

**REVIEW AND ANALYSIS
OF
LAWS OF UKRAINE**

ON

- 1. TELEVISION AND RADIO BROADCASTING**
- 2. NATIONAL TELEVISION AND BROADCASTING COUNCIL OF
UKRAINE**
- 3. PUBLIC TELEVISION AND RADIO BROADCASTING**
- 4. CREATION OF THE SYSTEM OF PUBLIC TV AND RADIO
BROADCASTING**

by

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INTRODUCTION

General Principles

In a democratic society, media legislation must be based on the presumption of freedom, including the rights and freedoms laid down in Article 19 of the Universal Declaration of Human Rights, Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Article 19 of the Universal Declaration lays down the principle that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 11 of the EU Charter of Fundamental Rights repeats the same principle, but adds: "The freedom and pluralism of the media shall be respected".

Article 10 of ECHR reads as follows:

- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing¹ of broadcasting, television or cinema enterprises .*
- 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions² or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the*

¹ The European Commission of Human Rights has stated that: "States do not have an unlimited margin of appreciation concerning licensing systems. Although broadcasting enterprises have no guarantee of any right to a licence under the Convention, it is nevertheless the case that the rejection by a State of a licence application must not be manifestly arbitrary or discriminatory, and thereby contrary to the principles in the preamble to the Convention and the rights secured therein. For this reason, a licensing system not respecting the requirements of pluralism, tolerance and broadmindedness without which there is no democratic society would thereby infringe Article 10, paragraph 1 of the Convention". (Appl. No. 10746/84, Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland, Decision of 16 October 1986, D.R. 49, p. 126). The European Court of Human Rights has made clear in its judgement in the Informationsverein Lentia case) that ECHR allows States to organise their domestic broadcasting system as they wish, including for grounds which are not listed in paragraph 2 of Article 10, for example to preserve and promote their national culture or language. The Court has made it clear at the same time that this freedom to shape the broadcasting system via a licensing policy is not an absolute one. Such freedom must respect the requirements of paragraph 2, namely (i) be prescribed by law and, above all, (ii) be necessary in a democratic society.

² The European Court of Human Rights has consistently held that any restrictions on freedom of expression, based on the exhaustive list of reasons for such restrictions in para. 2 of Art. 10 of ECHR, must be: prescribed by law; narrowly interpreted; must respond to a pressing social need; pursue a legitimate aim; must be pertinent, proportional to the aim pursued, and necessary in a democratic society.

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.

In the Helsinki Final Act, CSCE countries stated that they:

Make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and to improve the conditions under which journalists from one participating State exercise their profession in another participating State

The document adopted at the October 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE states that:

participating States reaffirmed the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.

They consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards.

The November 1991 CSCE Seminar of Experts on Democratic Institutions, Oslo, adopted a Report to the CSCE Council which had the following to say on the question of media regulation:

It was emphasized that a democratic form of government requires freedom of speech, without which its citizens cannot obtain the information necessary for participation in political and public life. A diverse and independent press and broadcasting system has a vital role to play in any democracy. The question of imposing certain regulation³ on the media was discussed. It was pointed out that some protection was required against excesses of the press. At the same time, it was underlined that freedom of expression should only be subject to such restrictions as are prescribed by law and are necessary in a democratic society (...)

³ As stated in the 1990 Copenhagen Document of the Conference on the Human Dimension of the CSCE Process, any restrictions on fundamental rights and freedoms must be "provided by law and relate to one of the objectives of the applicable law and be strictly proportionate to the aim of the law". They must be shown to be necessary in a democratic society. A pressing social need for such restrictions must be demonstrated and the restriction must be proportionate to the legitimate aim pursued. The reasons given to justify such restriction must be relevant and sufficient.

Ideally, economic conditions should guarantee complete editorial independence. It was, however, pointed out that State intervention could sometimes be necessary in order to protect the diversity of the press. In this context, it was mentioned that one should also take into account that the press and broadcasting system are parts of the cultural identity of a country.

The Declaration on the Freedom of Expression and Information, adopted by the Committee of Ministers of the Council of Europe on 29 April 1982, regards the freedom of expression and information as vital for the social, economic, cultural and political development of every human being and as an essential foundation of democracy, and calls on States to guard against infringements of the freedom of expression and information; it regards the existence of a wide variety of independent and autonomous media, reflecting a diversity of ideas and opinions, a cornerstone of a democratic media system.

Other recommendations of the Committee of Ministers of the Council of Europe in the media field include:

1. Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector
2. Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information
3. Recommendation No. R (99) 15 on measures concerning media coverage of election campaigns
4. Recommendation No. R (99) 1 on measures to promote media pluralism
5. Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance
6. Recommendation No. R (97) 20 on "hate speech"
7. Recommendation No. R (97) 19 on the portrayal of violence in the electronic media
8. Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting
9. Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension
10. Recommendation No. R (94) 13 on measures to promote media transparency

Ukrainian Broadcasting Regulation

A number of pieces of legislation constitute the Ukrainian regulatory framework in the field of broadcasting. In addition to the laws or drafts reviewed here, this includes Law of Ukraine on Information (adopted in 1992, amended in 2000); Law of Ukraine on Advertising (adopted in 1996, amended in 1997, 1999); Law of Ukraine on the Radiofrequency Resources of Ukraine (2000); Law of Ukraine on Copyright and Neighbouring Rights (1993).

The period which has passed since the adoption of these laws, and the development of Ukrainian broadcasting since then, have demonstrated both the strengths of the existing regulation, and the areas where improvement can be made.

Consideration could be given in future work on the regulatory framework to the following issues:

- Much stronger protection of freedom of speech and independence of the media, as well as of the broadcasting regulatory body, in the light of European standards;
- More precise definition of the tasks and obligations of the National Television and Broadcasting Council, in order to enable it to discharge its obligations properly, especially with regard to licensing, monitoring of broadcasters and general enforcement of the law;
- Transformation of the existing state broadcasting organization into a public service broadcaster;
- Harmonization, as far as it is possible, with the provisions of the amended European Convention on Transfrontier Television (1998) and the EU Directive (89/552/EEC) of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC (access to major events, European quotas, quotas of programming in the national language, independent production quota for all television broadcasters, etc. - see Appendix);
- Regulation of cable television;
- Regulation of transfrontier broadcasting (e.g. would the law cover a transfrontier broadcaster transmitting and up-linking from Ukrainian territory a satellite programme service aimed at a different country and broadcast in a different language? would it resolve issues of jurisdiction in transfrontier broadcasting?) and of retransmission of foreign programme services.

Some consideration should also be given to the new technologies. While it would probably be unrealistic to expect early introduction of digital terrestrial television, some provision for new technologies should be made. Regulation of broadcasting only in its most traditional form cannot hope to respond to new challenges which will appear, also in Ukraine, soon.

LAW OF UKRAINE ON TELEVISION AND RADIO BROADCASTING

Adopted by Verkhovna Rada of Ukraine in 1993 (as amended)

These comments concentrate on provisions which should be amended in future revisions of the Law in order to bring them into line with European standards.

PART I.

GENERAL PROVISIONS

Art. 1.

Definitions of terms provided in this article are encyclopaedic in nature and concern various elements of the broadcasting system, but lack some of the basic definitions needed for regulating broadcasting.

Definitions which are probably unnecessary here include those of: subscriber, audio-visual information, radio broadcasting (since there is a definition of broadcasting), telecommunications, television, television and radio organization, television and radio employee, television and radio centre, technical means of broadcasting, and others.

Some definitions should be reconsidered:

1. A licence is not just a permission to utilize a broadcast channel (or channels) - see below, Part II.
2. This article is not the right place to define public service broadcasting, or indeed state broadcasting.

RECOMMENDATION

1. As a minimum, introduce or develop definitions of "Transmission", "Retransmission", "Broadcaster", "Programme service" "European audiovisual works" (if required by appropriate regulation in the body of the law), "Advertisement", "Sponsorship".
2. Remove all the encyclopaedic definitions and retain only those which are pertinent to the issues regulated by the law and indispensable to make the object of regulation, and the nature of regulation entirely clear.

Art. 2

1. The article says that Ukrainian broadcasters should "guarantee the right of every citizen of access to information". This contravenes the Ukrainian Constitution (art. 34) and Article 10 of ECHR, both of which guarantee such rights to everyone. It is also unenforceable, in the sense that broadcasting cannot differentiate between citizens and non-citizens.
2. Most of the content restrictions are also found in other laws, especially the criminal code, so the need to repeat them here may appear questionable.
3. The implementation of some of the standards of programming activity depends on other laws, as in the phrase „Television and radio organizations do not have the right to divulge in their programs information that is a state secret or other secret that is protected by law”. Depending on the contents of the appropriate other laws (i.e. on state secrets), this provision may

potentially impose excessive restrictions on freedom of speech.

RECOMMENDATION

1. Change "citizen" to "everyone" (this would require changing also other laws, e.g. Law of Ukraine on Information).
2. Ensure coordination of this article with the criminal code, and remove restrictions on content or freedom of speech which are already defined there.
3. Ensure full harmonization of this article with Article 10 of ECHR.

Art. 3

1. The scope of the law should be defined differently, since it extends far beyond the „relations between subjects in the realm of television and radio broadcasting”⁴. The provision that the scope of the law does not extend to „activity in the on-broadcast rental of video or audio productions at various institutions” is unnecessary. If the scope of the law is clearly defined, then there is no need to list activities falling outside that scope.
2. In view of the growing problem of jurisdiction in transfrontier broadcasting, the question of the "scope" of the law could be extended to the issue of criteria applied in determining which broadcasters fall under the Ukrainian jurisdiction.

⁴ The Slovak Broadcasting Act contains the following articles on the scope of the Act

§ 1 This act shall govern

- a) the status and competence of the Council for Broadcasting and Retransmission (further only "Council"),
- b) the rights and duties of broadcaster, retransmission operator and legal persons or natural persons mentioned in § 2 paragraphs 2 and 4.

§ 2 (1) This law shall apply to:

- a) a broadcaster who has permission authority for broadcasting by law 1) (further only "public service broadcaster"),
- b) a broadcaster who has permission for broadcasting on the basis of a licence according to this act (further only "broadcaster with a licence" or "licensed broadcaster"),
- c) an operator of retransmission who obtained permission for retransmission according to this act.

(2) This law shall also apply to natural or legal persons who are not broadcasters according to paragraph 1 a) and b), if they have their head of office or head of office of their organisational structure unit

- a) in the Slovak Republic but decisions on the composition of their programme service are taken in a Member State of the European Union, and if they employ in the Slovak Republic a major part of their employees whose work activity is directly connected with broadcasting,
- b) in a Member State of the European Union, but decisions on the composition of their programme service are taken in the Slovak Republic and if they employ in the Slovak Republic a major part of their employees whose work activity is directly connected with broadcasting,
- c) in the Slovak Republic, but decisions on the composition of their programme service are taken in a country which is not a member of the European Union and if they employ in the Slovak Republic a major part of their employees whose work activity is directly connected with broadcasting.

(3) Provision of the paragraph 2 shall apply only if an international treaty published in the Collection of Laws of the Slovak Republic, by which the Slovak Republic is bound, does not state otherwise.

(4) This law shall also relate to natural and legal persons who are not broadcasters pursuant to paragraph 1 letters a) and b) and paragraph 2 does not apply to them if

- a) they use the frequency allocated to the Slovak Republic,
- b) they do not use a frequency allocated to the Slovak Republic but use the satellite capacity of the Slovak Republic,
- c) they do not use a frequency allocated to the Slovak Republic or the satellite capacity of the Slovak Republic, but they use a satellite up-link broadcast situated in the Slovak Republic.

RECOMMENDATION

Revise the article and extend it to the question of jurisdiction.

Articles 4 and 5

Areas of competence

- 1) These articles set out a hierarchy of the authority of state bodies vis-a-vis broadcasting in which
 - a) Verkhovna Rada and the President define state policy in this area, the legal framework for broadcasting and „guarantee the social and legal protection of the employees of this sector”;
 - b) the Cabinet of Ministers provides for the realization of state policy, as defined by Verkhovna Rada;
 - c) the State Committee for Radio and Television manages state broadcasting organizations and implements State information policy;
 - d) and the National Council „puts into effect and upholds legislation in the realm of television and radio”⁵.
 - e) the authority of the Supreme Soviet of the Crimea, local Soviets of People’s Deputies and state administration at various levels „with regard to the development of television and radio broadcasting is defined by law”
- 2) In art. 5, the National Council is given the power of licensing and supervision of broadcasters and of „coordinating the development of a unified conceptual framework for the television and radio information expanse of Ukraine and taking part in its implementation”. This last function is vague and imprecise and may conflict with the power of Verkhovna Rada to „define state policy” and with that of the Cabinet of Ministers to „coordinate the activity of the ministries and other central bodies of state executive power in this sphere” (art. 4). As a result, this competence of „coordinating the development of a unified conceptual framework” seems devoid of practical meaning.

ANALYSIS

1. A situation in which the legislative and executive branches of government may claim and exercise extensive authority over broadcasting must be a cause for serious concern since it may result in political and administrative restrictions on the freedom of broadcasters. Art. 6 does prohibit interference i.a. by state bodies in the „creative activity” of television and radio organizations, and this is proper, but the provisions described above do grant over-extensive powers to the legislative and executive branches of government. For example, the requirement that the National Council "coordinate" licensing and operational procedures with

⁵ In other countries, bodies similar to the National Council have some or all of the following functions: licensing; regulation (issuing secondary regulation pursuant to powers clearly granted to it in broadcasting legislation; setting the level of the licence fee, distributing licence fee revenue among public service broadcasters); power of appointment (e.g. of top officials of public service broadcasters); supervisory functions (e.g. monitoring of the performance of broadcasters); quasi-judicial functions; advisory functions (e.g. vis-à-vis parliament).

regard to television and radio channels and conditions of licence tenders with the Verkhovna Rada's standing commission (Art. 5) seems unjustified, as it might subject licensing procedures to political or other influences.

2. The co-existence of the National Council and the State Committee for Radio and Television means that effectively the National Council has no competence in the matter of state broadcasting, so its responsibilities in the matter of Ukrainian broadcasting as a whole cannot truly be fulfilled.
3. In general terms, the existence of state broadcasting cannot in the long term be reconciled with the development of a democratic broadcasting system in Ukraine. Media independence is a primary requirement if the media are to serve the public interest. Democratic transition in post-Communist countries means i.a. that state broadcasting is transformed into public broadcasting. Meanwhile, in Ukraine public broadcasting (see below) is seen as a separate sector from state broadcasting which is set to continue. Moreover, legal regulation of state broadcasting is minimal (see art. 11-13), giving government authorities a free hand in running it. This, too, is incompatible with a democratic media system.
4. The National Council should be responsible (or co-responsible, but if so, then with whom and by what procedures?) for determining directions of Ukraine's broadcasting policy. It should have the power of secondary regulation, pursuant to provisions of broadcasting law and on the basis of authority specifically granted to it to regulate particular issues. It should be consulted on all legislation and international agreements concerning broadcasting and audiovisual matters, and it should also be involved in representing Ukraine abroad in its field.

RECOMMENDATIONS

- 1) Define the National Council as an autonomous state authority competent in matters of broadcasting and lay down procedures by which takes part in contributing to the development and implementation of state broadcasting policy.
- 2) Regulate state broadcasting, its programme responsibilities, standards and public accountability, as well as procedures of appointing managerial staff. The law should set a deadline by which state broadcasting should be transformed into public broadcasting.

- 3) Art. 5 lists the measures the National Council may take in case the broadcaster violates regulations and/or the terms of the licence, including temporary suspension or revocation of the licence if the broadcaster violates the law or the terms of the licence. This seems to give the Council too extensive a margin of appreciation on when to revoke the licence, whereas such a move should occur only in rare, well-defined and justified circumstances. Otherwise this competence may be abused to curb freedom of speech. Article 46 on „Liability for Violations of the Legislation on Television and Radio Broadcasting” lists the violations, but does not specify penalties for particular types of those violations.

RECOMMENDATION

Rewrite both articles in order clearly to specify what penalties can be imposed for what types of violations, reserving suspension or revocation of licence only for extreme cases. Provide for the broadcasters' right of appeal to a court, or for judicial review of such decisions.

- 4) Art. 6 states that „the content only of information protected by law is monitored”. If taken literally, it might prevent the National Council from monitoring the content of programme services to verify that it is in accordance with the obligations accepted by the broadcaster in the licence. Art. 5 puts the National Council under an obligation to „conduct verification, within the scope of its authority, of the activity of television and radio organizations that pertains to the conditions and procedures for the utilization of broadcast channels”. This cannot be done without, among other things, monitoring the contents of all programming.

RECOMMENDATION

Change this provision and clearly define the right and duty of the National Council to monitor all programming as part of its mandate to enforce the law (continuous monitoring of all programming would be very expensive, so the National Council should have a choice of methods in this respect).

Appointment, term of office, status and dismissal of National Council members

According to Art. 5, „the composition of the National Council is approved by the Supreme Soviet of Ukraine for the elective term of the current composition of the Supreme Soviet of Ukraine and President of Ukraine...with four candidates submitted by the Chairman of the Supreme Soviet of Ukraine and four by the President of Ukraine”. These provisions impose a political manner of appointing members. This weakens the independence of the Council.

The Council's term of office should be different from that of the Verkhovna Rada, and the members' terms of office should be staggered. This would result in a more pluralistic composition of the Council, changing at a different pace from that of Verkhovna Rada.

It is not clear why most members of the National Council should work on a voluntary basis. This reduces their independence and their ability to do their job properly.

Dismissal of National Council members by a "vote of no-confidence" is unacceptable in terms of the Council's independence and autonomy.

RECOMMENDATION

Change the Council's term of office to differentiate it from that of the Verkhovna Rada; stagger the members' terms of office (e.g. every two years, a set proportion of the members should leave, and new people should be appointed).

We will deal with other issues below, when discussing the Law of Ukraine on National Television and Broadcasting Council of Ukraine, but recommendations made there should also be taken into account in revising the present law.

Anti-Monopolistic Provisions

Art. 7

Anti-monopolistic restrictions and promotion of media pluralism could be enhanced by applying the Recommendation No. R (99) 1 of the Committee of Ministers of the Council of Europe on measures to promote media pluralism.

Quotas

Art. 8

If the law is to be harmonized with the EU directive „Television without Frontiers” and the European Convention on Transfrontier Television, then this article needs to be changed to introduce at least a 50% quota of European works, a quota of independent works, and conceivably a quota of programming originally produced in the Ukrainian language.

State broadcasting

Art. 11-12

Article 12 gives state broadcasters a priority right to use national transmission networks, which may be to the detriment of the development of nation-wide private radio and television channels.

As noted above, continued existence of state broadcasting is incompatible with the widely accepted European standard which calls for the existence of a dual system, comprising public service and commercial stations, with no State involvement in broadcasting activity for the domestic audience.

PART II. THE FOUNDING OF TELEVISION AND RADIO ORGANIZATIONS AND THE LICENSING OF THEIR ACTIVITY

Art. 13-16

Founders of radio and television stations

Under art. 13 only Ukrainian citizens have the right to found radio and television organizations. This will have to be changed if and when Ukraine harmonizes its broadcasting legislation with that of the European Union.

The provision in art. 13 that Verkhovna Rada and the President of Ukraine may be „founders” of broadcasting stations is a cause for serious concern and should be changed because, as noted above, in a democratic society State bodies should not be involved in broadcasting.

The concept of the „founder⁶” is one of the features of the law which prevents the licensing and perhaps the whole broadcasting system from operating properly.

⁶ This concept is probably a legacy of the former period when artificial „pluralism” of the media system was created by having various State bodies and officially approved organizations appear as „founders” of various media outlets.

ANALYSIS

Legally speaking, the concept of the „founder” may prevent the National Council from finding out who is really applying for the licence and who the real owner of the station would be. This should be reconsidered for a number of reasons:

- It is imprecise and undefined, and thus creates legal uncertainty;
- it deprives the National Council of effective supervision of the broadcasting system;
- it is unacceptable from society’s point of view, as it is entitled to full knowledge about the identity of the broadcaster
- by the same token it is incompatible with Recommendation No. R (94) 13 of the Committee of Ministers of the Council of Europe on measures to promote media transparency;
- and it most probably renders art. 7 introducing anti-monopolistic restrictions ineffective.

RECOMMENDATION

1. Replace the concept of the founder and replace it with that of the owner.
2. Remove Verkhovna Rada and the President from the list of potential "founders" of broadcasting stations.

Foreign involvement in broadcasting

Art. 13 introduces a cap of 30 per cent on foreign ownership of shares or interest in a broadcasting establishment.

ANALYSIS

Free movement of capital is one of the fundamental principles within the European Union, so it must be remembered that such limits will have to be removed once possible accession negotiations with the European Union begin.

RECOMMENDATION

Consider removing this provision. However, in the meantime, if this provision is to be maintained, it should be remembered that it may not be enough to prevent effective foreign control of a station. It could be extended to imposing a similar limit on the number of seats the foreign partner has on the Board of Directors and Board of Management of a broadcasting company, and on the proportion of votes in the general meeting of shareholders;

The licensing process

ANALYSIS

The provisions of the law approach the licensing process as a largely administrative procedure, creating the presumption that every applicant should receive the licence if the application conforms to the law and frequencies are available. This may result from a desire to reduce the possibilities of discretionary decision-making by the National Council, but at the same time it deprives the Council of the ability to do its work properly (e.g. art. 15 speaks of "competitive selection" of applicants, but says that "when several founders have equal grounds to

receive a licence, the applicant that utilized the license for a prior term has a preferential right to receive it". This reduces the Council's ability to apply substantive criteria - programme concept, financial means at the applicant's disposal, managerial and programme talent available to the applicant, etc. - in awarding the licence).

This impression is reinforced by the definition in art. 1 ("License - written permission of an authorized body that gives the right to utilize broadcast channels"). The licence should be seen as a legal instrument used by the National Television and Broadcasting Council to authorise a precisely identified broadcaster to broadcast a clearly defined programme service, using a frequency or set of frequencies specified in the licence, and to do so on clearly defined conditions⁷.

In the process of preparing frequency allotment plans or plans for particular licence areas, the Council should adopt a list of priorities (number and types of broadcasters to operate in a particular area, taking into consideration already existing stations and their programme characteristics). On this basis, licence area plans should be drawn up that determine the number and characteristics of broadcasting services that are to be available in particular areas of Ukraine.

The Council should be able to reserve licences in particular licence areas for the types of stations and programme services envisaged in the plan of broadcasting services and consider applications for such licences as a matter of priority. Of course, considerable flexibility should be maintained at all times.

After completing its plan of broadcasting services for particular licence areas, or in other circumstances, the Council should advertise the availability of particular types of licences in the particular areas.

The law should give the Council the ability to pursue its licensing policy instead of treating each licence application separately in a largely administrative manner.

Contents of the licence application

Art. 14 says that the application may be submitted by "a television or radio organization and its founder, or a body authorized by him". Minimal requirements are specified as regards the information about the applicant to be included in the application.

Art. 14 specifies the contents of the application and says that no other documents or information may be required by the National Council. The article does not require the applicant to provide any financial information. This deprives the National Council of crucial information needed to consider an application. Art. 14 does not require the applicant to provide any documentation of the financial resources at his/her disposal (and practically prevents the National

⁷ The licence should specify, among other things, all the technical and telecommunications aspects of transmission, the broadcaster's coverage area, and full details of the programme service to be broadcast by the broadcaster. The licence should describe in detail the programme service the broadcaster has undertaken to broadcast (proportions of particular programme types, etc.) and so should constitute a set of criteria by which to measure and evaluate his/her performance, as defined in art. 5. The licence may also include other obligations on the part of the broadcaster (to invest in audiovisual production, etc.). The licence should sum up all the legal conditions binding on the broadcaster. Depending on the legal system of particular countries, the licence can have the form of a contract between the licensing authority and the broadcaster, involving a legal obligation on both sides for implementing the provisions of the licence

Council from requesting such information) and art. 16 does not list lack of adequate financing as a reason for the possible refusal to award a licence. In fact, without ascertaining the financial standing of the applicant, the National Council cannot know whether he/she is able to make the necessary investments and finance the operation of the station. An important part of the application should be devoted to demonstrating and documenting in detail the applicant's ability to finance the programme service.

RECOMMENDATION

1. The application should be submitted by the prospective licensee, i.e. the owner of the radio or television station.
2. Regulations covering the content of the licence application should require the provision of detailed information concerning the owner of the station. In the case of a company, this should include full information about the shareholders (with a list of all shareholders who have more than 5% of the shares), members of the Board of Directors and Board of Management, their involvement in other media activities, the involvement of major shareholders in other media activities, etc. application should be defined more clearly, and in any case the rules could allow the broadcaster to supplement documentation submitted to the National Council.
3. The applicant should be under an obligation fully to disclose his financial situation (both assets and debt). Promises of loan or investments should he receive a licence cannot be considered a sufficient guarantee of financial viability.

Art. 19

This article lists two reasons for the „curtailment of the activity” of a television or radio organization (1) the decision of the founders (or co-founders), and (2) a court verdict. A decision by the National Council to revoke a licence also results in ending the activity of a radio or television station, so it should be mentioned here, as well.

RECOMMENDATION

The reasons why a court might decide to close down a station should be clearly specified in a way compatible with European standards.

PART III ORGANIZATION OF TELEVISION AND RADIO BROADCASTING

Art. 22

The last sentence of this article constitutes an act of state interference into the operation of economic entities and may prevent telecommunications agencies from concluding advantageous contracts with broadcasters. This provision may be justified, however, if there is only one, state-controlled telecommunications operator which should not be in a position to deny service to any broadcaster.

Art. 23

This article appears unnecessary. The use of a satellite to transmit the signal is one of the options available to the broadcaster and this should be specified in the licence, without the need for any other special procedures or regulations. Transfrontier television is regulated internationally (by the European Convention on Transfrontier Television and by the EU directive „Television Without Frontiers”) with a view to ensuring freedom of reception and retransmission of transfrontier programme services complying with the regulations of those instruments of international law. By acceding to the Convention, Ukraine could become part of an international system of regulation of transfrontier television broadcasting.

Art. 24-25

ANALYSIS

Article 24 leaves local authorities a great deal of discretionary power to permit, or not to permit, the establishment of cable systems. This power could be abused for political or other purposes.

It is not clear what is meant by the phrase that „The procedure for the utilization of those networks for the purpose of television and radio broadcasting is defined by Articles 13-18”. If this covers the question of licensing programme services which are to be transmitted via cable networks alone, then this is not necessary because, according to the definition of the broadcaster, he/she assembles a programme service intended for reception by the general public and transmits it, or has it transmitted, complete and unchanged, by a third party. That third party could be a cable network.

If, on the other hand, this means that a cable operator has to obtain a licence to broadcast, then this is unacceptable. A cable operator is not a broadcaster and does not need a broadcasting licence to operate the network. The cable operator does need a licence to disseminate an original programme service in his network, but only for that purpose.

Art. 24 seems to leave it to the cable operator to decide what programme services to retransmit, except for „must-carry” rules as regards the programme services of state broadcasters. This deprives the National Council of any ability to prevent the retransmission of a programme service which violates standards defined in art. 2 (which, incidentally, refers only to „television and radio organizations” and does not mention cable operators).

Art. 25 covers issues which are better regulated in copyright law.

RECOMMENDATIONS

1. Remove the provision giving local authorities the power to allow or disallow the establishment of cable system, or clearly specify - in a way compatible with Article 10 of ECHR - the reasons why local authorities could prevent this.
2. Either here, or in a projected law on cable television, include an obligation for cable operators to register the retransmission of a programme service. Refusal by the National Council to grant registration (on well specified legal grounds and in well defined situations) would prevent the retransmission of a particular programme service.
3. Put cable operators under an obligation to obtain the permission of the broadcasters of the programme services they wish to retransmit.

Art. 26

This article covers issues which are already covered in the Law of Ukraine on Information. There should be no differences in access to information between journalists and non-journalists.

Art. 27

In order to prevent abuse of the power of state bodies listed in this article to demand dissemination of their announcement, the nature of announcements which broadcasters are obliged to disseminate should be specified more clearly, in a way that would underscore the importance of issues dealt with in those announcements. That should lead to a reduction of the number of such cases.

Art. 28

Much of this article deals with issues which are better regulated in election laws.

Art. 28-29

These two articles deal with the appearances of politicians in radio and television programming, potentially placing too much of a burden on stations which are obliged to offer air time to deputies at various levels. The principle in art. 28 that political parties should be granted equal opportunities for access to air time is correct. However, in line with principles and standards laid down in art. 2, these two articles should also make provision for access to air time for other representatives of public opinion.

Art. 30-32

These articles should be harmonized with the corresponding articles in the European Convention on Transfrontier Television and the directive on „Television without Frontiers”.

Art. 34

Accreditation of television and radio employees should be covered by general rules on accreditation, pertaining to all journalists, in the general press or media law.

PART IV THE RIGHTS AND OBLIGATIONS OF TELEVISION AND RADIO ORGANIZATIONS AND THEIR EMPLOYEES

Art. 36

This article deals with issues which should be regulated more fully in the copyright law.

Art. 37

The provision of letter f) that television and radio organizations are obliged to „respect national dignity ...” is too vague and may be abused for the purpose of persecuting a station which is critical of State bodies and other authorities. Such issues should be regulated in the penal law in relation to all citizens.

RECOMMENDATION

Delete this phrase.

Art. 38

It is not clear why the law speaks of “creative employees of a television and radio organisation” instead of "journalists". "Journalists" are a clear category in media laws and their rights and obligations are well defined. This is not the case with "creative workers".

Point e) is controversial, because it puts the onus on the journalist to refrain from „accessing documents and materials” which are protected by the law on state secrets. The obligation to prevent their dissemination should rest on those civil servants who have this duty, not on the journalist who should not be held back in the performance of his/her duties by having to guess in advance which documents do, or do not, contain such information.

RECOMMENDATION

Replace "creative workers" with "journalists" and delete point e).

Art. 39

It is not clear how journalists and programme-makers, and even more so „non-staff employees” of a radio or television station are to prevent the dissemination of information stipulated in the second part of art. 2, or of information „which violates the rights and legal interests of citizens or diminishes their honor and dignity”. They may be made responsible for not disseminating such information in their own programmes, but the article also invites them to disrupt the operation of the station if they notice such material in someone else’s programming. In other words, it invites them to perform the role of censors and engage in pre-publication censorship. This is unacceptable. The responsibility for the contents of programming rests with the broadcaster who is legally liable for violating the law.

RECOMMENDATION

Delete points c) and d).

PART V
THE RIGHTS OF TELEVISION VIEWERS AND RADIO LISTENERS

Art. 40-43

These articles provide for, among other things, the right of reply. This should more properly be regulated in a general press or media law. In addition, the right is very broad, including the „right to provide one’s own interpretation of the circumstances of an affair”. This goes far beyond what is usually understood as the right of reply, i.e. the right of rectification of incorrect information.

RECOMMENDATION

Define "right of reply" in line with generally accepted standards.

PART VI
THE FINANCING AND MATERIAL AND TECHNICAL BASE
OF TELEVISION AND RADIO ORGANIZATIONS

Art. 45

The requirement that plans for the development of other stations should be coordinated with the development of state television and radio could theoretically give the state broadcaster the power to block the growth of private broadcasting. This should be reconsidered.

PART VII
LIABILITY FOR VIOLATIONS OF THE LEGISLATION
ON TELEVISION AND RADIO BROADCASTING

Art. 46

As noted above, this article should clearly specify which penalties may be imposed for what violations of the law.

Art. 47

This article is very broadly worded and could be abused by politicians and public figures by taking journalists and broadcasters to court on defamation charges. This could have a deleterious effect on the freedom of broadcasters to comment on public life and the activities of public officials. Such issues should be dealt with in the penal code and need not be regulated separately in a broadcasting law.

RECOMMENDATION

Delete this article.

PART VIII
INTERNATIONAL COLLABORATION IN THE SPHERE
OF TELEVISION AND RADIO BROADCASTING

Art. 50

Accreditation of foreign correspondents should be regulated in the same way as that of Ukrainian journalists in the general press or media law.

APPENDIX

Directive on „Television Without Frontiers” and the level of harmonization of Law of Ukraine „Television And Radio Broadcasting” with it.

| Pertinent parts of the Directive | Articles of the Law which correspond to it |
|--|---|
| Art. 2 (jurisdiction and application) | None |
| Art. 2a (freedom of reception and retransmission) | Art. 40 (freedom of reception), Art. 24 (freedom of retransmission ⁸) |
| Art. 2a.2 (derogation from freedom of reception and retransmission) | None directly |
| Art. 3a (access to events of major importance for society) | None |
| Chapter III. Promotion of distribution and production of television programmes | None |
| Chapter IV. Television advertising, sponsorship and teleshopping | None as regards teleshopping; art. 30-32 as regards advertising and sponsorship, but they would need to be harmonized fully |
| Chapter V. Protection of minors and public order | Art. 2, Art. 37, Art. 41 (but not fully) |
| Chapter VI. Right of reply | Art. 43 |

European Convention on Transfrontier Television and the level of harmonization of Law of Ukraine „Television And Radio Broadcasting” with it.

| Pertinent chapters and articles of the Convention | Corresponding articles of the Law |
|--|---|
| Article 2: Terms employed | Some of these terms are defined in art. 1 |
| Article 4: Freedom of reception and retransmission | Art. 40 (freedom of reception), Art. 24 (freedom of retransmission ⁹) |
| Article 5: Duties of the transmitting Parties/jurisdiction | None |
| Article 7: Responsibilities of the broadcaster | Art. 2, Art. 37, Art. 41 |
| Article 8: Right of reply | Art. 43 |
| Article 9: Access of the public to information | None ¹⁰ |
| Article 9a: Access to events of major importance | None |
| Article 10: Cultural objectives | None |
| Article 10a: Media pluralism | Art. 7 |
| Chapter III. Advertising and tele-shopping, Chapter IV. Sponsorship | None as regards teleshopping; art. 30-32 as regards advertising and sponsorship, but they need to be harmonized fully |
| Chapter IVa. Programme services devoted exclusively to self-promotion or tele-shopping | None |

⁸ Provided the cable operator does not have to obtain a licence.

⁹ Provided the cable operator does not have to obtain a licence.

¹⁰ Art. 36 could theoretically be interpreted as applicable to this situation.

**LAW OF UKRAINE ON NATIONAL TELEVISION AND BROADCASTING
COUNCIL OF UKRAINE
(Adopted in 1997 and amended in 1998)**

INTRODUCTION

It is a frequent practice in European countries to establish a regulatory authority responsible for licensing radio and television stations, and for their regulation, as well as oversight, of their activities.

The existence of the National Council is compatible with Recommendation No. R (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector.

The Recommendation points out that member states of the Council of Europe 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 fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation. ... The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

The Appendix to this Recommendation states:

Regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or ad hoc reports relevant to their work or the exercise of their missions.

In order to protect the regulatory authorities' independence, whilst at the same time making them accountable for their activities, it is necessary that they should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. With respect to the legality of their activities, this supervision should be exercised a posteriori only. The regulations on responsibility and supervision of the regulatory authorities should be clearly defined in the laws applying to them.

The Recommendation also stipulates that clear rules should guarantee that the members of regulatory authorities do not receive any mandate or take any instructions from any person or body and do not make any statement or undertake any action which may prejudice the independence of their functions and do not take advantage of the latter for political purposes.

The Recommendation states in this regard:

In particular, dismissal [of a member of a broadcasting regulatory authority] should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions

*should only be possible in serious instances clearly defined by law, subject to a final sentence by a court"*¹¹.

The Recommendation also stipulates that clear rules should guarantee that the members of regulatory authorities do not receive any mandate or take any instructions from any person or body and do not make any statement or undertake any action which may prejudice the independence of their functions and do not take advantage of the latter for political purposes.

DETAILED COMMENTS

These comments concentrate on provisions in the law which fall short of European standards

Section 1 "General Provisions"

Art. 1

Art. 1 describes NTBCU as a "constitutional permanent extra-agency state authority accountable to the Supreme Council of Ukraine and the President of Ukraine" (emphasis added - K.J.) and says that it "shall act in the interest of society and be independent within the authority specified by the Constitution and laws of Ukraine".

The question of accountability to the Supreme Council and President raises serious concerns, especially when seen in conjunction with Art. 10 "Early termination of the Term of Office of a National Council Member" (see below).

Art. 2

Art. 2 describes the major tasks of the National Council. In large measure, they are the typical tasks of a broadcasting regulatory, licensing and monitoring body. Some of the provisions, however, seem to vest administrative powers in the National Council, while others are general and vague, potentially opening the door to discretionary decision-making or even abuse.

ANALYSIS

The article, because of its vague wording, seems to give the Council discretionary power over programming.

This concerns such provisions as:

- One of the Council's tasks is to "place the state order" for the coverage of activities of the Supreme Council of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine according to the law of Ukraine "On the Procedure of Mass-Media Coverage of Activities of

¹¹ The Polish Broadcasting Act says that members of the National Broadcasting Council of Poland can be recalled by the bodies which had appointed them if, among other things, (i) "they have been sentenced for a criminal offence" and (ii) "they have committed a breach of the provisions of the present Act and the said breach has been confirmed by a decision of the Tribunal of the State".

the State Authorities and Local Self-Government Bodies in Ukraine". Without closer knowledge of the contents of that Law, it is hard to judge whether or not this provision is in violation of Recommendation R (2000) 23 which prohibits *a priori* control of regulatory bodies over programming.

- The Council should "specify the procedure of the use of European and other foreign programmes by television/radio organizations of Ukraine in accordance with international standards and the current legislation of Ukraine".
- The Council is to "provide state support for the formation and development of the audio-visual mass-media of Ukraine". This should be read in conjunction with art. 28 which provides for a part of the licensing fee to be set aside in the state budget and used by the National Council "for the development of the national television and radio broadcasting". This can be taken to mean distribution of money from public funds for these vaguely worded purposes.
- One of the Council's tasks is to "avert the monopolization of the audiovisual mass-media". The objective is, of course, correct, but any grounds for, and forms of, interference into the freedom of business organizations such as radio and television stations, should be clearly spelt out in the law.

RECOMMENDATION

In the body of the law, all of these tasks and obligations should be specified clearly, together with procedures and criteria to be applied in the implementation of all of these tasks.

Section 2 "Composition of the National Council and Procedure of Formation Thereof"

Art. 6

This article states in part that "the proposals regarding candidates for the membership in the National Council shall be made by the Chairman of the Supreme Council of Ukraine upon submission of the relevant committee of the Supreme Council of Ukraine, taking into account suggestions of groups (factions) of the members (people's deputies) of the Supreme Council of Ukraine and associations of individuals".

ANALYSIS

This is not sufficiently clear as regards the procedure to be applied. Most likely, this should happen in two stages:

1. The relevant committee collects candidacies from various groups and factions within the Supreme Council and associations active in society, and on this basis draws up a list of candidates and submits it to the Chairman;
2. The Chairman then proposes candidates on the basis of the committee's proposal.

As regards the first stage, it is not clear whether the committee is (i) duty-bound to ask all (or all relevant?) associations for suggestions, and (ii) to pass them all on to the Chairman, or to make a selection, and if so - on the basis of what criteria and by what procedure.

The same is true of the second stage: does the Chairman merely publish and submit to a vote in the Supreme Council the list of candidates drawn up by the committee, or does he/she

have the freedom to select those who should be put to a vote? In both cases, any selection carried out by the committee and the Chairman may lead to abuses, if the criteria applied are political. Any procedures and criteria of selection should be explicitly defined in the law. In its present form, the article does not provide a safeguard against the abuse of the procedure.

RECOMMENDATION

These procedures should be clarified in the law, or the law should specify who should clarify them.

Art. 7

The requirement that the President should “consult” the Prime Minister and relevant ministries in selecting candidates for membership in the Council, while not limiting the President’s freedom of choice, creates a possibility that the range of candidates taken into consideration might be influenced by the wishes of the State administration.

Art. 9

This article introduces a linguistic criterion for appointing a National Council member: the ability to speak the state language of Ukraine. Given the existence of a large group of Russian speakers in Ukraine, this provision should be checked for conformity with the Constitution of Ukraine and with the CoE Framework convention for the protection of national minorities (1995) and European Charter for Regional or Minority languages (1992).

Art. 10

This article lists conditions for possible early termination of a member's term of office.

ANALYSIS

The terms and procedures described in this article are vague and could be abused. This concerns

- "abuse of office" (or, as in art. 12, “substantial abuse of office” in the case of the Chairman)
- The possibility created by this article for members of the Council to apply to the Supreme Council or the President for early termination of a member’s term of office when that member is absent for “two months without good reason”. If such a possibility should exist at all, then a set majority in favour of such a motion (at least two thirds) should be required for the Council to be able to take such action.

Any member of the National Council can at any time face a "declaration of no-confidence" from the authority which had appointed him/her and be dismissed from the Council as a result. So, in real terms, the independence of Council members, and of the Council in general, cannot not be guaranteed. The National Council's obligation, described in art. 2, of "protecting television and radio organizations from the pressure exerted by authorities, as well as by political ... circles of society" may thus be an empty phrase. This may also be true of art. 38 which prohibits "interference with the National Council's activities". Many provisions in this law provide for just such interference.

The implication of the above provision is that Council members appointed by either the President or the Supreme Council are treated in the law as "representatives" of the appointing body. This should not be the case. Once appointed, members should be guided by the general public interest (as noted above, the law says that the Council "shall act in the interest of society"), and not by the particular interests of appointing bodies.

RECOMMENDATION

All these provisions should be re-examined in any future revision of the law. The provision providing for a declaration of no-confidence by the Supreme Council or the President should be deleted.

Art. 12

- The procedure for appointing candidates and electing the Chairman of the National Council, or for recalling him/her (which includes the President and Chairman of the Supreme Council in decision-making roles) provides further grounds for restricting the Council's independence.

ANALYSIS

The vote for a single candidate agreed upon between the Chairman of the Supreme Council and the President can hardly be called "an election".

RECOMMENDATION

Members of the Council should be free to elect their chairman from among themselves¹². The article should set a minimum majority (e.g. two-thirds) of votes for the election or dismissal of the Chairman by the members.

- The article empowers the Chairman to issue orders and instructions "which should not conflict with resolutions of the National Council". Given that all members of the Council are full-time members, it is not clear why the Chairman should not, except in everyday, administrative matters, be obliged to act on substantive, policy issues on the basis of the Council's resolutions.
- It is not clear why the Supreme Council or the President should have the competence to "request" a meeting by the Council. This provision should be deleted.
- Provisions allowing the dismissal of the Chairman, or early termination of his/her term of office on the basis of a joint decision of the Supreme Council and the President are unacceptable. They should be deleted.

¹² The 1994 Ukrainian broadcasting law provided for precisely this (see art. 5). The system introduced in this law is a step back from that provision.

Art. 14

This article provides for the appointment of regional "representatives" of the National Council whose duties involve "co-ordination of the activities of local television/radio stations".

ANALYSIS

It is not clear what "co-ordination" is meant here, and whether this is not another signal that the National Council has administrative powers beyond its proper role as a regulatory, licensing and monitoring body. Neither the National Council nor its representatives should have any administrative power to direct the work of radio and television stations.

Section 3. Competence, authority and functions of the National Council

Art. 18

The article differentiates between "television and broadcasting policy" (which should be specified by law, with the National Council "taking part in its implementation"), and "licensing policy", which should be developed and implemented by the Council itself.

In addition to any laws regulating broadcasting, "television and broadcasting policy" is also pursued in the form of activities of the National Council and of government departments. The Council should be involved not only in its implementation, but also in its formulation and development. Otherwise its role is unjustifiably diminished.

Art. 19

The concept of the "television and radio environment of Ukraine" is not very clear, so it is hard to understand what is meant by the National Council's role in "its development and implementation". Such vague phrases should not appear in legal instruments, as they can be used to extend the Council's powers and competence in an unlimited way.

Alternately, the article could be so meaningless as to constitute dead-letter law.

Art. 20

The provision that the Council should "consult" the Supreme Council and the President before taking part in the conclusion of interstate agreements and international projects and programmes is another unjustified constraint on its independence.

Art. 21

The provisions that "the National Council may issue common regulations together with the state executive bodies" and that its resolutions "shall be binding upon the local authorities and self-government bodies, enterprises, institutions and individuals" is another sign that the Council may be treated here like a part of State administration. If so, then this is not in keeping with its proper status as a regulatory, licensing and monitoring body.

Art. 22

The article states that “The National Council shall issue the licenses for broadcasting, cable broadcasting, retransmission and wired (cable) radio broadcasting, as well as for the time of broadcasting”.

ANALYSIS

This seems to go beyond Art. 10 para. 1 of the European Convention of Human Rights, in that licences seem to be required for activities other than broadcasting itself. Unless this impression is created by imprecise translation of the Ukrainian original, the requirement that retransmission and operation of a cable system require a licence seems excessive.

Art. 30

The article does not mention monitoring of programming as a method of exercising its supervisory functions. This should be added.

Art. 31

Under this article, if both the Supreme Council and the President reject the Council's annual report, the Supreme Council must consider a vote of no-confidence in the National Council's Chairman, or the Council as a whole. Should such a motion pass, either the Chairman or the Council as a whole would be dismissed (presumably, the President, too, would declare his nonconfidence in either the Chairman or the Council as a whole). Dismissal of members of the Council on rejection of its report, i.e. on the basis of an unfavourable assessment of their work, could be seen as an element of the Council's accountability. However, two conditions would need to be met:

- To avoid dismissal of Council members upon rejection of the report resulting from political considerations, this should only take place if the report is rejected both by the President and the Supreme Council (this seems to be guaranteed by art. 31);
- It has to be noted that the Explanatory Report to Recommendation No. R (2000) 23 states: "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".

Section V. Financing of and co-operation with State authorities

Art. 39

The provision that "state executive bodies, local self-government bodies and their structures ... shall abide by the regulations of the National Council as far as activities of television/radio organizations are concerned" may be a signal, as noted above, that the National Council has some competence as an administrative body, or that "state executive bodies" and local government bodies have a role to play in the running and administration of broadcasting which may go beyond what is accepted in a democratic country. Closer knowledge of the Ukrainian situation would be required to know whether this is true.

LAW OF UKRAINE ON THE PUBLIC TELEVISION AND RADIO BROADCASTING (1997)

LAW OF UKRAINE ON THE CREATION OF THE SYSTEM OF PUBLIC TV AND RADIO BROADCASTING

INTRODUCTION

The 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) adopted Resolution No. 1: "The Future of Public Service Broadcasting". In that Resolution, member States defined the programme mission of public service broadcasting and

- Affirmed their commitment to maintain and develop a strong public service broadcasting system in an environment characterised by an increasingly competitive offer of programme services and rapid technological change;
- And undertook „to define clearly, in accordance with appropriate arrangements in domestic law and practice and in respect for their international obligations, the role, missions and responsibilities of public service broadcasters and to ensure their editorial independence against political and economic interference”, and to "guarantee public service broadcasters secure and appropriate means necessary for the fulfilment of their missions".

The Ministerial Conference also stated that participating states should encourage public service broadcasters to contribute to experimentation in new communications technologies in close collaboration with industry, taking account of the interests of consumers, and that particular attention should be given to developing the opportunities offered by telecommunications for the introduction of digital broadcasting and new services.

In Recommendation No. R (96) 10, the Committee of Ministers of the Council of Europe recommended that member states include in their domestic law provisions guaranteeing the editorial independence and institutional autonomy of public service broadcasters. The Recommendation states that the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy, especially in areas such as: the definition of programme schedules; the conception and production of programmes; the editing and presentation of news and current affairs programmes; the organisation of the activities of the service; recruitment, employment and staff management within the service; the purchase, hire, sale and use of goods and services; the management of financial resources; the preparation and execution of the budget; the negotiation, preparation and signature of legal acts relating to the operation of the service; the representation of the service in legal proceedings as well as with respect to third parties.

In the appendix to the Recommendation it is stated that the boards of management of public service broadcasters should be solely responsible for the day-to-day operation of their organisation. Such boards should:

- exercise their functions strictly in the interests of the public service broadcasting organisation which they represent and manage;
- may not receive any mandate or take instructions from any person or body whatsoever other than the bodies or individuals responsible for the supervision of the public service broadcasting organisation in question, subject to exceptional cases provided for by law.

The same should be true of the supervisory bodies of public service broadcasting organisations.

In the protocol on public service broadcasting to the Treaty establishing the European Community, adopted in June 1997, the European Council stated that the system of public broadcasting in Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. The protocol recognizes that it is within the competence of Member States to confer and define the remit of public broadcasting and to organize it. It indirectly acknowledges the right of member states to provide for the funding of public service broadcasting (from both licence fees and advertising, in addition to any potential public subsidies), insofar as such public funding is granted for the fulfilment of the public service remit and does not affect trading conditions and competition in the Community.

GENERAL COMMENTS

1. The law provides for public radio and television to be established by a resolution passed by the Verkhovna Rada - which has never been adopted. Presumably that means that many detailed regulations, necessary for the proper functioning of public service broadcasting, were meant to be included in the resolution.
2. The law makes no mention of the National Television and Broadcasting Council. It should be involved in supervising the public broadcaster.

DETAILED COMMENTS

Art. 1

The article describes Public Radio and Television as "a single national non-profit broadcasting system, owned by the Ukrainian people and built on a uniform program concept".

ANALYSIS

The concept that the public broadcaster is to be "owned by the Ukrainian people" is commendable, but many later provisions contradict this, giving mainly politicians and the state administration a dominant role in running it.

Art. 2

The role of the Verkhovna Rada described here is far too extensive.

RECOMMENDATION

The role of the Verkhovna Rada should be reduced to appointing members of the Public Council. MPs, representatives of political parties and civil servants should be excluded from membership in the Public Council.

Art. 3

The role of the Public Council is far too extensive. The law says it "should not interfere with business activities or exercise control of the content or programs", but gives it the power to "determine principles of staffing and an organization chart, control financial and economic activities". This provision opens the way to far-reaching interference into the work of the organization.

RECOMMENDATION

The Public Council should approve the Statute of the new organization, appoint its Administrative Council, perhaps take a few strategic decisions (approval of the annual financial and programme plan). Its main role should be that of supervising the activities of the station's management.

Art. 4

This provision requires significant changes.

ANALYSIS

The principle that the Public Council should be appointed by the Verkhovna Rada after its election means that the ruling party or coalition will be able to shape the membership of the Council in line with its political preferences. This means that the Council would be an extension of the current parliamentary majority, and so of the current government.

Its membership is to consist of representatives of political parties, of the President, Council of Ministers and various government departments and other state bodies, and of creative unions and public associations, selected by the Verkhovna Rada. This means that political considerations would prevail over the selection and appointment of these persons.

All this contravenes the principles embodied in Recommendation R (96) 10, which says in part:

The rules governing the status of the supervisory bodies of public service broadcasting organisations, especially their membership, should be defined in a way which avoids placing the bodies at risk of political or other interference.

These rules should, in particular, guarantee that the members of the supervisory bodies:

- *are appointed in an open and pluralistic manner;*
- *represent collectively the interests of society in general;*
- *may not receive any mandate or take any instructions from any person or body other than the one which appointed them, subject to any contrary provisions prescribed by law in exceptional cases.*

RECOMMENDATION

Principles of the appointment of members of the Public Council should be brought in line with the Recommendation. It should have a fixed term of office different from that of the Verkhovna Rada and the law should ensure that its members cannot be dismissed.

Art. 5

This provision should be deleted.

ANALYSIS

Creation of such a Qualification Council composed of representatives of the Verkhovna Rada and the President in equal proportions can only politicize the appointment of the Administrative Council and - in extreme cases - prevent its appointment in case of a conflict between parliament and the President. The Administrative Council should be appointed by the Public Council by a qualified majority.

Art. 6

Regulations concerning the composition, method of appointment, and powers of the Administrative Council should be much more detailed.

RECOMMENDATION

The Administrative Council should have a fixed term of office and considerable job security. A qualified majority of votes in the Public Council should be required to dismiss members of the Administrative Council, and only in cases clearly specified in the law.

Art. 7

The difference between advertising (which is to be forbidden) and "commercial presentations" (which are to be allowed) is not clear. This would have to be defined very clearly in order to be enforceable. Restriction of "commercial presentations" on public radio and television is understandable, but it might deprive the public broadcaster of funding required for its development - especially as successful introduction of the licence fee system cannot be ensured. This needs to be considered further.

The provision of Art. 8 that advertising may be allowed during an initial period may be a solution, but needs to be revised (see below).

Provisions concerning the introduction, collection and use of licence fees from listeners and viewers need to be much more specific for the system to be introduced and operated successfully.

Art. 8

A single public broadcaster needs nationwide reach in order to be able to serve the entire population of the country. Therefore it is not enough to say that it should enjoy priority in obtaining broadcasting channels. The law should put the pertinent authorities under an obligation to make available to the public broadcaster frequencies enabling it to have national reach.

Article 10

As noted above, the provision concerning the broadcasting of advertising by the public broadcaster during an initial period should be revised.

RECOMMENDATION

The law should specify the period during which advertising will be permissible in the programming of the public broadcaster. Otherwise the Verkhovna Rada may be able to withdraw or suspend its permission as a means of putting pressure on the public broadcaster.

There is no reason to confine advertising to goods and services of domestic producers. All advertising should be allowed.

LAW OF UKRAINE ON THE CREATION OF THE SYSTEM OF PUBLIC TV AND RADIO BROADCASTING

This law, adopted by the Verkhovna Rada, but then vetoed by the President, was passed pursuant to Article 2 of the Law of Ukraine on the Public Television and Radio Broadcasting System.

It does not solve any of the problems inherent in that law.

It introduces three changes compared to that law:

1. It makes it clear that the public broadcasting organization should be created on the basis of the existing state broadcaster;
2. Public radio and television is to be financed "during the period of its creation" from the stage budget (Transitional Clauses);
3. It states that the Statute of the public broadcaster should be developed jointly by the Public Council and Committee of the Verkhovna Rada on freedom of speech and information (Transitional Clauses).

COMMENTS

- 1) Transformation of the existing state broadcaster into a public service broadcaster is the right course to take. This has been done in all other post-Communist countries where public service broadcasting has been created.
- 2) It is probably a realistic decision to finance the newly created public service broadcaster from the state budget in the initial period. However, this provision needs to be expanded:
 - a. The duration of the "period of creation" should be defined, so that preparations can be made for introducing the licence fee system;
 - b. The government should not be able to cut or withhold financing for the public broadcaster at will. Therefore the law should guarantee that the financing would be adequate and define procedures for funding (e.g. via the National for Television and Broadcasting Council), so that the government can exert no pressure on the public broadcaster.
- 3) It is not clear why a parliamentary committee should be involved in drafting the Statute of the public service broadcaster. This job could be done by the National for Television and Broadcasting Council, working with the Public Council in a consultative role. If the law itself were more detailed (as it should be) concerning the goals and principles of operation of the public broadcaster, then the job of preparing the Statute would be much easier.