

Council of Europe Project
“Safeguarding Freedom of Expression and Freedom of Media in Ukraine”

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LEGAL OPINION

on the alignment with European standards
of the Draft Decree of the Cabinet of Ministers of Ukraine “On Amendments
to the Resolution of the Cabinet of Ministers of Ukraine No 1039 dated 28
December 2016 and the Order of the Cabinet Ministers of Ukraine No 18
dated 16 January 2017”

The role and responsibility of the Council of Europe in protecting freedom of expression has been underlined in the "Reykjavik Principles for Democracy", the [Reykjavík Declaration – United around our values](#).

Funded within the Council of Europe Action Plan for Ukraine “Resilience, Recovery and Reconstruction” 2023-2026, the Project “[Safeguarding Freedom of Expression and Freedom of Media in Ukraine](#)” aims to address urgent needs of major stakeholders and media players in the country. The Project’s objective is “Enabling a pluralistic media environment in Ukraine through harmonisation of legal and policy frameworks in line with European standards” and it is built around three main components:

- (1) Alignment of Ukraine’s framework on media, freedom of expression and freedom of access to information with the European standards;
- (2) Effective implementation of the legal framework governing the protection of journalists, public broadcasting and regulatory authority in line with European standards;
- (3) Effective and efficient communication strategies governing a balanced media coverage and preventing information disorder.

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1 I. BACKGROUND

This opinion is prepared at the request of the Government of Ukraine within the framework of the Council of Europe Project “Safeguarding Freedom of Expression and Freedom of Media in Ukraine” (hereinafter “the Project”). It assesses the alignment of the Draft Decree of the Cabinet of Ministers of Ukraine “On Amendments to the Resolution of the Cabinet of Ministers of Ukraine No 1039 dated 28 December 2016 and the Order of the Cabinet Ministers of Ukraine No 18 dated 16 January 2017” with the Council of Europe standards on freedom of expression, as well as the relevant provisions of the European Union’s legislative framework, in light of the country’s pre-accession commitments. The review is based on the unofficial translation of the draft legislative package prepared within the framework of the Project, annexed to this legal review for further reference.

2 II. LIST OF COUNCIL OF EUROPE STANDARDS AND RELATED LEGAL ACTS AND RECOMMENDATIONS OF THE EUROPEAN UNION

Council of Europe

- Recommendation [CM/Rec\(2023\)5](#) of the Committee of Ministers to Member States on the principles of good democratic governance, adopted on 6 September 2023;
 - Recommendation [CM/Rec\(2022\)11](#) on principles for media and communication governance and [Explanatory Memorandum](#);
 - Recommendation [CM/Rec\(2022\)4](#) on promoting a favourable environment for quality journalism in the digital age;
 - [Digest: Council of Europe Standards on Public Service Media](#);
- i.
- Recommendation [CM/Rec\(2012\)1](#) of the Committee of Ministers to Member States on public service media governance, adopted on 15 February 2012;
 - Recommendation [1878 \(2009\)](#) of the Parliamentary Assembly – Funding of public service broadcasting – adopted on 25 June 2009;
 - Recommendation [CM/Rec\(2007\)3](#) of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted 31 January 2007;
 - Recommendation [CM/Rec\(2007\)2](#) of the Committee of Ministers to Member States on media pluralism and diversity of media content adopted 31 January 2007;
 - Recommendation [1641 \(2004\)](#) of the Parliamentary Assembly – Public Service Broadcasting – adopted on 27 January 2004;

- Recommendation [Rec\(2003\)9](#) of the Committee of Ministers on measures to promote the democratic and social contribution of digital broadcasting adopted on 28 May 2003;
- Recommendation [No. R \(96\)10](#) of the Committee of Ministers to Member States on the guarantee of the independence of public service broadcasting adopted on 11 September 1996.

European Union

- Regulation [\(EU\) 2024/1083](#) of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act, hereinafter “EMFA”), PE/4/2024/REV/1, OJ L, 2024/1083, 17.4.2024;
- Protocol [\(No 29\)](#) on the system of public broadcasting in the Member States, OJ C 326, as of 26 October 2012;
- Directive [2010/13/EU](#) of the European Parliament and of the Council of 10 March 2010 on the co-ordination 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, hereinafter “AVMSD”), OJ L 95, 15.4.2010, as amended by the revised 2018 Directive.

Article 5 of EMFA defines guarantees for the independent functioning of Public Service Media (hereinafter “PSM”), in particular:

- PSM providers are editorially and functionally independent and provide impartially a plurality of information and opinions to their audiences,¹
- procedures for the appointment and the dismissal of the head of management or the members of the management board of PSM providers aim to guarantee the independence of PSM providers,²
- funding procedures for PSM providers are based on transparent and objective criteria laid down in advance.³

Protocol (No 29) and EMFA do not regulate the exact legal relations regarding the organisational and legal form and the principles of activity of subjects in the field of PSM. However, such issues

¹ EMFA, Art. 5(1).

² EMFA, Art. 5(2).

³ EMFA, Art. 5(3).

are to be stipulated in the national legislation. Preamble (31) of EMFA considers it to be necessary for states to build on the international standards developed by the Council of Europe and to put in place adequate legal safeguards for the independent functioning of PSM providers across the Union, free from different kinds of interest (governmental, political, economic or private). That should include principles suited to how Member States organise their PSM, such as those that exist in national administrative law frameworks or national corporate law frameworks as applicable to privately listed undertakings, as regards the appointment and dismissal of the persons or bodies which have a role in determining editorial policies or constitute the highest decision-making authority in that respect within the PSM provider.

3 III. BRIEF DESCRIPTION OF THE SCOPE OF THE DRAFT DECREE

The Draft Decree proposes to introduce changes to:

- A. Decree of the Cabinet of Ministers of Ukraine No. 1039 dated 28 December 2016 to set forth the Statute of the Joint Stock Company (hereinafter “JSC”) “National Public Television and Radio Company of Ukraine” (hereinafter “NPTU”) in a newer version,
- B. Order of the Cabinet of Ministers of Ukraine No. 18 dated 16 January 2017 “Issues of Management of Property of the Joint Stock Company “National Public Broadcasting Company of Ukraine” to determine the State Committee for Television and Radio Broadcasting as the body that manages the state property of the JSC “NPTU”.

The Draft Decree – as written in its explanatory note – proposes:

- bringing the terminology of the Statute in accordance with the legislative acts of Ukraine,
- defining the structure and management bodies of the JSC “NPTU”, revised norms regarding the exclusive competence of general meetings,
- provision of the work order, rights and duties of the corporate secretary,
- determination of the procedure for the rent (lease) of state property that is not included in the statutory share capital of the JSC “NPTU” and is assigned to the JSC “NPTU” on the right of economic management, the alienation and write-off of such property,
- determination of the issues of the alienation, write-off and lease of property belonging to the JSC “NPTU” under the right of private ownership,
- establishment of the legal succession rights and responsibilities of the JSC “NPTU”; implementation of the programme policy of the JSC “NPTU”,
- provision of the procedure for the formation of the Editorial Board and its powers,

- determination of the main requirements to the Editorial Statute of the JSC “NPTU” and distribution of programs of the JSC “NPTU”.

4 IV. ALIGNMENT ASSESSMENT

- A. The detail that would change “the television and radio company” to the “NPTU”, “Public Broadcasting” and “the public television and radio broadcasting of Ukraine” to “public media of Ukraine” (see General provision 1.) usually needs no attention as a seemingly neutral legislative change. However, switching from “broadcasting” to “media” responds to one of the main objectives pursued by the Council of Europe standards, notably Recommendation [CM/Rec\(2007\)3](#) of the Committee of Ministers to Member States on the remit of public service media in the information society, i.e. equip them to operating in the new “digital” information environment. Also, the *Baka v. Hungary* case⁴ of the European Court of Human Rights showed that renaming a state entity could bring unforeseen or unwanted circumstances. Therefore, in this case it is being advised to be more coherent with the name changes. (See also “M”)
- B. The removal of the original (in force) Article 5 of the General Provisions, which stated that the television and radio company is recognised as a national asset and the sale, transfer (excluding short-term leasing), or privatisation of its immovable property, unfinished construction projects, land plots where these assets are situated, and state-owned shares in the company’s share capital are strictly prohibited, may reduce the protection of the NPTU against potential influence attempts through future privatisation. Although Articles 91–94 guarantee rights for the NPTU, namely, that the NPTU manages state-owned property in line with its purpose and legal restrictions, without the right to transfer it freely, except as provided by law, and it may own, use, and manage its privately owned property, with expropriation, write-offs, and leasing subject to regulations set by its board and the Cabinet of Ministers of Ukraine, the modification could still be considered a step backwards, because it does not provide robust, principle-level protection for the property of NPTU.
- C. New provisions in Article 37 about the General Meeting’s competencies, allowing it to change the type of NPTU, issuing shares or convertible securities, adjusting the share capital (increase, reduction, or restructuring), adopting a corporate governance code, and approving or amending provisions related to the supervisory board align with European standards as long as they do not interfere with the NPTU’s editorial freedom and policy.⁵ The

⁴ *Baka v. Hungary*, App. no. 20261/12, 23 June 2016, 25., 146.

⁵ Cf. Cabrera Blázquez, F.J. – Cappello, M. – Talavera, M.J. – Valais, S. (2022): *Governance and independence of public service media*. IRIS Plus, European Audiovisual Observatory, Strasbourg.

provided conditions are legally acceptable, but it is worth pointing out that concrete decisions taken under these rules will have to comply with the EMFA and the given recommendations. Article 4 of the EMFA emphasises that States “shall respect the effective editorial freedom and independence of media service providers in the exercise of their professional activities” and that “States, including their national regulatory authorities and bodies, shall not interfere in or try to influence the editorial policies and editorial decisions of media service providers”. The protection of editorial independence of PSM is a cornerstone of Council of Europe standards, as reflected in multiple recommendations, including: Point 3.4 of the Recommendation CM/Rec(2007)2 states: that “Member states should adopt the mechanisms needed to guarantee the independence of public service media organisations vital for the safeguard of their editorial independence and for their protection from control by one or more political or social groups. These mechanisms should be established in co-operation with civil society. Point 2 of the Recommendation CM/Rec(2012)1 states that “The first priority for public service media must be to ensure that their culture, policies, processes and programming reflect and ensure editorial and operational independence”. Point 23 of the same Recommendation also states that “The fundamental requirement is that the editorial autonomy of the public service media should be guaranteed, and the structures necessary to ensure independence of editorial action clearly and unambiguously set out”. Point 27 of the same Recommendation also stipulates that any type of decision-making or funding system should be designed so that it cannot be used to exert editorial influence or threaten institutional autonomy, and the process for deciding the level of funding should not be able to interfere with the media service’s editorial autonomy. Recommendation CM/Rec(2022)4’s provisions on “stable and sufficient funding” for PSM clearly link this to the need to guarantee the editorial and institutional independence. These requirements are fulfilled as long as the General Meeting does not interfere with decisions related to the editorial independence of the NPTU.

- D. In Article 37(1), further clarification is needed regarding the meaning of the phrase “change the type of the NPTU”. If this could affect editorial freedom, additional remedies might be necessary.
- E. Removing the Audit Commission from the governance structure of the public service media could lead to concerns, because the explicit presence of the Audit Commission as part of the governance bodies has significantly elevated its role and importance. However, as there is no EU regulation stating how audits should be organised, these provisions should be stipulated in the national legislation. The Supervisory Board of the NPTU approves the

procedure for the competition on the selection of the subject of audit activity (Article 44(21)), determines the audit company that carries out the mandatory audit of annual financial statements, determines the amount of payment for its services, agrees on terms of the contract on provision of auditing services. Principle 10 of Recommendation CM/Rec(2023)5 states that “there should be sound financial and economic management throughout government and public institutions and by all public officials”. A “sound financial and economic management” also includes entrusting the financial oversight of the media service provider and its associated institutions to a qualified, independent auditor who can impartially assess the company’s financial operations. Point 40 of Recommendation CM/Rec(2012)1 suggests that a good system of accountability could potentially require making financial performance information available on a more regular and open basis, so it could be considered that certain parts of these auditory reports could be made public. Recommendation Rec(2003)9 also underlines in Point 22 that “without a secure and appropriate financing framework, the reach of public service broadcasters and the scale of their contribution to society may diminish”.

- F. The separation of responsibilities between the Supervisory Board and the Management Board seems appropriate to jointly guarantee the proper functioning of the NPTU, both financially and professionally. It is vital, though, to state for future legislation that Appendix Point II.2 of Recommendation No. R (96)10 clearly defines that “rules governing the status of members of boards of management or persons assuming such functions in an individual capacity should be defined in a manner which avoids placing the boards at risk of any political or other interference”.
- G. The decision on the formation, reorganisation and/or liquidation of structural and/or separated structural subdivisions of the NPTU should be clarified. Currently, it is the responsibility of the Supervisor Board (Article 44(18)), but it could delegate it to the Management Boards (Article 66(20)). It would be a more suitable solution if the reasoning of the delegation were enumerated in the Draft Decree and not left to the unfettered decision of the Supervisory Board. Recommendation CM/Rec(2012)1 provides detailed guidelines on the structural requirements that public service media must meet. It should not be allowed that operational decisions would be used as a tool to exert editorial influence. Furthermore, Recommendation CM/Rec(2007)2 mandates that the state “should ensure that the public have access to information concerning the persons or bodies participating in the structure of the media and on the nature and the extent of the respective participation of these persons or bodies in the structure concerned and, where possible,

the ultimate beneficiaries of this participation” (Section III. 1). Accordingly, we recommend incorporating higher-level transparency requirements and legal guarantees into the text. Additionally, Article 5 (2) of the EMFA stipulates that “The head of management or the members of the management board of public service media providers shall be appointed on the basis of transparent, open, effective and non-discriminatory procedures and transparent, objective, non-discriminatory, and proportionate criteria laid down in advance at national level. The duration of their term of office shall be sufficient for the effective independence of public service media providers. Decisions on the dismissal of the head of management or the members of the management board of PSM providers before the end of their term of office shall be duly justified, may be taken only exceptionally where they no longer fulfil the conditions required for the performance of their duties according to criteria laid down in advance at national level, shall be subject to prior notification to the persons concerned, and shall include the possibility of judicial review.⁶ If the establishment, restructuring, or dissolution of individual sub-divisions is not conducted transparently and in accordance with these standards, it could affect the mandates of decision-making leaders and undermine the proper functioning of the PSM provider. Therefore, it may be more appropriate to enshrine the Supervisory Board’s and Management Board’s decision-making scope in this regard into legislation, ensuring both transparency and legal guarantees, as recommended by these guidelines.

- H. The new Article 45(27) would need a more comprehensive provision as both developing and approving the corporate governance code by the same Supervisory Board could cause disturbances in accordance with transparency requirements. Usually having more bodies from different levels of the PSM in long term could create a more stable governance code. The rationale for this change is unclear and requires more detailed legal reasoning.
- I. Article 49 requires a more thorough assessment of the reasons for changing from “may” to “obligatory”. It is not clear/explained why such a change was necessary. There is no guarantee that the Supervisory Board will need permanent or temporary committees. The change could be due to a fear that the Supervisory Board will not form a committee when needed. A more appropriate solution could be to keep the “may” but stipulate some cases when there is an obligation to create such a committee.
- J. A remuneration of the Supervisory Board members will be introduced. Up to now, they have carried out their powers free of charge, but according to the Draft Decree, this will be set by

⁶ Cf. Price, E.M. – Raboy, M. (eds.) (2003): *Public service broadcasting reader*. Kluwer Law International, New York.

the General Meeting (although in times of war, the rule of free of charge will apply). The Recommendation 1641 (2004) of the Parliamentary Assembly of the Council of Europe calls for states to define an appropriate legal, institutional and financial framework for the functioning of public service broadcasting. Protocol (No 29) grants that the funding to broadcasting providers for fulfilling the public service remit can be conferred, defined and organised by each Member State independently. The inclusion of board members' remuneration in the Draft Decree could positively impact transparency and the fair allocation of funds.

- K. In a new provision (Article 66(9) and 66(10)), the Management Board has the possibility to establish the order for the definition of the starting prices for the property that belongs to the NPTU on the private property right, for further distribution of such property for rent (lease) and to take decisions on the determination of the term of the contract for rent (lease) of the property that belongs to the NPTU on the private property right. This is supervised by the General Meeting (Articles 37(15) and 37(16)), which is in accordance with European standards. According to European legal standards in this field, it is the duty of the State to provide the necessary financial support, which includes property provisions as well. In line with Article 5 of the EMFA, Member States must ensure that PSM providers are editorially and functionally independent. Funding procedures for these providers must be based on transparent and objective criteria set out in advance. These procedures should guarantee that PSM providers have adequate, sustainable, and predictable financial resources that enable them to fulfil and develop their public service mandate. Notably, the financial resources provided must safeguard the editorial independence of PSM providers. Additionally, Point 7 of Recommendation 1878 (2009) calls for guaranteeing secure and appropriate means for public service broadcasters to fulfil their missions. The management of these resources (excluding ownership transfers) may fall under the responsibility of the Management Board, though it must be subject to oversight by the General Meeting. This requirement is currently well-reflected in the Draft Decree.
- L. The inclusion of a new body introduced by the draft decrees, the Corporate Secretary (Articles 72–78), would be responsible for the effective interaction between the two governance bodies (Article 41) and the shareholder, maintaining the practical work of the Supervisory Board and performing other functions. It would be subject to the supervision of the Supervisory Board. There are no concerns on paper as per the English translation provided for the assessment. The governance principles detailed in Recommendation [CM/Rec\(2012\)1](#) of the Committee of Ministers to Member States on public service media

governance are fundamental, especially in Points 30–31. These require that PSM providers should function within a framework that clearly defines the bodies to which they are accountable. Their resources and operations management must enable them to adapt to rapidly changing conditions. Furthermore, PSM providers must have confidence that their decisions are well-considered, with the appropriate balance of skills, perspectives, and engagement across the organisation involved in the decision-making process.

- M. As old Public Service Broadcasters everywhere in Europe became Public Service Media,⁷ which is in line with the Recommendation [CM/Rec\(2007\)3](#) of the Committee of Ministers to Member States on the remit of public service media in the information society, the changes in the Programme policy section (Article 79) reflected that change with the inclusion of terms linear and non-linear audiovisual services.
- N. Adding online games to the legislation as a distribution channel (Article 79) could reflect the changing technological environment with flexibility. As Paul Göttlich notes, “games could potentially be included in the derogation under AVMSD” under Article 11(3)(a) for light entertainment programmes, and consequently, product placement would be permitted.⁸
- O. In Articles 80–81, it is not sufficiently clear why public broadcasting is mentioned instead of the NPTU (the same as in, e.g., Articles 151–152). If the issue is not related to the quality of the translation, a more consistent approach to the definitions is recommended.
- P. As per the Editorial Board and editorial statute in Article 85–89, a more detailed procedure to protect editorial independence and journalists’ daily work is to be established in the Draft Decree, and this is to be welcomed.
- Q. The original (in force) Article 89, which dealt with the quota for European works, has been removed from the legislation. Article 16 of the AVMSD requires Member States to ensure that broadcasters reserve a majority of their transmission time for European works; Article 17 of the AVMSD also mandates that broadcasters allocate at least 10% of their transmission time, or alternatively at least 10% of their programming budget, to European works created by independent producers. Furthermore, Article 13 of the AVMSD stipulates that on-demand audiovisual media services should actively promote both the production and accessibility of European works.

⁷ Cf. Donders, K. (2012): *Public Service Media and Policy in Europe*. Palgrave Macmillan, London, pp. 9–24.

⁸ Cf. Göttlich, P. (2007): *Online Games from the Standpoint of Media and Copyright Law*. IRIS Plus, European Audiovisual Observatory, Strasbourg, p. 8.

- R. The amendments of the Draft Decree introduce changes related to the status of the “creative team”. The scope of this definition is unclear, as this is the only mention of the NPTU’s creative team, and it is not evident who can be considered a member of the creative team. This raises several questions, such as whether there is a separate general meeting for the creative team or whether they are journalists or other media professionals belonging to the NPTU staff. Point 37 of the Recommendation CM/Rec(2012)1 of the Committee of Ministers to Member States on public service media governance emphasises that PSM providers must uphold high levels of responsibility by “creating and reinforcing a culture of journalistic and production standards” against which stakeholders can assess their performance. Similarly, Article 4 of EMFA mandates that Member States respect the editorial freedom and independence of media service providers in their professional activities. Article 6 of EMFA further requires PSM providers offering news and current affairs content to take appropriate measures to ensure the independence of their editorial decisions. If the creative team in the Draft Decree is supposed to be a composition of journalists, these safeguards must be incorporated into the decision-making process to protect editorial independence.⁹
- S. The consequences of the happenings if the Supervisory Board constantly rejects the NPTU’s submitted editorial statute (Article 87(1)) should be implemented into the Draft Decree. The concern stems from the possibility that the Supervisory Board might repeatedly reject the editorial statute proposed by the NPTU’s editorial board. Such a scenario could result in a prolonged stalemate, potentially compromising the editorial independence and operational efficiency of the NPTU. To prevent governance deadlocks and ensure the editorial board can effectively fulfil its role, the Draft Decree should address the consequences of repeated rejections and provide a mechanism to resolve such disputes.
- T. The changes in the roles of property, financial, and economic resources of NPTU should be carried out according to the order established by the Cabinet Ministers of Ukraine (Article 91). This seems to be in line with Council of Europe standards. As referenced in Point L of this legal opinion, it is the State’s responsibility to ensure the provision of public funds. Any changes related to these resources may only occur in accordance with the relevant legal requirements, which guarantee the protection of these resources and the transparency of decision-making processes. According to Point 34 of CM/Rec(2012)1, public service media must be prepared to innovate in the way they allocate resources internally. Furthermore,

⁹ Cf. Puppis, M. – Ali, C. (eds.) (2021): *Public Service Media’s Contribution to Society*. Nordicom, Göteborg.

Point 30 of Recommendation CM/Rec(2007)3 highlights that, considering new digital technology developments, Member States may consider complementary funding solutions, paying due attention to market and competition concerns. Therefore, certain adjustments to the allocation of public funds may be necessary, though such changes must be the result of a significant specific governmental decision.

5 V. RESUME

Provisions and aims of the Draft Decree of the Cabinet of Ministers of Ukraine “On Amendments to the Resolution of the Cabinet of Ministers of Ukraine No 1039 dated 28 December 2016 and the Order of the Cabinet Ministers of Ukraine No 18 dated 16 January 2017” regarding the definition of the NPTU as an entity in the field of public audiovisual media services, the purpose of its creation and principles of activity, do not contradict Protocol (No 29), Regulation 2024/1083 and the EU law and Council of Europe standards.¹⁰

Though, based on certain issues raised in this legal review, some legislative corrections should be made in the Draft Decree to ensure that the legal meaning of the proposed provisions is fully clarified and aligned with the relevant European standards on freedom of expression, including in the field of public service media.

¹⁰ Practical implementation of the Draft Decree was not the subject of this legal review.