy by broadcasters for sanction. According to the code of administrative penalties Ombudsman have right to penalize in the sphere of personal data protection. The Council has no ability to sanction, as the necessary legislation has not yet been passed).	R: Privacy regulation is yet another area of work for the NTRBCU with an already very broad remit. In the EU this is not a common responsibility for broadcasting regulators. If there is no other option, the National Council should be empowered with sufficient resources and powers, otherwise this area should be removed from the Council’s remit.
6	President of Ukraine	T: Political body A: No	Presidential election	According to the Article 106 of the Constitution: - Appoints 4 members of National council of Ukraine on TV and radio; - Signs the laws or veto them during 15 days from the date of receipt. President has the right of legislative initiative.	
7	Cabinet of Ministers (CMU)	T: Executive power A: Parliament	Parliament upon the President’s proposal	Article 116 of the Constitution: Takes measures to ensure human and citizens' rights and freedoms; - Elaborates the draft law on the State Budget of Ukraine and ensures the implementation of the State Budget of Ukraine approved by the Verkhovna Rada of Ukraine, and submits a report on its implementation to the Verkhovna Rada of Ukraine; - Directs and co-ordinates the operation of ministries and other bodies of executive power; - Establishes and dismisses ministries; - Responsible for 1 st stage of privatization of the state and municipal print press; - Shareholder of PSB; ²⁷ Passes decrees and orders. Currently 23 ministers (Prime-minister, First Vice-Prime Minister, 4 Vice-prime ministers,	O: approves the fine scheme of NTRBCU R: the Cabinet of Ministers may be the suitable body to hold the shares of the new public service broadcaster. There should be a body at a ministerial level with an overarching responsibility for audiovisual media policy, possibly Ministry of Culture, and a ministerial responsibility for technical aspects of broadcasting at another adequate ministry; another option is that the responsibility for both areas is within one Ministry, responsible for media and electronic communications policies. As for fines, the law should define their range for

²⁷ By itself or determine the state authority which shall be the shareholder.

				ministers) http://www.kmu.gov.ua/control/en/publish/officialcategory?cat_id=247605901	different breaches.
8	Ministry of Information Policy of Ukraine (MIP)	T: Executive power A: CMU	Parliament upon President's proposal	Established on 2/12/2014. Regulation of Jan, 14, 2015: The main body in the system of central executive authorities in the field of information sovereignty of Ukraine, in particular on socially important information dissemination in Ukraine and abroad, as well as the functioning of the state information resources. Goals: - Ensuring information sovereignty of Ukraine - Ensuring reforms of the media to spread public necessary information. Activities: - Drafting laws - Normative regulation in the sphere of information sovereignty of Ukraine, in particular on dissemination of public necessary information in Ukraine and abroad, as well as the functioning of the state information resources; - Technical assistance to state and municipal press in the process of denationalization (de-jure); - Establishes foreign broadcasting, appoints its director, approves the Statute (Law on the system of foreign broadcasting, 2015 ua) infographic: http://mip.gov.ua/files/isu_01_en.pdf	O: NTRBCU, SCTRB R: The MIP Regulation should be amended to concentrate the MIP remit and functions specifically on the state media for which it is directly responsible (i.e. UA TV) and not give the MIP any wider scope in relation to mass media.
9	State Committee on TV and radio broadcasting (SCTRB)	T: Executive A: CMU D: Not independent	By Parliament	Regulations of Aug, 13, 2014 ua The main body in the system of central executive bodies to form and implement state policy in the field of television and radio broadcasting, information and publishing industry. Activities: - Determining the functioning of websites of executive authorities, e.g. monitoring the content of websites of executive authorities - Developing activities to	O: NTRBCU, MIP, SSCIP R: Until there is an opportunity to amend the Constitution, the State Committee's remit should be reduced substantially to remove all of its responsibilities for broadcasting; it may retain consultative functions; it should not become a shareholder of the public broadcaster.

				<p>promote domestic publishing products;</p> <ul style="list-style-type: none"> - Promoting creation of PSB and terrestrial DTV - Ordering TV and radio programs and publications (so-called “state ordering” – the main source of money for state TV) - Responsible for the process of privatization of state and municipal print press under the law on reform of the state and municipal press ua 	
10	National Television and Radio Broadcasting Council of Ukraine (NTRBCU)	<p>T: Regulator</p> <p>A: Parliament and President</p> <p>D: Independent by law, but not de facto, because of non-transparent procedure of appointments, inadequate financing and low enforcement power</p>	<p>4 members – by President without transparent procedure.</p> <p>4 members by Parliament; pre-selection by Committee on Freedom of Speech and Information Policy.</p> <p>Head of the body elected by members of the NC 5 or more voices.</p>	<p>Law on National Council ua</p> <p>Regulator in the sphere on TV and radio:</p> <ul style="list-style-type: none"> - Grants licenses to broadcasters; - Controls media ownership; - Sanctions violations of the Law on TV and radio (except those related to advertising); - Participates in developing the State frequencies plan; - Conducts a State register of information activities in the field of television and radio; - Holds conferences of electing 9 members of Supervisory council of the National public broadcaster; - Participates in the development and implementation of state policy in the field broadcasting; - Develops and adopt the Plan of development of TV and radio space; - Passes decisions on terrestrial channels and multiplexes. 	<p>O: SCTRB, Consumer Rights Inspection, State Film Agency, Central Election Commission</p> <p>R: The regulator should be empowered to be able to carry out the duties from its remit independently and effectively.</p> <p>To this aim:</p> <ul style="list-style-type: none"> - The appointment procedure should be revised, - Independent and sufficient funding should be guaranteed (possibly via a mixed model, including the industry fees), - Independent staff recruiting and salary policy should be made possible, - The regulator should get adequate enforcement powers, including in the area of advertising and monitoring of elections, - Its obligation in the sphere of public film rentals should be abandoned.
11	National Security and Defense Council of Ukraine	<p>T: Presidential body</p> <p>A: President</p>	<p>Formed and headed by President</p>	<p>Passes decisions via President’s decree and are obligatory for executive power.</p> <p>In 2009 passed a decision on creation of PSB and DTV ua</p>	
12	State Service of Special Communication and Information Protection of Ukraine (SSSCIP)	<p>T: Regulator</p> <p>A: CMU</p> <p>D: Not formally independent, but high de-facto independence.</p>	<p>Head appointed by CMU upon proposal of the Prime-minister</p>	<p>Regulation ua</p> <p>Ukraine Administration Representative in the ITU</p> <p>Remit:</p> <p>Development and implementation of the state policy in the field of cryptographic and technical</p>	<p>O: NCSRCI, UCRF</p> <p>R (applicable to all authorities with overlapping or complementary responsibilities in this segment): all tasks related</p>

				<p>protection of information, telecommunications, use of radio frequency resource of Ukraine, postal special purpose government courier communication, protection of state information resources and information, determined by law, protection of informational and informational-telecommunication systems and on objects of information activities, as well as in the use of state information resources in terms of information security, countering technical intelligence, performance, security and development of the state system of government communication, national system of confidential communication.</p> <p>Activities:</p> <ul style="list-style-type: none"> - Prepares draft laws and sub-legislation on matters within its competence; - Manages the registry of info-telecommunication systems of state agencies and enterprises, institutions and organizations under their control, keeping the National Register of electronic information resources of public authorities; - Participates in formulation and implementation of state tariff policy in telecommunications and radio frequency resource; - Develops the National table of distribution of radio frequencies and the Plan of using of radio frequency resource of Ukraine and submits them to the CMU for approval; - All activity regarding cryptography: developing standards, licensing, certification etc. 	<p>to radio spectrum for public and private use (i.e. except the spectrum reserved for military, police, and other special purposes) should be merged, and fall within the overall responsibility of the new independent regulatory authority in electronic communications in the making.</p>
13	<p>National Commission for the State Regulation of Communications and informatization (NCSRCI)</p>	<p>T: Regulator A: President Parliament D: Not independent</p>	<p>Head + 6 members by Presidential Decree</p>	<p>Established by article 17 of the law on telecommunications and Presidential Decree #1067/2011.</p> <p>Activities:</p> <ul style="list-style-type: none"> - Licensing and registration of telecommunications services; - Management and monitoring of the use of numbering resource - Sets procedures for determining markets of telecommunications services, 	<p>O/R: see above</p>

			<p>conducting analysis and determining operators with significant market power;</p> <ul style="list-style-type: none"> - Applies administrative penalties to the telecommunications market players (art. 243 of the code); - Applies to the court if legal entities in the telecomm. market violate legislation on telecommunications; - Sets limits or fixed tariffs for public telecommunication services, tariffs for leased telecommunications operators, with a dominant position on the market of such services; - Provides alternative dispute resolution between the subjects of the telecomm. market; - Manages the register of operators, telecommunications providers; - Provides State supervision (control) on <ul style="list-style-type: none"> (a) Compliance with the legislation on radio resource of Ukraine and prevents crime in the bands of radio frequencies of general use; (b) Compliance with licensing conditions of telecomm. Providers – users of frequency resource; (c) Monitors technical equipment in telecommunication and information-telecommunication networks of general use, and other emitting devices; (e) Participates in the development of the National table of radio frequency bands distribution and Spectrum Plan, and approves draft changes to them. 	
	<p>The Ukrainian State Centre of Radio Frequencies (UCRF)</p>	<p>T: State enterprise</p> <p>A: National Commission for the State Regulation of Communications and Informatization</p> <p>D: Not independent</p>	<p>Created under art. 16 (ua) Law of Ukraine on Radio Frequency Resource of Ukraine:</p> <ul style="list-style-type: none"> - Radio frequency assignment; - Assigning call signs to radio electronic facilities and issuing permissions for their operation; - Managing the Register of radio frequency assignments; - Radio frequency monitoring; - Electromagnetic compatibility of radio electronic facilities and radiating devices; 	<p>O/R: see above</p>

				<ul style="list-style-type: none"> - Determination and elimination of sources of harmful interference; - Conclusions for decisions of the National Commission for the State Regulation of Communications and Informatization concerning the issuance of licenses on radio frequency resource usage; - Preparation of conclusions on the request of the NTRBCU concerning the possibility and conditions of radio frequency use for TV and radio broadcasting; - Other kinds of activities related to usage of radio frequency resource of Ukraine. <p>UCRF is financed by fees of users of radio frequency resource (for its services) and by the State Budget of Ukraine (for work related with determining the frequencies for networks of digital terrestrial broadcasting and identification of sources of interference in the bands for general use upon request of special users).</p> <p>Upon request of the NCSRCI the UCRF performs international protection and coordination of radio frequencies, and takes part in the ITU. As well, on request of the Commission, the UCRF participates in state supervision of compliance with legislation applying to frequency use.</p>	
14	Broadcasting, Radio-communications & Television Concern (BRT)	<p>T: Operator</p> <p>A: SSSCIP</p> <p>D: Not independent</p>	<p>Head of BRT appointed by the Cabinet of Ministers (present one app. in 2015)</p> <p>CMU decided to appoint the head of BRT in 2011 ua</p>	<p>Concern comprises of 25 enterprises and branch-offices throughout Ukraine, licensed for:</p> <ul style="list-style-type: none"> - Maintenance and operations of terrestrial broadcast networks; - Maintenance and operations of satellite communications networks; - Providing telecommunication channels to the users. 	
15	State service on food safety and Consumers Rights	<p>T: Executive</p> <p>A: Ministry of Economic Development and Trade</p>	<p>Head appointed by CMU upon the proposal of the Prime-minister</p>	<p>State control over protection of consumer rights and advertisement relevant for this report:</p> <p>Control over compliance with</p>	<p>O: NTRBCU</p> <p>R: Enforcement powers in advertising regulation should be transferred to the NTRBCU.</p>

		D: Not independent		legislation on advertising for protection of consumers of advertising. If the State Service recognises advertising as unfair, hidden or illegal can stop its distribution. http://www.kmu.gov.ua/control/uk/cardnpd?docid=248464285	
16	Ukrainian State Film Agency	T: Executive A: Ministry of Culture D: Not independent	Head appointed by CMU upon proposal of the Prime-minister	Main duties within the scope of this report: - Manages a state film registry - Grants a state certificate for distribution and demonstration of films. http://dergkino.gov.ua/ua/text/legal-basis.html	O: NTRBCU R: The NTRBCU should be released from the responsibilities for monitoring the public rental licenses.
17	Central Election Commission	T: Constitutional body D: Independent	15 members appointed by Parliament upon proposal of the President. Dismissed by Parliament.	Main duty within the scope of this report: Controls the compliance by political parties and other subjects the electoral process legislation on referendum and on elections;	O: NTRBCU R: Enforcement powers for compliance with rules on covering the elections in media should be transferred to the NTRBCU.
18	Ministry of Justice of Ukraine	T: Executive A: CMU	Parliament upon the President's proposal	Main duty within the scope of this report: Approval and registration of the documents of the NTRBCU	O: NTRBCU R: Ensuring reasonable duration of registration procedures or better remove this obligation for the acts of the NTRBCU.
19	State Regulatory Service of Ukraine	T: Executive A: CMU	Head appointed by CMU upon proposal of the Prime-minister	Main duties within the scope of this report: - Can cancel the acts that do not comply with the laws of Ukraine - Approves the draft of regulations on supervision (control) of economic activity and on licensing, which was developed by executive authorities. http://www.dkrp.gov.ua/info/2	O: NTRBCU R: The powers of the Service should be performed in a way not to affect the independent functioning of the NTRBCU.
20	Ministry of Finance	T: Executive A: CMU	Parliament	Prepares the draft of the State budget, advises the NTRBCU on its budget.	R: The Ministry should endorse the solution for adequate funding of the national regulator.

Ukrainian Parliament Commissioner for Human Rights competencies and legislation in the sphere of Access to Public Information

Legislation analysis and recommendations

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Contents of the report “Ukrainian Parliament Commissioner for Human Rights competencies and legislation in the sphere of Access to Public Information. Legislation analysis and recommendations”

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Executive Summary

In our opinion the Ukrainian legislation in force does not provide a sufficient level of protection of the right to freedom of information. Main weaknesses involve:

- 1) Lack of clear definition of the competent appeal body in API cases;
- 2) Lack of stronger formal independence of the HR Commissioner;
- 3) The supposed appeal body has no competence to issue binding decisions.

Main strong points of the Ukrainian API model are:

- 1) Secure position of the HR Commissioner;
- 2) Strong investigative powers of the HR Commissioner;
- 3) Awareness of the need to improve.

The Draft Law 2913 on improvement of certain provisions of legislation of Ukraine on Access to Public Information (hereinafter: Draft API law), if passed, would from our point of view provide a sufficient level of protection of requesters for API, however, in this paper we recommend several further improvements:

- 1) Setting up an independent Information Commissioner (preferably a joint DPA body and API authority);
- 2) Improving Draft Law in certain aspects;
- 3) Providing IC with sufficient financial and human resources.

1 Objectives

The aim of this paper is to reveal the weaknesses of the existing Ukrainian legislation in the field of access to public information (hereinafter: API), specifically considering the competencies and efficiency of the present appeal authorities in this field. We will point out what legal circumstances negatively affect the exercise of the right to freedom of information on the levels of general status of the competent authority, its resources and relevant procedural provisions, focusing on the API appeals. In this paper we will not analyse any substantive provisions of Ukrainian existing or planned legislation on freedom of information, including but not limited to the definition of public information, definition of entities bound by API legislation, scope of free access and limitations thereof.

Based on the results of the analysis of the relevant legislation in the field of access to public information, we will give recommendation on necessary changes to:

1. status and structure of the competent authority;
2. powers of the competent authority;
3. sufficiency of human and financial resources for the effective exercise of powers of the competent authority;
4. possible ways to strengthen cooperation with NGOs.

For the purposes of this analysis we used English translations of the following Ukrainian legal acts as provided by the Council of Europe:

- *Constitution of Ukraine;*
- *Law on Access to public information (hereinafter: Law on API);*
- *Draft Law 2913 on improvement of certain provisions of legislation of Ukraine on Access to Public Information (hereinafter: Draft API law);*

- *Law on the Ukrainian Parliament Commissioner of Human Rights (hereinafter: Law on HR Commissioner);*
- *Law on information;*
- *Law on transparency of spending public funds;*
- *Code of Ukraine on Administrative Offences;*
- *Law on local self-government.*

2 Methodology

We evaluated the existing Ukrainian appeal mechanism system considering the following key aspects:

1. **Timeliness** is one of the crucial elements of FOI, because the value of specific information loses its importance if needed for a certain action (for example, for an investigative article by a journalist, for starting a public debate on a current issue, a document which can help the applicant prove something and on grounds of the document decide to start a court or some other legal procedure, or to prove that a public official is corrupt or not taking all the necessary measures needed to fulfil his public duty).
2. To ensure timeliness it is essential how **efficient** the appeal procedure is in cases where the public authority declines the access, does not respond or is silent (the so called “administrative silence”). It is therefore important whether the appeal body reacts rapidly or whether the slowness of the appeal mechanism in fact only “helps” the first level body gain more time before giving the information to the public, helps to reduce the importance of potential public debate or even makes the information obsolete, not relevant any more.

3. For efficiency evaluation, **power and significance of the decisions** issued by the appeal bodies are crucial. It is essential to evaluate which type of appeal body is likely to be most effective in ensuring the disclosure of information: the one which can issue binding decisions or the one which can issue only recommendations? Such decision shall take into consideration also general legal culture.
4. For effective protection of FOI, the **costs** that the applicant has to pay for gaining the information may also be an important element: the more expensive the appeal procedure, the less likely it is that the applicant will decide to pursue it.
5. In taking decisions on access to information requests, there is always a chance that the public authority will try to hide its mistakes, arising from the requested documents. Precisely in such cases it can make a significant difference whether the appeal body has strong **investigative competences** and is genuinely **independent** of the body it supervises (which would potentially include also the Parliament itself).

Having all these relevant factors in focus, we answered the following questions regarding advantages and disadvantages of the legislation in effect and the planned Draft FOI law:

- How independent is the appeal authority?
- Does the appeal authority have strong investigative competences (is the appeal inefficient because of the passivity of the public authority – the holder of a document)?
- Can the appeal authority issue binding decisions?
- How high is the possibility of a reversed decision?
- What is the risk of backlogs occurring?
- Can the appeal body itself be sued before the court?
- Is it necessary to hire a lawyer to file an appeal?
- Are there high costs for the applicant to file an appeal?

3 Weaknesses

3.1 Comparative analysis

Before we answer how efficient the current Ukrainian FOI system is, let us explain through an international comparison the general advantages and disadvantages of having an Ombudsman as an appeal mechanism in between the first level bodies and courts as an appeal body with binding decision powers.

Some countries²⁸ leave the conflict between the body obliged to follow the rules of access to information and the applicant to be settled before the courts (as is the case in Ukraine as well). In Bulgaria the decisions for granting access to public information or for refusals to grant access to public information may be appealed before the regional courts or before the Supreme Administrative Court, depending on the body which issued the decision under the provisions of the Administrative Procedure Act or the Supreme Administrative Court Act.²⁹ In Sweden the majority of the cases have to be appealed before the court. Article 15 of Freedom of Press Act defines that if a public authority, other than the Parliament or the Government, has rejected an application for access to an official document, or if such a document has been made available with reservations which restrict the applicant's right to disclose its contents or otherwise to make use of it, the applicant may appeal against the decision. An appeal against a decision by a Minister is lodged with the Government, and an appeal against a decision by another authority is lodged with a court of law. According to this, Sweden has a kind of a mixed system – court as an appeal body for all cases except when the Minister is a deciding body.

²⁸ E.g. Bulgaria, Sweden, Israel, Finland.

²⁹ Article 40 of Bulgarian FOIA, available at <http://www.legislationline.org/documents/action/popup/id/6299>.

In Finland the general appeal procedure is prescribed by the Act on Administrative Judicial Procedure (586/1996)³⁰. The Act on the Openness of Government Activities further on defines that the decision of an authority must be subject to an appeal, as provided in the Act on Administrative Judicial Procedure. A decision of an authority other than those listed in chapter 7³¹ of the Act on Administrative Judicial Procedure shall be appealed before the Supreme Administrative Court. However, an appeal against the decision of a local or regional authority and a decision of an institution, corporation, foundation or private individual exercising public authority shall be lodged with the Administrative Court.³²

In Israel too, the applicant trying to achieve disclosure after an initial denial must petition the Administrative Court.³³

This system proved to be extremely non-efficient in the countries where judiciary process is slow since the principal aim of the access to information - timeliness - is not reached (i.e. EU, Bulgaria). Furthermore, the applicant procedure before the court is also quite expensive. For example, in Israel a procedure requires an attorney to draft pleadings and a payment of (approx.) \$420 court fee. According to the Movement for Freedom of Information a judgment in such FOI appeals in Israel can take years, and again the agency can easily avoid disclosure by simply not complying. There are no real sanctions for non-compliance.

Appealing directly to a court would be definitely the most expensive and time-consuming. Applicants, facing several years of litigation, costing thousands of dollars or Euros are less likely to challenge a denial.

³⁰ See Chapter 2, law is available at <http://www.finlex.fi/en/laki/kaannokset/1996/en19960586.pdf>.

³¹ Section 7: Appeal against the decision of a State administrative authority

»(1) Appeal against a decision of the Council of State or a Ministry shall be lodged in the Supreme Administrative Court. The appeal may only be founded on the illegality of the decision.

(2) Appeal against a decision of an authority subordinate to the Council of State shall be lodged in an Administrative Court. (433/1999)«

³² Chapter 8.

³³ Article 17 of Israeli FOIA.

In some of the systems the applicant can, in addition to the appeal possibility before the courts, ask for the Ombudsman’s help as well (Finland, Sweden, Denmark, Bulgaria ... and Ukraine as well), but he/she has to decide whether to appeal to Ombudsman and miss the time-limit for the appeal before the court or use both possibilities at the same time. Namely, to go only to an Ombudsman when not satisfied with his/her recommendation, or when the public sector body has not taken the recommendation into consideration, after the period prescribed in legal caution which instructs the party when the appeal has to be lodged, the court will not try the case. Therefore, the applicant loses the possibility to obtain binding decision on grounds of the request which has gone through the decision process at the public sector body - the holder of the information.

In many countries³⁴ the function of a review is subject to a procedure before an Ombudsman and her/his competence is explicitly prescribed by the FOIA (as is the case also in Ukraine), and not only in a law defining all of her/his competencies. In majority of the states with this system the Ombudsman does not have the status of a second instance body which the applicant is obliged to use, but the procedure before him/her is only a possibility which an applicant can decide to use or not (also the case in Ukraine). In the analysed laws the role of an Ombudsman therefore looks more like a role of a mediator. So the person who is not satisfied with the decision of the public body which holds the requested document can either appeal to an Ombudsman, or directly to court. Despite the fact that Ombudsman can only give recommendations and not bring binding decisions, it seems that this possibility regarding access to public information is quite often used by the applicants (in EU, Sweden, Finland), mainly for the reason of efficiency (faster procedure than at courts) and financial reasons (free of charge). One reason could also be that to file an appeal to Ombudsman, the applicant is not obliged to hire a lawyer.

³⁴ E.g. Australia, Bosnia & Herzegovina, New Zealand, EU, Moldova has a specialized Ombudsman dealing only with access to public information and data protection...

Table 1 – A chart of advantages and disadvantages

Appeal body Advantages/Disadvantages	Appeal to the 1st level body itself	Appeal to higher administrative body	Court directly after 1st level body	Ombudsman	Information Commissioner
Inefficient appeal because of passivity of the body - holder of a document	yes	yes	no	no	no
Backlogs appear more often	yes	yes	yes	no	no
Binding decisions	yes	yes	yes	no	yes
High costs	no	no	yes	no	no
Higher possibility for reversed decision	no	no	yes	yes	yes
Timeliness	no	no	no	yes	yes
Can the appeal body itself be sued before the court?	no	no	no	no	yes
Necessary to hire a lawyer	no	no	yes	no	no
Strong investigative competencies	no	no	yes	no/yes	yes
Independency	no	no	yes	yes	yes

*Advantages/disadvantages are generalized properties of the appeal systems, and do not necessarily apply to an individual system in a specific country.

3.2 Ukrainian current situation

Let us evaluate now how efficient (regarding legal provisions defining appeal procedure) in our opinion is the existing Ukrainian FOI system. Primarily, which is the competent authority for handling requestors’ appeals.

Existing Ukrainian legislation provides for limited and rather confusing appeal possibilities, therefore, it is ineffective in providing sufficient legal security to requesters. Pursuant to Art 23/l of the Law on API decisions, actions or inactions of information administrators may be appealed to the administrator’s superior official, a higher authority or court. There are no specific provisions on appeal procedure and on possible actions, competencies or powers of the appeal bodies. It is unclear when the requester should appeal to the administrator’s superior, a higher authority and when he/she may (or should) file an appeal directly with the court. It is even less clear which is the “higher authority” in an individual case. It is unlikely for an average requester to be familiar with the hierarchy of authorities, especially with the broad notion of information administrators³⁵.

Considering Mrs. Kushnir and Mr. Kotlyar who have both commented that there is no confusion in practice as to which is the competent appeal body, we underline that this does not mean that the legislation itself provides for sufficient legal certainty and predictability. Additionally, they both pointed out that under the Constitution and the Law on the Ombudsman, the Ombudsman can receive complaints for any human rights related violation whereas the right to freedom of information is a human right guaranteed by the Constitution of Ukraine. We cannot argue against that, however, what we do suggest is that general Ombudsman competence, together with several other competent authorities (the administrator’s superior official, a higher authority or court), are significantly less clear possibilities as opposed to a specialised independent appeal body, such as the Information Commissioner (or Commission).

It also has to be assented that the current legislation (concretely Article 212/3 of the Administrative Code of Offences) allows Ombudsman to write a protocol in which the administrative offences when administrator in charge for access to public information violates someone’s right to information and the right to petition are described. The Ombudsman can proceed this protocol to the Court and further on Court has to decide whether there was a violation of the right in question or not. In such a case the Ombudsman

³⁵ Pursuant to Art. 13 of existing API Law these are subjects of public authority, legal persons funded by subjects of public authority, persons which perform delegated authorities, natural or legal monopolists.

has a status of a public prosecutor. This competence we understand as a suggestion for a penalty procedure, namely to penalize non obedient information (public) officers.

Additionally, in cases when administrator in charge for access to public information does not comply with the recommendation (“*submissions*”³⁶ or “*legal requests*”³⁷) of the Ombudsman, the Ombudsman can issue a protocol based on the Article 188/40 of the Administrative Code of Offences and proceed it to the Administrative Court. In such a case the Ombudsman also has a role of a public prosecutor. The main difficulty the Ombudsman has using this power is that a person who does not follow the Ombudsman’s recommendation has to meet with the Ombudsman personally and he/she has to reveal a passport number and other personal data. If he/she refuses to provide requested personal data, the Ombudsman cannot write the protocol neither according to the article 212/3 nor according to the article 188/40 of the Administrative Code of Offences. This competence seems to be close to judicial enforcement of the Ombudsman’s recommendation, hence this way the recommendation through the court’s verdict can become binding. Mr. Kotlyar commented that this provision only enforces individual liability for non-compliance, whereas instructions or recommendations are binding under the law as such, under threat of administrative sanction for non-compliance.

Such a procedure is highly complicated, ineffective and completely out of requester’s power. Surely, part of the right to information should also be the right of the requester to enforce the right to information through judiciary system. If only the Ombudsman has the discretionary power to decide whether its recommendation will be enforced through the court, a requester cannot use any power to show that he/she disagrees with the Ombudsman’s negative decision, namely when the Ombudsman decides not to proceed the case to the court.

Administrative penalties are an efficient tool for API enforcement, however, more appropriate procedure is undoubtedly the one, through which the power to proceed the

³⁶ Law on HR Commissioner translation terminology.

³⁷ the Administrative Code of Offences translation terminology.

matter to the court is defined as the right of the requester to file an appeal. This way the requester could also contest the Ombudsman’s decision (with which it denies access to public information) and decides whether he/she would continue the legal fight to receive the requested information through judiciary system with his/her own reasons and arguments.

Further on, it is highly unclear how do the Ukrainian Parliamentary Commissioner on Human rights’ powers of parliamentary control in the field of API³⁸ relate to the appeal procedure, i.e. what are its powers in relation to concrete requesters’ appeals. The confusion is even greater considering the existing Art. 17/l provision of Law on API provides that parliamentary control over API rights shall be carried out by the Parliamentary Ombudsman³⁹, temporary investigation commissions of the Verkhovna Rada of Ukraine and members of the Ukrainian Parliament; in addition, also civic control and state control exist. With so many possible control and appeal mechanisms it is unclear what should the requester do in case he or she does not receive the requested information (in due time), what are the possible results, how much time will it take and how much will it cost.

These procedural confusions and uncertainties could be resolved by establishing a new independent appeal body, suggested in this paper, with clear competencies and set of procedural provisions on this matter as well and a possibility that such a body itself can be sued before the court.

Considering the Parliamentary Ombudsman which is in practice the main authority handling requestors’ appeals in API cases, it is reasonably well independent and autonomous. The appeal bodies’ independence should be guaranteed, both formally and through the process by which the head and/or board is/are appointed.⁴⁰ The Ombudsman is

³⁸ Pursuant to Art. 14/V the HR Commissioner shall exercise parliamentary control over the observance of the right to API.

³⁹ We presume that Parliamentary Ombudsman and Parliamentary Commissioner for Human Rights are the same entity and the difference in terminology is only a result of translation.

⁴⁰ Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, London 1999, available at <http://www.article19.org/pdfs/standards/righttoknow.pdf>, viewed on 26 August 2008.

nominated, appointed and dismissed by the Parliament. With the slight lack of formal independence (nomination and election within one body), it can be argued that on the other hand the current Ombudsman has relatively strong investigative powers⁴¹ and several provisions aiming at establishing its independence⁴² are also reasonably strong. Although, when discussing formal independence through relevant laws sent to us to evaluate it could not be established how strong a so called administrative independence is (i.e. does the Ombudsman have the power to nominate its own employees or the employees are chosen by the Parliament, is the budget of the Ombudsman (not just the total amount but concrete spending) under the complete authority of the Ombudsman or it has to go through the accountancy and approval of the Parliament ...). Mr. Kotlyar and Mrs. Kushnir commented that the Ombudsman in the practice is independent enough (i.e. can select its own staff etc.).

Furthermore, the Ombudsman’s acts of response to violations are:

- 1.) the constitutional submission to the Constitutional Court of Ukraine on issues of legal acts’ conformity with the Constitution⁴³ and
- 2.) submission to bodies for purpose of taking relevant measures aimed at elimination of revealed violations⁴⁴.

These acts are recommendations and not binding decisions which could be enforced in any way (the Ombudsman is hence the so called “toothless tiger”, this is especially the case in the countries where the ombudsman tradition is still new in the legal culture). It can be argued that this is a major deficiency in the Ukrainian API system. However, a

⁴¹ Among others, the Parliamentary Ombudsman has the power to invite and question officials and other persons, obtain and review documents (including classified documents and irrespective of their ownership), enter premisses, attend sessions and appeal to a court (Art. 13 of Law on HR Commissioner).

⁴² Prohibition of interference with the Ombudsman activities, absence of its obligation to explain details of cases handled by it, right to immunity, right to be provided with an employment upon the termination of tenure and mandatory state insurance (Art. 20 of Law on HR Commissioner).

⁴³ Art. 15/II of Law on HR Commissioner.

⁴⁴ Art. 15/III of Law on HR Commissioner.

positive aspect is that it may oversee the actions of all entities subject to abiding the Law on API.

Experiences show that in systems with the Ombudsman acting as the higher instance the possibility of reversed decisions (i.e. the decision/recommendation of the Ombudsman is different than the decision of the PSI holder) and speed of the proceedings are at a sufficient level. Also backlogs occur less frequently than in countries where higher administrative bodies or courts perform the role of “second instance”. If this is the case in Ukraine as well, it has to be further evaluated. We recommend to perform an analysis on the reversed decisions ratio and average time of handling API cases by the Parliamentary Ombudsman, to evaluate whether the efficiency required for API appeals system are met.

Considering the Parliamentary Ombudsman cannot handle cases that are reviewed by the courts⁴⁵ and that the deadline for filing an appeal to the Parliamentary Ombudsman is one year from the disclosure of the violating act⁴⁶, there is a high possibility that API cases that have been handled by the Parliamentary Ombudsman will not be able to be reviewed upon the requester’s appeal by the court later on. This is a serious weakness of the system.

There is no explicit requirement to hire a lawyer for filing an API appeal which also means that costs are lower, however, with the confusing provisions on powers and the procedure, hiring a lawyer seems needed, albeit, is not necessary *ex lege*. In analysing the legislation provided by Council of Europe, we did not come across any appeal costs related provisions.

After presenting this opinion to Council of Europe we have learned that abovementioned unclarities in legislation, do not cause any problems in current practice and are resolved efficiently. However, the legislation in force remains unclear which causes legal uncertainty. It is good that the API appeal system in Ukraine works well in practice at the moment,

⁴⁵ Art. 17/IV of the Law on HR Commissioner.

⁴⁶ Art. 17/II of the Law on HR Commissioner. In exceptional circumstances, the deadline may even be extended for up to two years.

*nevertheless, as a consequence of unclear, therefore uncertain, legislation this could not necessarily be the case (or could not be the case in the future). The objective of this paper was not to comment on current practices in Ukraine, but rather to analyze the existing and proposed legal texts and give recommendation thereof. As described in this paper, we have found **deficiencies in legislation** (specifically the Law on API) which leave plenty of room for different interpretations and this could lead to a much different practice than the one currently in place; possibly an inefficient and highly arbitrary one. As stated in this paper we have therefore, found that the level of legal certainty in handling API cases is low.*

4 Recommendations

4.1 Status and structure of the competent authority

First of all, and most importantly, we recommend that Ukraine sets up an independent (*sui generis*) state Information Commissioner or Commission (hereinafter: the IC)⁴⁷ which would be the sole second instance body competent for handling API appeals. According to Article 19⁴⁸ opinion⁴⁹, a system with an IC as an appeal body has the least disadvantages and applicants can thereby obtain information in the fastest possible way.

Independence should primarily be established through the two level process of nominating, appointing and dismissing the IC. These three competencies should be for example divided between the president which would nominate the IC and the legislative branch which would be competent for appointing (approving) and dismissing the IC on the proposal of the

⁴⁷ In this paper we do not go into details on whether there should be a one-person commissioner or a collective body (commission). The emphasis is on independence of IC leadership.

⁴⁸ One of the largest non-governmental organizations in the world dealing with the protection of freedom of expression and access to public information.

⁴⁹ Article 19, A Model Freedom of Information Law, available at <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.

president⁵⁰. However, only formal and structural independence is not a guarantee for efficient human rights protection – clear procedural norms, sufficient powers and resources must also be attributed to the competent authority.

As Mr. Kotlyar reasonably pointed out, it would be ideal to set up the IC on the constitutional level (i.e. amend the Constitution of Ukraine to include the IC as an independent DPA and API appeal body). This would make it impossible to abolish the IC without constitution amendments, therefore, minimizing political pressures on the IC. However, we cannot agree with Mr. Kotlyar on the necessity to include the IC into the Constitution. Exhaustive public powers principle does not extend to establishing independent institutions intended to protect human rights, so there is no need to include the IC into the Constitution. The IC can be simply set up by a law, however, this would mean it can simply be abolished by a law.

Considering personal data protection is one of the most common exceptions to free access of data and EU standards which require each Member State to have an independent data protection authority (hereinafter: DPA), we would highly recommend setting up a joint independent authority competent for handling the two human rights, which has proven to be a very effective model in many modern democracies. The competence of both mentioned human rights under one umbrella is already the case in Ukraine since data protection is also under the jurisdiction of the Parliamentary Ombudsman. Such a joint independent API and DPA authority is highly efficient in handling conflicts between the two human rights (privacy v. FOI) and is very cost-effective (having common administration and infrastructure).

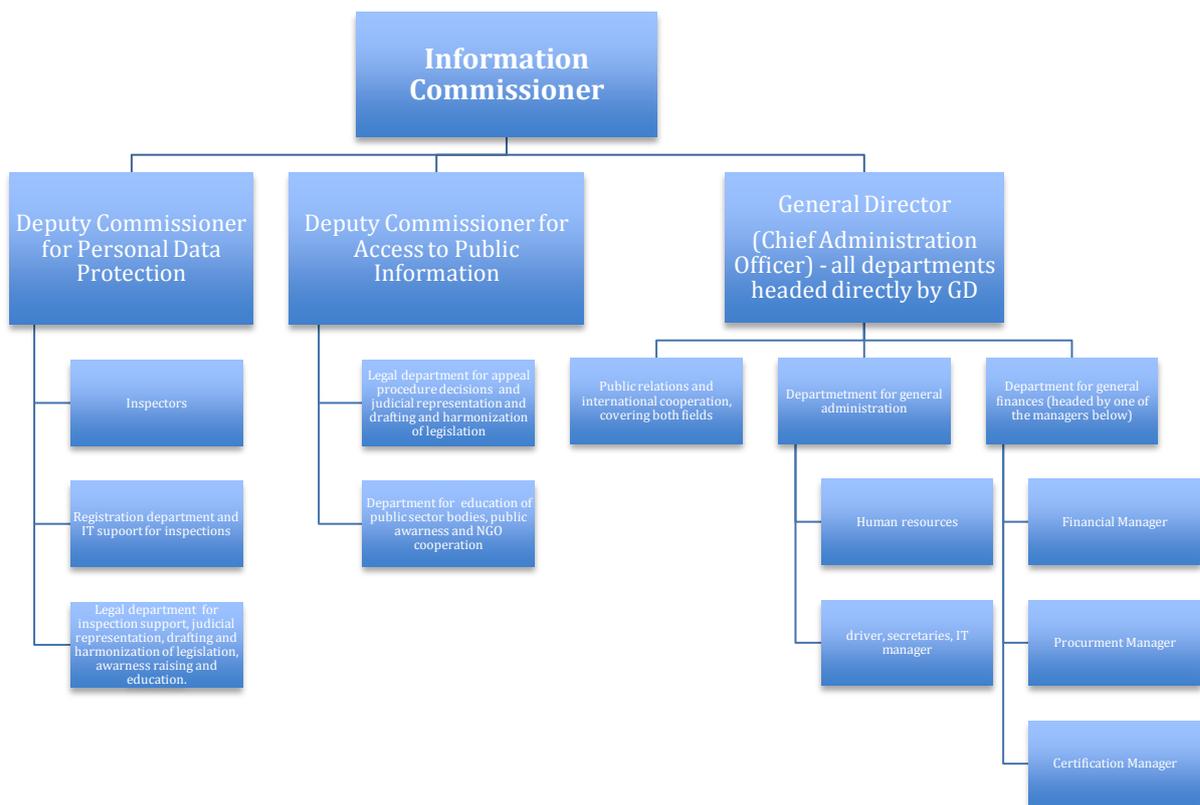
It has to be stressed that there is a clear trend in Europe to combine the functions of data protection and for access to public document under one authority. Examples of countries

⁵⁰ Preferably the competent authority to nominate the appointment should also be the one competent for proposing dismissal in certain circumstances.

which have established such joint bodies include Germany, Hungary, Ireland, UK, Serbia, Montenegro, Estonia, Slovenia and Switzerland.

Because establishing new public sector body always takes time to consider all the legal details and respect the legislative procedure for enacting the law in the parliament, we recommend that until then, in the transitional period, current competent body for FOI (Ombudsman) should be further strengthened (financially, employing more staff etc.). Only that way the FOI will be efficient as a human right and public sector bodies obliged to follow the rules of transparency in effective manner.

We recommend the following IC structure is set up⁵¹:



We furthermore recommend Ukraine establishes several outposts evenly distributed throughout the country according to *per capita* and geographical needs, preventing

⁵¹ As discussed above (see page 13), we make no recommendation on whether the IC should be a one-person or collective body.

backlogs from happening. Outposts should have no independence of their own and should include only legal department for API appeals and personal data protection inspectors.

Current position of the HR Commissioner provided in Article 20 of Law on HR Commissioner aims at establishing its strong independent position, which is a strong point of current legislation in Ukraine, therefore, we recommend providing the IC with equal statutory amenities.

4.2 Powers of the competent authority

Considering the weaknesses discussed above, we believe that API legislation in Ukraine does not provide adequate protection of the right to freedom of information. However, after reviewing the Ukrainian Law on HR Commissioner⁵² together with the Draft API Law⁵³, we can say that appeal body powers will be sufficient, however, there is room for improvement.

Namely, we would recommend including the power to obtain help by the police authorities when necessary and implementation of “*mandatory requests (instructions)*”⁵⁴ enforcement provisions.

The Draft API law we were provided with is also somewhat confusing in the sense that point 6 and 7 of para.2, Article 17 **seem to be in direct conflict**. While point 6 refers to mandatory instructions (i.e. they should be followed or sanctions shall be imposed) including amending or overturning legal acts of PSI holders, point 7 refers to the power of HR Commissioner to file a suit with the court for establishing that a decisions or action of PSI holder had been illegal. It remains uncertain in what cases will the first instance decision be overturned

⁵² Art. 13 of Law on HR Commissioner.

⁵³ Art. 17 of Draft API Law.

⁵⁴ Art. 17/II(6) of Draft API Law.

directly via binding decision by the HR Commissioner and when will the HR Commissioner refer to the court to do the same.

Therefore, we advise to delete point 7 and at the same time include extra provisions on IC decisions enforcement and allow requesters and PSI holders (i.e. first instance bodies) to contest IC decision before the court (preferably administrative court). As we understand this is included in Draft API Law.

4.3 Sufficiency of resources

Another important aspect of IC independence is the need for providing it with sufficient financial and human resources to enable IC independence and its efficiency in exercising the powers of authority in the field of API.

Financial resources of IC should be sufficient to cover the appropriate number of staff being able to handle all of the assigned tasks in a timely and highly professional manner. In Slovenia, the number of staff handling substance of API cases⁵⁵ is cca. 6 per 1 million inhabitants and another cca. 6 per 1 million inhabitants handling personal data cases on full time permanent employment basis. There are 3 administrative staff, 2 IT professionals supporting both human rights’ staff and a head of each section⁵⁶. The Slovenian model of 7 professionals per 1 million handling API appeals and the same number performing personal data inspections has proven to be sufficient in practice with no relevant backlogs in either field. However, it is important to consider that in the field of API the Slovenian IC has no competencies concerning legal drafting (including EU cooperation), awareness raising,

⁵⁵ They are all lawyers.

⁵⁶ Secretary general, API deputy, PD deputy, IT section deputy and head of inspectors.

education, general API legislation supervision and proactive transparency⁵⁷, i.e. it is only competent for handling individual API appeals, filing constitutional reviews⁵⁸ and giving remarks in legal drafting procedures. With the Ministry of Administrative Affairs having 7 professionals work in the API field (awareness raising, general supervision, legal drafting, support and education of PSI holders, proactive transparency promotion), we recommend another 4 staff members per 1 million inhabitants to cover these fields of work.

The IC **should be able to appoint its own deputies and staff** (as it is the case with the Ombudsman today). The IC (or members of the Commission) and its staff members should have a high enough salary to prevent possibilities of corruption and to attract competent and highly educated experts to accept the posts. The IC salary should be equal to constitutional court justices’ salaries.

Budget should also consider that:

- 1.) administration⁵⁹ should be large enough to handle the total number of staff,
- 2.) there is need for field work (vehicles, portable computers and printers are required),
- 3.) the need for use of modern technology and knowledge thereof is constantly increasing (including but not limited to providing sufficient resources to set up and maintain useful IC website and enable IC to be present in social media) and
- 4.) an appropriate working environment including appropriate stimulation should be set to attract the best experts, also offering them possibilities of further professional education.
- 5.) We also recommend the IC sets up a user-friendly help line which also requires additional financial and human resources.

⁵⁷ These competencies are held by the Ministry of Administrative Affairs. The division of competences in the API field between an independent IC (individual appeals) and an executive branch body has its advantages but also has several weaknesses, however, this issue is not a subject of this paper.

⁵⁸ Through individual appeals. In the API field, no constitutional review demand has been filed.

⁵⁹ Setting paychecks of administrator staff should consider they are handling also confidential data and personal data.

4.4 Possible ways to strengthen cooperation with NGOs

Empowering NGOs is an important factor in establishing the culture of transparency and sustaining strong freedom of information rights in society. NGOs can act as important partners of the IC.

We recommend the IC establishes a special division for awareness raising and education of the relevant public which would have a priority task to focus on NGOs. IC could also establish a special free-of-charge education programme for NGO professionals.

Cooperation with NGOs could also involve IC financing projects aiming at further peer-to-peer awareness raising and / or education, as well as programmes for targeted awareness raising, i.e. among journalists (the media), the population (*en general*, locally, the youth, etc.), PSI holders (focusing on different groups) or decision-makers. NGOs could also be engaged, encouraged or even financed to perform analysis or research in the field of freedom of information.

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