SECRETARIAT GENERAL

DIRECTORATE GENERAL
HUMAN RIGHTS AND RULE OF LAW

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DGI(2015)15_
June 2015 p.

Opinion of DGI (Directorate of Information Society and Action Against Crime, Information Society Department, Media and Internet Governance Division)
Prepared on the basis of the expert opinion by Ad van Loon and Mathias Huter

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/ Draft Law on "Amendments to the Laws of Ukraine on providing measures to ensure the transparency of media ownership and implementation of the state policy principles in the field of television and radio broadcasting" № 1831 from 29 May, 2015

DGI (2015), 16 June 2015 p./

Joint Programme between the European Union and the Council of Europe
Strengthening Information Society in Ukraine

Funded by the European Union and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Implemented by the Council of Europe

Analysis and comments on the draft Law of Ukraine on "Amendments to the Laws of Ukraine on providing measures to ensure the transparency of media ownership and implementation of the state policy principles in the field of television and radio broadcasting"

By Ad van Loon[1]

This expert opinion has been prepared for the Secretary General of the Council of Europe at the request of the Special Advisor of the Secretary General (SASG) for Ukraine in the framework of the Joint Project of the European Union and the Council of Europe on "Strengthening Information society in Ukraine".

It concerns an assessment of the compliance of the provisions of the draft Law on "Amendments to the Laws of Ukraine on providing measures to ensure the transparency of the media ownership and implementation of the state policy principles in the field of television and radio broadcasting" (registration #1381) with the European standards.

It consists of three parts: an opinion on the structure and contents of the draft Law in general (in the framework of European standards), an opinion on individual (sets of) provisions of the draft Law and a series of conclusions and recommendations.

The expert is aware of previous expert opinions[2] on earlier draft laws on the issue, but has chosen not to refer to those earlier opinions in detail. Instead, he has chosen for a pragmatic approach by focusing entirely on the latest draft in order to provide a fresh and concise view with concrete recommendations.

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[2] Mathias Huter, "Suggestions for Effective Media Ownership Transparency Provisions in Ukraine", 18 May 2015;
Zrinjka Peruško, "Expertise on the 'Law of Ukraine On Amendments to the particular Laws of Ukraine on Ensuring the Transparency of Ownership Relations in respect of Mass Media', October 2013" (DGI(2013)15;
Sandra Bašic-Hrvatin & Ad van Loon, "Analysis and comments on the draft Law of Ukraine On Amendments to Certain Laws of Ukraine on Ensuring Transparency of Ownership Relations With Regard to Mass Media", 26 February 2007.

1 Structure and contents of the draft Law: General issues

Ukraine has entered into an Association Agreement with the European Union. The Association Agreement aims at political association and economic integration. It provides for a shared commitment to a close and lasting relationship based on common values, in particular full respect for democratic principles, rule of law, good governance, human rights and fundamental freedoms. These are the same European standards as those which the Council of Europe safeguards and promotes.[3] One of the recitals on page 4 acknowledges that,

> " the political association and economic integration of Ukraine with the European Union will depend on progress in the implementation of this Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas".

Under the Association Agreement, Ukraine committed to gradually approximating Ukraine's legislation with that of the European Union along the lines set out in this Agreement and to effectively implementing it.

For the above reasons, it is important that new legislation takes due account of and implements existing European legislation and uses the same legal standards, legal concepts and harmonized rules as the Member States of the EU and the States of the European Economic Area are obliged to do.

Thus, it is essential that Ukraine adheres to the same relevant definitions as the other EU Member States, notably the definitions in the EU's Audiovisual Media Services Directive[4] and the additional definitions in the European Convention on Transfrontier Television.[5] A list of all relevant definitions to be used is attached to this expert opinion in Appendix One.

Following the commitments made by Ukraine under the Association Agreement, it is important that the draft Law does not limit itself to traditional and, in a way, out-dated and obsolete concepts such as television broadcasting and radio broadcasting. For regulatory purposes, the European Union uses new concepts which take into account new types of media services and new distribution methods. Under EU law, a television broadcasting service is referred to as a linear audiovisual media service (regardless of the chosen distribution method), while the term non-linear audiovisual media service is used for on demand services (also regardless of the infrastructure chose for the electronic distribution of those type of services). It is therefore necessary that the Ukrainian legislator makes a distinction between linear and non-linear audiovisual media services, as the Directive contains a section of rules which apply to non-linear audiovisual media services only.[6]

Neither the European Convention on Transfrontier Television, nor the EU Audiovisual Media Services Directive apply to radio broadcasting. Therefore, within the limits set by Article 10 of the European Convention for the Protection of human rights and fundamental freedoms and the EU's fundamental right on the freedom of movement of services, Ukraine is free to set its own rules in respect of radio broadcasting.

Since 2002, the EU regulates the (re-)transmission of electronic distribution of audiovisual media services in a technology neutral way; i.e., independent of the electronic communications network used for the dissemination of such services.

Important principles to be taken into account and to respect (and which need to be reflected in the laws of Ukraine) are the following:

- *Everyone* (not just entities licensed under Ukrainian law) has the right to freedom of expression and the freedom to receive and impart information without interference by public authorities;

[3] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJEU No. L161, 29 May 2014, pp. 3-2137.

[4] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJEU No. L 95, 15April 2010, pp. 1–24.

[5] European Convention on Transfrontier Television, 5 May 1989, CETS No.: 132 as amended by the Protocol to amend the European Convention on Transfrontier Television (ETS No. 171) which entered into force, on 1 March 2002.

[6] Chapter IV.

- Technology neutral approach;
- One stop shop for jurisdiction over linear and non-linear audiovisual media services;
- Freedom of cross-border movement of audiovisual media services.

European standards do not oblige the Ukrainian legislator to promote full disclosure of ownership and control in the media sector *to the general public* (although Ukraine has every right to go beyond what is required by those European standards, by adopting more strict requirements in respect of the Ukrainian media outlets).

Article 6 para. 2 of the European Convention on Transfrontier Television merely requires that,

> "Information about the broadcaster[7] shall be made available, upon request, by the competent authority of transmitting Party. Such information shall include, as a minimum, the name or denomination, seat and status of the broadcaster, the name of the legal representative, the composition of the capital, the nature, purpose and mode of financing of the programme service the broadcaster is providing or intends providing."

This does mean, of course, that the responsible Ukrainian authority (in this case, the National Radio and Television Broadcasting Council) is under the obligation to collect such information to be able to meet the above requirement if such a request would be made by a sister authority in another State which is a Party to the Convention.

An information and disclosure obligation can also be found in the Audiovisual Media Services Directive. Article 5 obliges the EU Member States to ensure that all audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

(a) the name of the media service provider;
(b) the geographical address at which the media service provider is established;
(c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;
(d) where applicable, the competent regulatory or supervisory bodies.

Moreover, Article 30 of this Directive, which stipulates that,

> "Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies."

Article 2 contains criteria for the establishment of which country has jurisdiction over an audiovisual media service provider, Article 3 concerns cases in which a State (exceptionally)restricts the retransmission on its territory of channels which come under the jurisdiction of another State and Article 4 concerns cases in which a Member State imposes stricter rules on broadcasters than required by the Directive. But the obligation of collaboration with the Commission on the basis of Article 30 is not limited to those 3 cases and therefore the Commission could ask for other types of information too.

Finally, it is important to adopt a clear and coherent definition of the notion of 'control'. In the current draft, the notion is spread out over a number of sections and articles and it appears in different forms. On page 2 it appears as a 'significant share' in an 'affiliate', while later on the terms 'affiliated persons' (page 11) 'final beneficial owner' and 'controller' are introduced (page 5) as well as the notion of 'indirect ownership of significant share' (page 10) and 'ownership structure'(page 14)

[7] According to Art. 2 under c of the European Convention on Transfrontier Television a 'Broadcaster' is "the natural or legal person who has editorial responsibility for the composition of television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party".

Also in certain sections, 10 percent is used (in the definition of 'significant share' and in Art. 40 para. 3 under c) while in the section which deals with applications for (renewal of a) broadcasting licence, Art 24 para. 2 under a, stipulates that "Joint-stock companies shall provide the information identified in this paragraph as to their shareholders with at least 5 percent ownership as of the day of filing the application" and the definition of 'control' refers to 50 percent.

For reasons of clarity one option could be to at least group together all the relevant definitions which refer to ownership and control. However, a better solution would be to refer to an existing definition of control under general laws such as, for example, the Civil Code. Is there a Civil Code (or other type of general legislation applying to company structures) in which there is a definition of 'ownership' and/or 'control'? Or in which the criteria are determined of when companies are deemed to be part of a group?

If not, it is worthwhile to consider the inclusion of those notions in general legislation (such as the Civil Code) and then to simply refer to those definitions in the current draft Law on transparency. A suggestion for the wording, based on the Dutch Civil Code, can be found in Appendix Two to this expert opinion. In the Ukrainian situation it is probably a good idea to keep the definition of '(final) beneficial owner' (as a sort of 'catch all' provision).

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[8] defines 'Control' as follows:

> "Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
>
> (a) ownership or the right to use all or part of the assets of an undertaking;
> (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
>
> 3. Control is acquired by persons or undertakings which:
>
> (a) are holders of the rights or entitled to rights under the contracts concerned; or
> (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom."

2 The individual (sets of) provisions of the draft Law: Specific issues

- *Article 1. Definitions*

The notion of 'audiovisual article' is unclear; perhaps this is due to the translation. Perhaps what is meant is 'programme part'? Also, it's difficult to see how the notion of 'audiovisual' relates to radio.

Rather than defining different types of electronic distribution infrastructures (such as 'house distribution network' or 'telecommunications network' or 'multichannel (on air/cable) network" or 'broadcast network'), it is advisable to use one technology neutral definition. Such a definition can be found in the EU's regulatory framework for electronic communications networks and services[9]:

[8] OJEU No. L 24 , 29 Januari 2004, pp. 1-22, Article 3, para. 2.

[9] Article 2 under (a), Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJEU No. L 108 , 24 April 2002, pp. 33-50, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJEU No. L 337, 18 December2009, pp.. 37–69.

"electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed".

There seems to be no need to define 'local product' as the notion doesn't reappear in the text of the draft Law (however, in the English version made available to the expert, only the provisions which are subject to amendment have been provided, so it may very well be that the notions may appear in other sections of the current Law); the same applies to 'state-run broadcasting organisations', 'community broadcasting organisation', 'domestic audio-visual product', 'program service provider of the multichannel television network in the standard DVB-T or DVB-T2', 'wired radio network', 'broadcast format', 'community antenna system', 'social broadcasting', 'public service broadcasting', 'channel sublease', 'TV/radio journalist' and 'member of TV/radio personnel').

More generally, it is advisable that the legislator or public authorities do not attempt to define criteria on which basis it can be decided who is a journalist. It opens the door to abuse. Moreover, Article 10 of the European Convention for the protection of human rights and fundamental freedoms protects the right to freedom of expression and the right to receive and impart information of *everyone*; not just of those persons who are recognized as *journalists* by the State.

In regard to the definitions of 'programming service provider' and 'programme service provider's licence', it should be noted that under EU legislation, the provision of electronic communications networks or the provision of electronic communications services may only be subject to a *general* authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity. In short: under EU rules, Ukrainian authorities should not make the activities of cable operators subject to an individual licence: all companies which fulfil the general conditions laid down by law should be free to start their business activities without any further permission[10] (although they may, of course, be subject to registration obligations in the same way as any other type of business).

The notion of 'versatile' in 'versatile programming service' is unclear. Does it refer to must carry obligations? If so, than due account should be taken of Article 31 of the EU's Universal Service Directive[11], which stipulates that,

"1. Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet

[10] Article 3, para. 2, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJEU No. L 108 , 24 April 2002, pp. 21-32, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJEU No. L 337, 18 December2009, pp.. 37–69..

[11] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJEU No. L 108, 24 April 2002, pp. 51–77, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJEU No. L 337 of 18 December 2009.

clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review.

2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner."

For reasons of coherence with EU law, the notion of 'live broadcast' should perhaps be replaced by the notion of 'linear broadcast' (or 'linear audiovisual media service').

The definition of 're-transmission' should contain the following three elements: simultaneous, unchanged and unabridged. The European Convention on Transfrontier Television defines 'Retransmission' as "the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public".[12]

- *Article 8. Protection of economic competition in television and radio broadcasting*

Important questions are who defines the geographical markets and what are the exact definitions of the product markets "television market" and "radio broadcasting market". Guidelines on how to define a relevant product market in the media sector can be derived from the reports which can be found at http://ec.europa.eu/competition/sectors/media/documents/index.html. A further question is what it means that one owner cannot 'control' more than 35 percent of any given geographical market? This needs to be clarified: Is it the 'share of voice' that is relevant (i.e., the audience reach?)? Is it the number of competing companies which are operating in the same product market in the geographical region(s) in question? Is it related to a certain electronic communications infrastructure? What is the relevance of simulcasting (e.g. on the internet)?

How does para. 3 of Article 8 relate to television broadcasting in digital multiplexes?

- *Article 12. Establishment of broadcasting organizations*

Para. 1 of this provision clearly violates the right to freedom of establishment which is one of the economic freedom rights of the EU.

Para. 2 does not only prohibit public authorities to establish and take part in broadcasting organisations, but also religious organisations. It is highly unlikely that such a ban on the activities of religious organisations can be upheld under Article 10 of the European Convention for the protection of human rights and fundamental freedoms.

- *Article 24. Application for (extension of) a broadcasting licence*

It is important to develop clear, transparent and non-discriminatory selection criteria and procedural criteria for the 'hors concours' licensing procedure referred to in para. 8. An appeal procedure should be foreseen, but this requirement seems to be covered by Article 30.

- *Article 25. Competitive broadcast licensing*

If a tender is used to assign space in terrestrial digital multiplexes, perhaps the best way to organise this would be a two-step assessment. In the first step, the National Radio and Television Broadcasting would then decide (on the basis of clear, transparent and non-discriminatory criteria) whether or not an applicant meets those criteria; in a second step, the applicants which have passed the first test could then be invited to bid for the

[12] Art. 2 under b.

available space in an auction procedure. This is a more objective and transparent procedure than letting the dominant operator of terrestrial multiplexes (Zeonbud) unilaterally fix an annual fee for the use of the multiplexes.[13]

- *Article 40. Licensing programming service providers*

This provision will need to be amended. As explained above in the section on the "Structure and contents of the draft Law: General issues", the individual licensing of operators of electronic communications networks and services (such as telecommunications or cable network operators) is not permitted under the EU regulatory framework for electronic communications networks and services.

Almost certainly, a general obligation for channel aggregators ('programming service providers') to obtain a licence for which purpose they need to submit to public authorities a list of channels which will be included in their package(s), cannot be justified and upheld under Article 10 of the European Convention for the protection of human rights and fundamental freedoms (para. 3 under a jo. Para. 4). Such an obligation can only be justified if,

- Under the EU regulatory framework for electronic communications networks and services, on the basis of a thorough market analysis, the authorities would come to the conclusion that a certain 'programming service provider' has significant market power in a certain relevant product market and a certain geographical market in which case the obligation could be imposed as a possible remedy;

  or,

- Under the European Convention for the protection of human rights and fundamental freedoms if the obligation serves a legitimate aim[14], the obligation is as such capable of protecting that legitimate aim, the obligation is proportionate to the aim pursues and the obligation does not go beyond what is reasonably necessary to achieve that aim.

Whether or not a 'programming service provider' has secured and cleared all the necessary rights for the distribution or re-transmission of a broadcaster's channel should not be of interest to the public authorities. Copyright law is private law and copyright owners and other rightsholders can act to protect their private interests by following the general procedures for litigation between private parties pursuing their private interests. Systems of broadcast licensing around Europe have been created to protect public interests; not private interests.

- *Article 42. Re-transmission of television and radio programmes and broadcasts*

A number of EU Member States is not a Party to the European Convention on Transfrontier Television[15], but they are Member States of the EU and therefore they have integrated the principles and the provisions of the Audiovisual Media Services Directive into their national systems of law. Given the above and given the

[13] Given the dominant position which has been created by the legislator by granting exclusive rights to manage and operate digital multiplexes to Zeonbud, the company has been granted significant market power. In such a case, the EU regulatory framework for electronic communications networks and services would normally require imposing remedies to ascertain that the company shall not abuse such power. The remedies which could be envisaged may vary from disclosure obligations to unbundling of services. See: Art. 16 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJEU No. L 108 , 24 April 2002, pp. 33-50, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJEU No. L 337, 18 December2009, pp.. 37–69..

[14] See Art. 10, para. 2 of the European Convention for the protection of human rights and fundamental freedoms. The legitimate aims are: in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[15] Belgium, Denmark, Greece, Ireland, Luxembourg, Netherlands and Sweden.

Association Agreement between Ukraine and the EU it is advisable to expand the scope of this article to all Member States of the EU and to States which are Parties to the European Economic Area Agreement (so as to include Iceland which is also not a Party to the European Convention on Transfrontier Television).

Furthermore, it would be advisable to re-phrase the proposed wording to amend this Article in the following way:

> "The procedure of re-transmission shall be governed by this Law, and the European Convention on Transfrontier Television in respect of television broadcasters which fall under the jurisdiction of States that are Parties to the European Convention on Transfrontier Television. In respect of television broadcasters which fall under the jurisdiction of a Member State of the EU, Article 27 of the European Convention on Transfrontier Television shall be applied by Ukraine as if Ukraine were a Member of the EU".[16]

Para. 2 of Article 42 can of course only be applied to the extent that it does not violate the fundamental right to freedom of expression and the freedom to receive and impart information as protected by Article 10 of the European Convention for the protection of human rights and fundamental freedoms.

- *Article 59. The duties of broadcasting organisations*

It should be kept in mind that these provisions can only apply to broadcasting organisations which fall under the jurisdiction of Ukraine.

3 Conclusions and recommendations

Ukraine entered into an Association Agreement with the EU and, on that basis, committed itself to the approximation of Ukrainian laws to EU standards (which include and respect) Council of Europe standards). Given the nature and the objectives of the draft Law on "Amendments to the Laws of Ukraine on providing measures to ensure the transparency of media ownership and implementation of the state policy principles in the field of television and radio broadcasting", there is now an immediate opportunity to undertake such approximation in the (audiovisual) media sector.

This expert opinion explains the legal context and makes a number of recommendations for bringing Ukrainian media legislation in line with European standards while, at the same time, fulfilling (also in line with European standards) public interest objectives by making it more transparent who owns or (ultimately) controls media outlets (by means of mandatory disclosure of interests). The information thus obtained will make it possible to impose certain limits on certain ownership and control relations which are considered damaging for the role of the media in a democratic society or which are considered to hamper competition relations.

It is therefore recommended that the Ukrainian legislator,

- incorporate the definitions in Appendix One to this expert opinion into the relevant Laws of Ukraine;

- define the notion of 'control' in the Civil Code or similar type of general law (or at least group together and simplify the proposed definitions). An example of an EU definition taken from the EU Merger Regulation, is given above;

- describe relevant relationships between companies and between the owners/controllers of companies in the Civil Code or similar type of general law. An example of how to do this can be found in Appendix Two to this expert opinion;

- consider re-phrasing Article 8 to clarify the meaning of control of more than '35 percent of any given geographical market' and assess whether this threshold is capable of reaching the objective aimed at. Perhaps it is more effective to set limits on the audience share in different geographical markets for

[16] In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

each person controlling media outlets; crossing the thresholds would then require divestment or result in banning the person or company in question from acquiring any further media outlets in that particular geographical market;

- make legislation technology neutral in terms of services and means of electronic communication (in line with the EU regulatory framework for electronic communications networks and services and in line with the EU Audiovisual Media Services Directive;

- insert the following text in Article 42 of the Draft Law:

  "The procedure of re-transmission shall be governed by this Law, and the European Convention on Transfrontier Television in respect of television broadcasters which fall under the jurisdiction of States that are Parties to the European Convention on Transfrontier Television. In respect of television broadcasters which fall under the jurisdiction of a Member State of the EU, Article 27 of the European Convention on Transfrontier Television shall be applied by Ukraine as if Ukraine were a Member of the EU";

- make sure to keep the definition of (ultimate) Beneficial Owner (as this is important in the Ukrainian context);

- do not oblige operators of electronic communication networks to seek individual licences for their activities (such as for the establishment of an electronic communications network of for the aggregation of channels), but respect the provisions of the EU Authorisation Directive. This Directive allows all those who respect the criteria of the General Authorisation, which are to be included in a Law, to start their business activities;

- perform a market analysis under the EU regulatory Framework for electronic communications networks and services in order to determine in which relevant geographical and/or product markets there are businesses which have significant market power and impose remedies to prevent possible abuse of that position;

- do not attempt to grant 'professional journalists' more (or less) rights than anyone else; Article 10 of the European Convention on human rights protects *everyone* 's right to receive and impart information (not just those who the State considers to be 'professional journalists');

- further and more detailed recommendations for adjustment of the draft Law can be found above, in section '2 The individual (sets of) provisions of the draft Law: Specific issues'.

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Appendix One

Relevant definitions
Taken from European legal instruments

Relevant definitions taken from Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJEU No. L 95, 15 April 2010, pp. 1–24.

Article 1

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'audiovisual media service' means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

(b) 'programme' means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

(c) 'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) 'media service provider' means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(e) 'television broadcasting' or 'television broadcast' (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(f) 'broadcaster' means a media service provider of television broadcasts;

(g) 'on-demand audiovisual media service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(…)

(n) ‘European works’ means the following:

(i) works originating in Member States;
(ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
(iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.

2. The application of the provisions of points (n)(ii) and (iii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned.

3. The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions:

(i) they are made by one or more producers established in one or more of those States;
(ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States;
(iii) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

4. Works that are not European works within the meaning of point (n) of paragraph 1 but that are produced within the framework of bilateral co-production agreements concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.

Relevant definitions taken from the European Convention on Transfrontier Television, 5 May 1989, CETS No.: 132 as amended by the Protocol to amend the European Convention on Transfrontier Television (ETS No. 171) which entered into force, on 1 March 2002.

a "*Transmission*" means the initial emission by terrestrial transmitter, by cable, or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public. It does not include communication services operating on individual demand;

b "*Retransmission*" signifies the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public;

c "*Broadcaster*" means the natural or legal person who has editorial responsibility for the composition of television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party;

d "*Programme service*" means all the items within a single service provided by a given broadcaster within the meaning of the preceding paragraph;

e "*European audiovisual works*" means creative works, the production or co-production of which is controlled by European natural or legal persons.

Appendix Two

Example of definitions taken from Book 2 of the Dutch Civil Code

Article 24a Definition of a ‘subsidiary’

1. A subsidiary of a legal person is:

a. a legal person in which another legal person or one or more of its subsidiaries, whether or not under a contract with other persons entitled to vote, is able to exercise, solely or jointly, more than one half of the voting rights at the General Meeting;

b. a legal person with regard to which another legal person or one or more of its subsidiaries, whether or not under a contract with other persons entitled to vote, is able to appoint or discharge, solely or jointly, more than one half of the members of the Board of Directors or the Supervisory Board, even if all persons entitled to vote would cast their vote.

2. With a subsidiary is equated a commercial partnership acting in its own name in which the legal person or one or more of its subsidiaries participate as a partner who is fully liable towards the creditors of that commercial partnership for all debts.

3. For the purpose of paragraph 1, rights attached to shares shall not be linked to a person who holds these shares on behalf of someone else. Rights attached to shares shall be linked to the person on whose behalf these shares are held, if this person has the power to decide how these rights are to be exercised or if he has the power to acquire these shares.

4. For the purpose of paragraph 1, voting rights attached to pledged shares are linked to the pledgee (holder of the pledge) if he has the power to decide how these rights are to be exercised. If the shares, however, are encumbered with a pledge as security for a loan which the pledgee has provided in the ordinary course of his business, then the voting rights shall only be linked to him if he has exercised them in his own interest.
Article 24b Definition of a ‘group’

A group is an economic unit in which legal persons and commercial partnerships are organizationally interconnected. Group companies are legal persons and commercial partnerships interconnected to each other in one group.

Article 24c Definition of a 'participating interest'

1. A participating interest in a legal person is present when another legal person or a commercial partnership or one or more of its subsidiaries for their own account, either solely or jointly, have provided or have caused the provision of capital (recourses) to the first mentioned legal person in order to be interconnected with that legal person for a long-lasting period of time in support of their own activities. If one fifth or more of the issued share capital is paid up (is held), a participating interest is presumed to be present.

2. A participating interest in a commercial partnership is present if a legal person or its subsidiary:
a. is fully liable as partner towards the creditors of the commercial partnership for all debts, or;
b. is otherwise a partner in that commercial partnership in order to be interconnected with that commercial partnership for a long-lasting period of time in support of its own activities

Analysis and comments on the draft Law of Ukraine on "Amendments to the Laws of Ukraine on providing measures to ensure the transparency of media ownership and implementation of the state policy principles in the field of television and radio broadcasting"

by

Mathias Huter[17]

16 June, 2015

This expert opinion has been prepared for the Secretary General of the Council of Europe at the request of the Special Advisor of the Secretary General (SASG) for Ukraine in the framework of the Joint Programme between the European Union and the Council of Europe entitled Strengthening Information Society in Ukraine.

This paper seeks to assess the compliance of the provisions of the draft Law on "Amendments to the Laws of Ukraine on providing measures to ensure the transparency of the media ownership and implementation of the state policy principles in the field of television and radio broadcasting" with European standards. This paper seeks to complement an assessment of the draft Law produced by Ad van Loon, and will thus not repeat the analysis, comments and recommendations made there.[18]

This assessment builds on a previous policy paper of the author that sought to help inform the drafting of the law.[19] This paper also seeks to reflect discussions from a stakeholder conference in Kiev, held on 11 June 2015, organized by the Council of Europe in the framework of the Strengthening Information Society in Ukraine project.

Article 1 – Definitions

Comment:
The Council of Europe's Recommendations on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector highlight:

> "The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law. [...] The regulations governing the broadcasting

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[18] Ad Van Loon, „Analysis and comments on the draft Law of Ukraine on ‚Amendments to the Laws of Ukraine on providing measures to ensure the transparency of media ownership and implementation of the state policy principles in the field of television and radio broadcasting', 12 June, 2015.

[19] Mathias Huter, " Suggestions for Effective Media Ownership Transparency Provisions in Ukraine", 18 May, 2015.

licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner."[20]

Throughout the draft Law, the level of control in a broadcaster that has to be disclosed appears to be inconsistent. While the definitions of "significant share" put the level of control that has to be disclosed at 10 percent of direct or indirect ownership, the definition of "ownership structure" states that all owners, founders and participants of each legal entity in the chain of ownership have to be disclosed.

Article 12 – Establishment of broadcasting organisations

> Para. 2: "It is prohibited in Ukraine to establish and take part in broadcasting organisations: [...] individuals, legal entities, physical persons-entrepreneurs registered in offshore zones, the list of which is approved by the Cabinet of Ministers of Ukraine and stateless persons;"

Comment:
Article 12 lists actors that are banned from establishing and "taking part in" broadcasting organizations. From the translation, it was not clear if "taking part in" refers to holding any direct or indirect shares, if it means the holding of significant shares, or if it has another meaning. It should be ensured that the wording of this Article is clear and leaves no room for interpretation.

Para. 2 includes a ban on individuals "registered in offshore zones". From the translation of the draft Law, it is unclear whether this refers to the nationality, or the permanent residency of individuals. It is thus not clear if, for example, a citizen holding a passport from a jurisdiction that is recognized as an offshore zone by the Ukrainian government would be allowed to directly hold shares in a Ukrainian company owning shares in a broadcaster.

In Georgia – which appears to be the only European country that currently has a similar ban on offshore ownership in the broadcasting sector – the Law on Broadcasting reads:

> Article 37, para. 2: "A broadcasting license holder/authorized person shall not be: (...) e) a legal entity registered offshore; f) a legal person with a share or stocks in it directly or indirectly owned by a legal entity registered offshore.[21]

(A provision in para. 3, stating: "The founding and operations of TV and radio broadcasting organizations (co)founded or (co)owned by non-resident(s) registered in one of the offshore jurisdictions as specified by the Cabinet of Ministers of Ukraine shall be prohibited" appears to largely repetitive of a similar provision in para. 2.)

Article 24 – Application for (extension of) a broadcasting license

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[20] Council of Europe: Recommendation No R (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, https://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)023%26expmem_EN.asp

[21] Offshore is defined as "a state or territory in a state where information on property, activity and partners/shareholders of a legal person is kept confidential" (Article 2), Georgian Law on Broadcasting, http://www.gncc.ge/uploads/other/1/1252.pdf.

Comment:
Several terms in Article 24 para. 3, including “major shareholder”, “affiliates of the founder”, “persons related to the broadcasting organization” and “information according to the declaration of assets, revenues, expenses and financial liabilities” appear to lack clarity (this may partly be due to the translation). What exactly is meant by these terms appears to be open to interpretation. They should thus be refined to ensure that the provisions are clear.

Article 38 – Public registration and keeping of the Public of the subjects of the information activities in the television and radio broadcasting

> Para. 14: “Access to the State Register of subjects of information activities in the field of television and radio broadcasting is free. The procedure of using of this Register and the fee for receiving the information in written form are determined by the National Council. The National Council places information from the State Register of broadcasting organizations of Ukraine on the website.”

Comment:
The provision appears somewhat contradictory. While it states that access is free, it also allows the National Council to set fees for issuing information. Ideally, extracts from the register should be free to ensure a high level of transparency, which is the stated purpose of this law.

The EU-Ukraine Association Agreement makes no reference to the Public Sector Information Directive, which promotes minimum standards in the area of Open Data and the re-use of public sector information in the EU. Nonetheless, legislators could consider adding a provision stating that the National Council places information from the State Register of broadcasting organizations of Ukraine on its website in a machine-readable format. By publishing ownership information in machine-readable file formats rather than (only) as scanned documents, the National Council would facilitate the use and re-use of this information. If Ukraine has legislation that defines standards for Open Data, a reference to such provisions could be included.

Article 59 – The duties of broadcasting organizations

> “1) The broadcasting organisation shall be obliged [...] m) [to] post on its website on the Internet information about its ownership structure in the form determined by the National Council.
> 2.) Broadcasting organizations have to annually submit a report to the National Council for the previous (reporting) year in the period until March 31, which should contain the following information: - changes in the ownership structure during the year indicating the data on all final beneficial owners (controllers) of the broadcasting organizations and affiliated entities (for each person - name, surname, date of birth, nationality, address);”

Comment:
The bill should be clarified to ensure consistency in the level of beneficial ownership that has to be disclosed. Several Articles state that “data on all beneficial owners” has to be disclosed, the definition of “ownership structure (Article 1) also states defines the term as “a system of relations between legal entities and individuals which allows to identify all owners, founders and participants of the broadcasting organization (...)”. However, in some Articles a 5 percent threshold for the

disclosure of beneficial ownership for Joint Stock Companies is mentioned (Article 24), other Articles mention a 10 percent threshold. These provisions should be clarified.

Article 12.4) and 59, para. 1) appear to be largely repetitive. To improve the transparency of the rules, should also be considered to include a timeframe in the law within which changes in ownership have to be reported to the regulator, and be updated on the license holder's website.

The Georgian Broadcasting Act (Article 62) requires a broadcaster to provide the regulator with an updated declaration with its beneficial shareholders, members of governing bodies and officials within ten days of a change in this structure occurring, and to post this updated information on its own website. The Austrian Audio-visual Media Services Act requires that any change in the ownership relations are reported to the regulator within two weeks of the legal effectiveness of the assignment or transfer of shares (Art. 10).

Article 59 – Financial transparency provisions

Article 59 para 1m (and Article 40, para. 9. a) require that "information on persons who provided funding for program service provider (credits, loans, donations, etc.) during the reporting year, if the total amount of such funding from one person during the reporting year amounted to more than 10 percent of the share capital of program service provider as a legal entity" is reported to the regulator.

The Council of Europe's Recommendation on Measures to Promote Media Transparency provides the following guidance on financial disclosure requirements for broadcasters:

Guideline No. 1: Access by the public to information on the media:

> "11. Where appropriate, the disclosure to the public of other information might be envisaged (data on financial results or, as regards press undertakings, on their circulation figures). The consequences of communication of such information to third parties must be carefully considered, especially when the financial results of undertakings are negative ones (for example, the risk of advertisers losing confidence in particular publications which might worsen the financial difficulties of the undertaking in question)."

Guideline No. 4: Disclosure of information following the granting of broadcasting licences to broadcasting services:

> "35. The aim of the provisions included in national legislation will be to enable the service or the authority concerned to be kept informed of all elements relating to the running of the service which were not subject to disclosure at the time of granting the licence since the service was simply not in existence. First and foremost, this will concern data relating to the financial life of the service (origin and amount of resources, profits) which in some national the information subject to disclosure may also vary considerably. It may be restricted to the communication of basic documents (balance sheets, accounts) or it may be extended to the presentation of more detailed financial declarations accompanied, if need be, by justifications setting out in a more detailed manner the distribution and origin of the various

types of resources (advertising, sponsorship, the sale of programmes or provision of services carried out for third parties, etc.)".[22]

Comment:
From the draft Law, it remains unclear if and how the National Council will be able to establish that the financial information it receives is correct. There appear to be no requirements for a license holder to submit (audited) annual accounts.

From the translation, it remains unclear if in-kind contributions, such as the free or subsidized provision of an office, cars, equipment, labour force services etc., would also have to be disclosed. Would the disclosure also include all sources of commercial income that exceed the threshold?

It appears that the threshold for income that has to be disclosed will largely vary among broadcasters and programme service providers, as it is determined by the founding capital of the respective entity, which is likely to vary significantly across the sector. There may also be license holders that are registered or organized as entities that do not have a founding capital.

It remains unclear what details and information the wording "information on persons who provided funding for program service provider" entails.

It remains unclear from the bill whether the annual report license holders submit to the National Council will become available to the public or not. It should be considered to mention any requirement for the pro-active publication of the annual reports (or parts of the information they contain) by the National Council in the law. At the same time, consequences of extensive financial transparency requirements should be carefully considered by the legislator.

Article 72 – Sanctions for violation of the broadcasting legislation

Para. 10:

> "For non or late submission of the report provided in the part 2 of the Article 59 (for broadcasting organizations) or part 9 of Article 40 (for program service providers) of this Law or submitting the report with unreliable data, the broadcasting organization or program service provider pays a fine of 25 percent of the total amount of the license fee for all licenses owned by the infringer, under Article 31 of this Law."

In its Recommendations on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, the Council of Europe stipulates in regards to sanctions being imposed:

> "23. A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law."

The Explanatory Memorandum to the Recommendation states:

[22] Council of Europe: Recommendation No. R (94) 13 of the Committee of Ministers to Member States on Measures to Promote Media Transparency, adopted by the Committee of Ministers on 22 November 1994 at the 521st meeting of the Minister's Deputies,
https://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1994)013&ExpMem_en.asp

„The sanctions may range from a simple warning through moderate and heavier fines or the temporary suspension of a licence, to the ultimate penalty of withdrawing a licence. According to domestic law, sanctions can be made public in order to inform the public and ensure the transparency of the decisions of regulatory authorities. Given the gravity of licence withdrawal, it should be applied only in extreme cases where broadcasters are guilty of very serious failures of compliance."

„(...) In fact, it is the primary task of regulatory bodies not to "police" the broadcasting sector, but rather to ensure that it functions smoothly by establishing a climate of dialogue, openness and trust in dealings with broadcasters. Nonetheless, the application of sanctions without prior warning may be justified in certain exceptional cases. For the sake of operators' legal certainty, such exceptional cases should be defined in law."

Comment:
The principles described above should be applied in all cases the National Commission moves to sanction license holders for violations. It appears advisable that also in the case an annual report containing information that the regulator finds to be insufficient, the regulator should first issue a warning and allow the license holder to correct the mistake, before a fine is issued. The term "unreliable data" may also need to be clarified.

Timeline for the introduction of transparency requirements
The bill does not appear to include provisions stipulating a date when disclosure requirements come into force.

„4. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity."[23]

The law appears to require that once the provisions come into force, all license holders have to immediately file for a re-issuing of their license with the National Council, which has to decide on the application within ten working days. This would mean that the regulator would have to process possibly hundreds of such applications at the same time. Legislators should, in consultation with the regulator, consider solutions that would ensure an orderly introduction of the requirements. It is important that license holders have sufficient time to collect and authenticate all the information required by this law, and to ensure that their shareholding structure complies with this law.

When Georgia introduced beneficial ownership disclosure requirements, broadcasters had several months between the provisions entering into force and the deadline for filing a first annual ownership disclosure form with the regulator. (Georgia's legal framework does not require licenses to be re-issued when changes in ownership occur.)

Media companies' access to their beneficial ownership
Civil society representatives at a stakeholder meeting held on June 11, 2015 in Kiev raised the issue that a broadcaster/licensee might not be able to obtain all the detailed information from the

[23] Council of Europe: Recommendation No R (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, https://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)023%26expmem_EN.asp

company's beneficial owners, and would thus not be able to comply with the transparency provisions and report all information required by the law to the National Council.

The Austrian Audio-visual Media Services Act, which also requires beneficial ownership transparency, requires that beneficial owners disclose their shareholdings to the media company:

> Art. 10 para. 7: „The media service provider shall communicate to the regulatory authority the ownership relations or membership relations, existing at the time when an application is filed for being granting a license or when a report is filed, together with the application or the report, and any change in these relations within two weeks of the legal effectiveness of the assignment or transfer of shares. In the event that shares of the media service provider are held, directly or indirectly, by corporations, partnerships or cooperatives, these must also communicate their ownership relations and disclose their fiduciary relations. These obligations shall not affect any other statutory disclosure obligations."[24]

Similarly, the Austrian Media Act requires beneficial ownership information be provided upon request to the media company:

> Art. 25 para. 2 „[...] Persons holding a direct or indirect share, trust makers, founders and beneficiaries of a foundation shall be obligated, upon request by the media owner, to communicate to the media owner the details required for the media owner to comply with his/her/its disclosure obligation."[25]

Legislators could consider introducing such a requirement if it ensured that broadcasters receive all the information they need from their direct and indirect owners.

Improving the capacity of the National Council

Several civil society representatives at a stakeholder conference held on June 11, 2015 in Kiev stated that the National Council does not have a satisfactory record of being an efficient and independent regulatory body. Attendees voiced concerns that the National Council may not have the capacity to properly to administer and implement additional responsibilities in regards to ensuring the transparency of ownership.

The Recommendations on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector stipulate that member States should:

> "(...) include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfill their missions, as prescribed by national law, in an effective, independent and transparent manner (...)"[26]

In regards to the financial independence of regulatory bodies, the Recommendations underline:

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[24] Austrian Audio-visual Media Services Act, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2001_1_84/ERV_2001_1_84.html

[25] Austrian Media Act, as amended in 2014, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1981_314/ERV_1981_314.html

[26]

„9. Arrangements for the funding of regulatory authorities – another key element in their independence – should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.

The Explanatory Memorandum to the Recommendations further underlines the importance of adequate resources being provided to a regulator so that it can fulfill its responsibilities:

„Whatever funding arrangements are adopted, account must be taken of the human, technical and other resources which regulatory authorities need in order to perform all their functions independently. Clearly, the more numerous and substantial those functions, the more important it is that the funding of the regulatory authority should match its needs."

Comment:
The legislative should seek to ensure that the National Council receives adequate resources from the State budget so that it can build and maintain the capacity needed to implement, monitor and enforce the new ownership transparency provisions, and also fulfill its other responsibilities stipulated by the Law.

Strengthening the independence and accountability of the National Council
At the 11 June 2015 stakeholder conference, a number of attendees stated that the regulator lacked a track record of operating in an efficient and independent manner, and expressed their concern that additional powers to sanction broadcasters could be misused.

The Council of Europe's Recommendations on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector includes the following guidelines in regards to the independence of regulators:

"1. Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

2. The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
- regulatory authorities are under the influence of political power;
- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.

5. Furthermore, rules should guarantee that the members of these authorities:
- are appointed in a democratic and transparent manner;
- may not receive any mandate or take any instructions from any person or body;
- do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.

6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure. (...)"

The Recommendation also highlights:

"27. All decisions taken and regulations adopted by the regulatory authorities should be:
- duly reasoned, in accordance with national law;
- open to review by the competent jurisdictions according to national law;
- made available to the public."

In regards to the protection of the regulator's independence from external interference, the Explanatory Memorandum to the Recommendation elaborates:

"It is understood, though not spelt out in the Recommendation, that dismissal can only apply to individual members of regulatory bodies and never to the body as a whole. (...)"

„The incompatibilities under the Recommendation extend beyond politics to other fields that might impinge on the independence of regulatory authority members. They include the exercise of any function or possession of any interests, in enterprises or other organisations in the media or related sectors (such as advertising and telecommunications), which might lead to a conflict of interest in connection with membership of the regulatory authority. If, for example, a member of such an authority had financial interests, or occupied a post, in a broadcasting or cable company that came under the regulatory authority's purview, the two functions would clearly be incompatible."

"Likewise, there is nothing to prevent [States from] requiring that regulatory authority members declare their assets when they are appointed and again at the end of their term of office, in order to prevent them profiting unduly from that office in any way."

Comments:
In an effort to strengthen the independence and accountability of the National Council, as well as public trust in its impartiality, the legislature could consider to evaluate relevant provisions in the Law on the National Broadcasting Council. In consultation with civil society and other stakeholders, the legislature could assess whether and how provisions regarding the appointment and dismissal of National Council members, the qualification requirements for members of the regulator, conflict of interest provisions (for example, in regards to preventing regulatory capture through a 'revolving door' of individuals moving between regulator and companies they oversee to oversee, or in regards to the proactive disclosure of assets and interests of senior regulator employees), provisions protecting the regulator from undue outside interference and provisions ensuring its transparency and accountability need to be strengthened.

Detailed information on procedures and practices in regards to the protection of the independence of audio-visual media services regulatory bodies across Europe can be found in the results of the INDIEREG study.[27] Relevant provisions of the Georgian Law on Broadcasting may also serve as an example for stronger provisions in some of the areas described above (see Appendix 1).[28]

[27] http://www.indireg.eu/?p=8
[28] Georgian Law on Broadcasting, http://www.gncc.ge/uploads/other/1/1252.pdf.

Appendix 1:

Provisions from the Georgian Law on Broadcasting, governing the independence, appointment, transparency and accountability of the Georgian broadcasting and telecom regulator, the Georgian National Communications Commission (GNCC).

Article 6. Independence and Immunity

1. GNCC, its officials and employees of its office are independent in exercising authority and amenable only to the law. Inconsistent influence and illegal intervention in their activity shall be considered illegal; consequently a decision made under inconsistent influence and illegal intervention shall be declared void.
2. Interested person has the right to apply to court for avoiding and preventing any kind of influence or intervention, also nullifying the results of such intervention and influence.
3. Only GNCC is authorized to nominate, appoint and dismiss employees of its office according to Georgian legislation.
4. Any action of an employee of GNCC office may be appealed before GNCC within 30 days, or before court within the term determined in the legislation. The decision of GNCC may only be appealed before court within the term determined in legislation.
5. Arrest or search of a Commissioner may be conducted only with the consent of Parliament of Georgia, except the cases when the Commissioner is taken in flagrante delicto. Parliament shall be informed instantly about such cases. If Parliament refuses its consent, the Commissioner shall be immediately released from custody. Parliament takes decisions according to the rules determined by regulations.

Article 7. Session of GNCC and Confidentiality of Information

1. The session of GNCC is public. All resolutions, decisions, orders, records and other documents of GNCC shall be available for public discussion, except cases defined in the General Administrative Code of Georgia.
2. GNCC shall ensure transparency and participation of all interested parties in the decision-making process of GNCC in accordance with General Administrative Code of Georgia.
3. GNCC is authorized to hold closed sessions to maintain the confidentiality of information. Resolutions and decisions made during closed sessions shall be published after the removal of any secret information, according to the General Administrative Code of Georgia.
4. The session of GNCC shall be called at least twice per month. An extraordinary session may be convened by the Chairperson on his/her own initiative or upon the request of two Commissioners.
5. GNCC shall publish information on the time, place and agenda of the nearest session 3 days prior to the session, and in case of relevant decision - on closing the session.
6. In emergency cases GNCC is entitled to hold a session without observing the rules determined in this Article, Paragraph 5. In such cases GNCC shall immediately publish information about the time and place of the session, as well as an agenda, or information on closing the session, if a relevant decision is taken.
7. GNCC is authorized to make a decision if a majority of listed Commissioners

attends the session. GNCC takes a decision on the majority of votes of the Commissioners.
8. Each Commissioner has one vote during decision-making process. In case of a draw, the vote of the Chairperson shall be decisive.
9. To ensure publicity, GNCC shall create its own web site and regularly update information published therein; decisions of GNCC, including decisions on the approval of a budget of GNCC and a report on budget performance, shall be published on the web site within three working days of taking a relevant decision, whilst declarations of compliance, specified in this Law, shall be published within three working days after they have been submitted to GNCC.

Article 8. Legal Acts of GNCC
1. According to the rule determined by legislation, GNCC, within the scope of its competence, enacts (issues) legal acts, such as resolutions and decisions of GNCC and orders of the Chairperson.
2. A resolution of GNCC is a regulatory legal act adopted on the basis of this Law, laws of Georgia on National Regulatory Bodies and on Electronic Communications and other legislative acts as prescribed by the Law of Georgia on Normative Acts.
3. The decision of GNCC is an individual legal act of. It shall be issued within the scope of the GNCC competence determined by legislation.
4. GNCC takes decisions on non-normative issues to exercise its authority as determined by legislation, as well as on intra-organizational issues of GNCC and/or its staff that contain general behaviour rule for a defined number of people.
5. The Chairperson of GNCC issues orders on intra-organizational issues of GNCC and its staff in specific cases. Such orders do not contain the general behaviour rule.
6. All legal acts of GNCC shall be enacted (issued) at the GNCC session.
7. Legal acts of GNCC may be appealed to court under the rule determined in legislation.

Article 9. Composition of GNCC
1. GNCC consists of five Commissioners.
2. The tenure of a Commissioner shall be six years.
3. A Commissioner shall not be appointed for more than two consecutive terms.
4. A candidates for a Commissioner shall be elected by an open competition.
5. 100 days prior to the expiry or within 10 days after the termination of the tenure of a Commissioner, the President of Georgia issues a decree about holding a competition.
6. A candidate shall be a person having public recognition and confidence. He/she shall have a master's degree or equivalent thereof in economics, public administration, business administration, law, electronic communications or journalism and at least 10 years of work experience, including three years on a managerial position.
7. Everyone is entitled to nominate a candidate within 30 days of a competition being announced.
8. If at least three candidates are not nominated for one vacancy within the term defined by law, the new competition shall be announced and held in manner provided by this Article.
9. Within 10 days after the expiration of the term of nomination, a list of candidates and documents submitted by them for the competition shall be published on the official web site of the President of Georgia.

10. Within 10 days after the publication of the list of candidates, the President of Georgia, in consideration of the eligibility criteria identified by this Law, agrees with the government of Georgia the list of candidates to be selected for their submission to Parliament. The President of Georgia and the government of Georgia select at least three candidates for each vacant position.
11. The list of nominees candidates upon between the President of Georgia and the government of Georgia shall be countersigned by the Prime Minister of Georgia within three days of such agreement, and thereafter, the President of Georgia submits the nominees to Parliament.
12. Within two weeks of the list of nominees being submitted by the President of Georgia, Parliament elects members of GNCC. In case the period of considering the nominees fully or partially coincides with a parliamentary holidays, the process of electing members of GNCC shall start or continue, respectively, upon the resumption of regular sessions or at a extraordinary session which can be called upon a decision of the Chairman of Parliament.
13. A candidate nominated for a vacant position of a Commissioner shall be deemed elected if such candidate receives more votes than others but at least half of votes of payroll Members of Parliament. In the event of a draw, Parliament shall re-vote.
14. If none of the candidates receives the vote of more than half of payroll Members of Parliament, the process of electing a candidate for the position of a Commissioner, set forth in this Article, shall start anew and the President of Georgia shall, within 50 days, nominate to Parliament a new list of candidates who shall be selected in a manner provided by this Article. A candidate nominated for a vacant position of a Commissioner shall be deemed elected if he/she receives the majority of votes of the Members of Parliament attending the plenary session, but no at least one third of payroll Members of Parliament.
15. The Chairperson of GNCC shall be elected by GNCC from amongst its members for the term of three years, not earlier than 30 and not later than 15 calendar days before the tenure of the incumbent chairperson expires, whereas in case of early termination of the incumbent chairperson's tenure – within 15 calendar days of the termination of the tenure. The Chairperson cannot be elected for another term.
16. The tenure of a newly elected Chairperson of GNCC starts on the next day of the expiration of previous chairperson's tenure whereas in case of early termination of the previous chairperson's tenure, from the moment of the election of a new chairperson. The term of office of a chairperson expires on the third anniversary of his/her election, a day before the date when this term began.
17. The Chairperson has the right to resign, but can remain as a Commissioner for the rest of his/her tenure.
18. The Chairperson of GNCC presides over the sessions of GNCC, is responsible for the observance of procedures in making decisions and resolutions and publication of the decisions and resolutions passed as well as the management of the staff of GNCC.
19. In the event the Chairperson of GNCC resigns or is absent or is not able to perform his/her duties, the oldest member of GNCC shall act as the Chairperson.
20. GNCC is entitled to dismiss the Chairperson of GNCC before the expiry of his/her tenure with the majority of votes of all members of GNCC. The issue of early dismissal of the Chairperson of GNCC can be raised on the basis of a joint written request of at least two Commissioners. Within 10 calendar days after the submission of the request of Commissioners, GNCC shall consider the issue of early dismissal of the Chairperson of GNCC and put it to vote. If GNCC does not dismiss the

Chairperson of GNCC, the issue of early dismissal of the Chairperson of GNCC shall not be raised over the period of following three months.

Article 10. Dismissal of a Commissioner
1. If a court delivers against a Commissioner a verdict of guilty that prescribes as punishment the restriction of freedom or imprisonment for a definite or indefinite term, or if a court finds a Commissioner incapable or lost without trace, or if a Commissioner resigns or passes away, Parliament of Georgia, within a month of the occurrence of any of the above listed event, shall take a decision on a removal of such a Commissioner from his/her office.
2. Procedures established for the early termination of the office of Member of Parliament, which are specified in Article 9 of the regulation of Parliament of Georgia, are applied in case of the occurrence of an event specified in Paragraph 1 of this Article. A Commissioner shall be deemed removed from his/her office, if this decision is voted for by more than half of the Members of Parliament attending the plenary session.
3. At least one third of the payroll Members of Parliament can initiate the procedure to for removal of a Commissioner, if:
a) the conflict of interest as determined in this Law arises;
b) he/she fails to fulfill the duties of Commissioner during 15 consecutive days or for more than two months in a year without reasonable excuse.
4. Members of Parliament initiating the dismissal procedure shall provide documentary evidence of a specific ground of the dismissal of the Commissioner.
5. Within 30 days after gathering signatures, Parliament shall put, by payroll majority, the matter of removal of the Commissioner on the agenda of the plenary session of Parliament.
6. Within 30 days after putting the issue of removal of a Commissioner on the agenda of the plenary session, Parliament shall put the issue to voting. Approval of a Commissioner's dismissal requires the votes of more than three-fifths of payroll Members of Parliament.
7. If the number of votes is not enough or if Parliament does not hold voting within the term indicated in Paragraph 6 of this Article, the procedure for dismissal of a Commissioner shall be terminated.
8. The matter of removing a Commissioner on the basis of one fact cannot be put to voting again.
9. A decision on a Commissioner's removal may be appealed in court.

Article 11. Conflict of Interest of a Commissioner and his/her staff employee
1. Conflict of interest may arise if a Commissioner simultaneously:
a) is an official of another administrative authority;
b) is a member of any political party;
c) carries out any remunerated work for an entity whose activity is subject to regulation by GNCC;
d) holds shares or part of the fixed capital of an enterprise whose activity is subject to regulation by GNCC;
e) is an official, representative or consultant of a person whose activity is subject to regulation by GNCC;
f) has any other direct or indirect economic interest towards a person whose activity is subject to regulation by GNCC.

2. A person with a conflict of interest as envisaged in this Article, Paragraph 1, shall not be a Commissioner.
3. A person, whose family member has a conflict of interest as envisaged in this Article, Paragraph 1, sub-Paragraphs c and f, shall not be a Commissioner.
4. A person with a conflict of interest as envisaged in this Article shall not be a staff employee of GNCC, with the exception of technical personnel.
5. A person, whose family member has a conflict of interest as envisaged in this Article, Paragraph 1, sub-Paragraphs c and f, shall not be head of the structural unit of GNCC office.
6. A Commissioner, as well as any other official indicated in Paragraph 5 of this Article shall announce in writing if he/she or his/her family member, within