



ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on the

draft Act on Amendments to the Broadcasting Act of Poland

by

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Global Campaign for Free Expression

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I. Introduction

This Memorandum¹ is based on the draft Act on Amendments to the Polish Broadcasting Act as recently introduced in Parliament. The draft Act will introduce important restrictions on multiple ownership of radio and television licences, limiting broadcasters to a single national TV or radio channel, as well as on cross ownership between the print and broadcast sectors. The draft fails, however, to address serious problems in the existing law, in particular the failure to guarantee adequately the independence of both the broadcast regulator and the public broadcaster.

The speed with which the draft Act was introduced attracted severe criticism, both nationally and internationally. On March 19, the Polish government informed the public that it had adopted a new draft of the Broadcasting Act; within days, the Prime Minister had signed the draft and sent it to the Parliament. The draft Act had initially been scheduled on a fast-track legislative path which would have effectively preempted any public consultation process. However, following widespread criticism the government withdrew from the fast-track procedure and the draft Act is now being considered as part of the normal legislative timetable.

¹ ARTICLE 19 would like to acknowledge the assistance of Anthony Hudson, of Doughty Street Chambers, London, in drafting this Memorandum.

Most of the ownership restrictions proposed by the draft Act mirror measures taken in other countries to stimulate pluralism, although some of them are excessively vague and hence open to abuse. ARTICLE 19 is very concerned that the Act fails to provide for structural guarantees against political interference in broadcast regulation, as well as in the public broadcaster. Furthermore, ARTICLE 19 is concerned that no limitations have been imposed on the commercial activities of the public broadcaster, which might take advantage of its public funding to engage in unfair commercial activities. The Polish Parliament should take this opportunity to address these concerns, securing the regulator's independence and cutting ties between the State and the public broadcaster.

This Memorandum first outlines the guarantee of freedom of expression in international law and in the Polish constitution. It then analyses various clauses of the draft Act in detail, offering recommendations for improvement.

II. International and Constitutional Standards

International Guarantees of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. Article 19 of the UDHR guarantees the right to freedom of expression and information in the following terms:

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

The *International Covenant on Civil and Political Rights* (ICCPR), a legally binding treaty which Poland ratified in 1977, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. A Council of Europe Member State since 1992, Poland is also a party to the *European Convention on Human Rights*, which guarantees freedom of expression at Article 10.

These guarantees allow for some restrictions on freedom of expression but any limitations must remain within strictly defined parameters. Article 10(2) of the European Convention on Human Rights lays down the benchmark, stating:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions 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 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.

While the licensing of broadcast enterprises is explicitly allowed for in Article 10(1), the European Court of Human Rights has indicated that such regulation should still

comply with the requirements of Article 10(2).² It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its fundamental importance in democratic society. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, approved by both the European Court of Human Rights and the UN Human Rights Committee. This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure that interest.

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient. In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible.³ Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

Under Article 91 of the Polish Constitution, international human rights treaties have precedence over domestic law.

Constitutional Guarantees

A new Constitution was approved in a national referendum on 25 May 1997. It guarantees citizens’ right to freely express their opinions and to acquire and disseminate information, and the right to freedom of expression is protected in two different places. Article 14 states:

The Republic of Poland shall ensure freedom of the press and other means of social communication.

Article 54 states:

1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.
2. Preventive censorship of the means of social communication and the licensing of the press shall be forbidden.

Limitations on the right to freedom of expression are permitted, but only in certain narrowly prescribed circumstances analogous to the three-part test under international human rights law. Importantly, Article 31(3) adds that “[s]uch limitations shall not violate the essence of freedoms and rights.”

² *Groppera Radio AG and Others v. Switzerland*, Judgment of 28 March 1990, Application No. 10890/84, para. 61; *Autronic AG v. Switzerland*, Judgment of 22 May 1990, Application No. 12726/87, para. 52.

³ *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245 (European Court of Human Rights), para. 62. These standards have been reiterated in a large number of cases.

Finally, under Article 54(2), the operation of a radio or television station may be subject to license.

The Importance of Freedom of Expression

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which states:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

The importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the African Commission on Human and People's Rights has held:

Freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.⁴

Similarly, the Inter-American Court of Human Rights stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.⁵

This has repeatedly been affirmed by both the UN Human Rights Committee and the European Court of Human Rights.

Media Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."⁶

Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

[I]t is ... incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and

⁴ *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communications 105/93, 130/94, 128/94 and 152/96, para. 52.

⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.

⁶ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, op cit.*, para. 34.

ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.⁷

This applies particularly to information which, although critical, is important to the public interest:

The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁸

This has been recognised by the constitutional courts of individual States around the world. For example, the Supreme Court of South Africa has recently held:

The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.⁹

Pluralism

Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

An important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”¹⁰ The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”¹¹

This implies that the airwaves should be open to a number of different broadcasters, but also that the State should take measures to prevent monopolisation of the airwaves

⁷ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

⁸ *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).

⁹ *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6.

¹⁰ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 17 EHRR 93, para. 38.

¹¹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 6, para. 34.

by one or two players. However, at the same time these measures should not be such as to limit unnecessarily the overall growth and development of the sector.

Public Service Broadcasting

Public service broadcasting – through a non-profit broadcaster, independent of the State and with an overall mandate to provide a wide range of quality programming that serves all the people and that informs, enlightens and entertains – can make an important contribution to pluralism. The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.¹² For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

A Resolution of the Council and of the Representatives of the Governments of the Member States, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural needs, and the need to preserve media pluralism. As a result, the 1997 Treaty of Amsterdam exempted funding to public broadcasters from the strong prohibition on State funding usually found in EU law.¹³ For the same reasons, the 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.¹⁴ As a candidate Member State of the European Union, Poland has taken on a legal obligation to implement the full *acquis* of EU law in relation to broadcasting.

Independence and Funding

The State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression, including publicly-funded broadcasters. This follows from a case before the European Court of Human Rights which decided that any restriction on freedom of expression through licensing was subject to the strict test for such restrictions established under international law.¹⁵ In particular, any restrictions must be shown to serve one of a small number of legitimate interests and, in addition, be necessary to protect that interest.

An important implication of these guarantees is that bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments. The most important of these are Recommendation (96)10 on the *Guarantee of the Independence of Public Service Broadcasting* and Recommendation (2000)23 on the *Independence and Functions of*

¹² See *Fourth Television* case, 87 BverfGE 181 (1992). In Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 58.

¹³ Protocol No. 32 to the Treaty establishing the European Community, OJ C 340, 10 November 1997, pp. 173-308. See also EU Council Resolution of 21 January 2002 on the development of the audiovisual sector, OJ C32, 5 February 2002, p. 4.

¹⁴ Clause 5.

¹⁵ *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, Application No. 10890/84, 12 EHRR 321, para. 61.

Regulatory Authorities for the Broadcasting Sector, both passed by the Committee of Ministers of the Council of Europe.¹⁶ A central principle in both Recommendations is that the powers of supervisory or governing bodies should be clearly set out in the legislation and these bodies should not have the right to interfere with programming matters. Governing and regulatory bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.¹⁷ Similarly, in the preamble to the European Convention on Transfrontier Television, States: “[Reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters.”¹⁸

ARTICLE 19 has adopted a set of principles drawn from international law and practice relating to broadcasting, entitled, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*.¹⁹ Principle 34 notes the need to transform government or State broadcasters into public service broadcasters, while Principle 35 notes the need to protect the independence of these organisations. Article 35.1 specifies a number of ways of ensuring that public broadcasters are independent including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of goals, powers and responsibilities;
3. through the rules relating to appointment of members;
4. through formal accountability to the public through a multi-party body;
5. by respect for editorial independence; and
6. in funding arrangements.²⁰

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”²¹

Many of these standards reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. This is reflected, for example, in Principle 35.3 of the ARTICLE 19 *Principles*, which states: “The independent governing body should not interfere in day-to-day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose prior censorship.” The governing body may

¹⁶ 11 September 1996 and 20 December 2000.

¹⁷ Articles 9-13 Recommendation R(96)10; Articles 3-11 Recommendation R(2000)23.

¹⁸ 5 May 1989, European Treaty Series No. 132.

¹⁹ London: ARTICLE 19, 2002.

²⁰ *Ibid.*, Principle 35.1.

²¹ *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

This approach is reflected in Article 1 of Recommendation No. R(96)10 of the Council of Europe, which notes that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters. The Recommendation goes on to state that management should be solely responsible for day-to-day operations and should be protected against political interference, for example by restricting its lines of accountability to the supervisory body and the courts.²²

Similarly, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. Articles 17-19 of Recommendation No. R (96) 10 of the Council of Europe note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

III. Specific concerns

Many of the draft Amendments are uncontroversial; some are necessary in view of Poland's impending membership of the European Union. This concerns, for example, the draft provisions on when a broadcaster shall be deemed to be established in Poland. However, other amendments are proposed irrespective of EU law requirements, including those restricting foreign ownership and certain forms of multiple ownership. Whilst some of the restrictions are permitted and would be likely to enhance pluralism, others are vague and restrictive on freedom of expression. We are also concerned that the public broadcaster, which is to be allowed to gain funding through advertising, should not gain an unfair advantage. Importantly, one issue not addressed in the current draft Act is the relationship with government of both the public broadcaster and the broadcast regulator. There have been significant allegations of government interference with both the national broadcast regulator as well as with the public broadcasters, and the draft Act should introduce measures to address this important issue. Finally, we comment on 'must carry' requirements and restrictions on broadcasting major sporting events.

Ownership restrictions

The draft Act introduces two new types of ownership restrictions: restrictions on foreign ownership and restrictions on certain types of multiple ownership.

Limitations on foreign ownership

First, under new Article 35 of the Broadcasting Act, foreign ownership of a company that holds a broadcasting license is limited to 33% of the shares; such companies are also required to fulfil a number of conditions designed to enhance Polish participation. Following EU accession, the limit for non-EU foreign ownership will be

²² Articles 4-8.

set at 49%, while new Article 35(4) will allow companies established in the EU to own a broadcasting licence outright.

In many countries, it is common practice to limit foreign ownership. For example, in France, foreign ownership is limited to 20% of the voting rights of broadcasters.²³ In the United Kingdom, corporations in which non-residents hold a controlling share, defined as effective control of more than 50% of the shares, may not be awarded licences.²⁴ In South Africa, “foreign persons” are barred, directly or indirectly, from exercising control over a private broadcasting licensee, from owning more than 20% of the financial or voting interests in a licensee or from holding more than 20% of the directorships.²⁵ The limitation on foreign ownership of broadcasting licences of 33%, and 49% after EU accession, is therefore not unreasonable.

Limitations on certain types of multiple ownership

Clause 41 of the draft Act introduces various amendments to Article 36 with the purpose of limiting various forms of multiple ownership.

First, the new Article 36.3.1 provides that a license to broadcast radio or television programmes on an area inhabited by 80% or more of Poland’s population will not be granted to an applicant who already operates a licensed broadcasting service which reaches more than 80% of the population or who owns a national daily newspaper or magazine. This provision prevents ownership by one person of more than one national or radio television service, or national daily newspaper or magazine at the same time. Second, Article 36.3.2 prohibits granting a broadcasting license covering an area containing a town with a population of more than 100,000 to an applicant who already holds a national broadcasting licence. Third, Article 36.3.3 prohibits granting a broadcasting license covering an area containing a town with a population of more than 200,000 to an applicant who already broadcasts radio or television programmes in that area. Fourth, Article 36.3.4 prohibits granting a broadcasting license covering an area containing a town with a population of more than 100,000 to an applicant who already broadcasts two or more radio or television programmes in that area. Fifth, Article 36.3.5 prohibits granting a broadcasting license to an applicant who already broadcasts ‘other similar’ radio or television programmes in the same area. Finally, Article 36.6 prevents a company restricted from owning a licence on any of the above grounds from holding more than 20% of the shares in a company that has been granted a licence.

Under Article 10 ECHR, the State has an obligation to take positive measures to promote the growth and development of broadcasting, and to ensure that it takes place in a manner which ensures maximum diversity.²⁶ This means that effective measures should be in place to prevent undue concentration, and to promote diversity of ownership both within the broadcast sector and between broadcasting and other media sectors. Such measures must take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable. The State

²³ Law No. 86-1067 of 30 September 1986 as amended, article 40.

²⁴ *Broadcasting Act 1990*, schedule 2, part II, paragraph 1.

²⁵ *Independent Broadcasting Authority Act*, No. 153 of 1993, section 48. These levels are doubled to 40% for signal carrier licensees. See section 38A.

²⁶ See, for example, *Informationsverein Lentia and Others v. Austria*, note 10.

also has an obligation to refrain from imposing restrictions on broadcasters which unnecessarily limit the overall growth and development of the sector.

The restrictions in new Article 36.3.1 and new Article 36.3.2, preventing multiple ownership of national broadcast licences, national and local broadcast licences and cross-media ownership between the print and the broadcast sectors, are not unusual. Similar restrictions can be found in Australia and the United Kingdom, for example, and have been justified as being necessary to prevent undue concentration of ownership. Similarly, the restrictions in new Article 36.3.3 and new Article 36.3.4 are reasonable. It should be noted that, at present, there are nearly twenty cities in Poland with a population of more than 200,000.²⁷

Article 36.3.5 prohibits granting a license to broadcast radio or television programmes to an applicant who simultaneously broadcasts ‘other similar’ radio or television programmes over such area. The article does not appear to provide any definition of ‘similar’ programmes. Nor does it indicate what proportion, if any, of programmes in a programme service need to be similar to prohibit the granting of a license. As a result, this provision is unacceptably vague and subjective, opening up the possibility of its abuse for political reasons.

Recommendation:

- The restriction on holding a licence if a broadcaster simultaneously transmits ‘similar’ programming should be removed.

Licensing

While licensing procedures will not be significantly affected by the draft Act, it does introduce a number of licence restrictions. In addition to the restrictions introduced through the new proposals on restricting multiple ownership, the draft Act provides in new Article 36 that a licence may not be granted if the programs to be broadcast by the applicant “might threaten national culture, morals and/or good manners, national safety and security, and/or divulge state secrets.” No further guidance is given as to the precise meaning of this provision. It should be noted that terms such as ‘morals and/or good manners’ are very broad and subjective, and open to abuse on political grounds.

Similarly, Article 38 allows for licence withdrawal on grounds of breach of the Act or breach of licence conditions. There is no guidance as to the severity of the breach, nor is there a requirement that less restrictive measures should be taken first. In many other countries, it is customary to require the regulator to issue a warning or impose fines before resorting to the ultimate sanction of licence withdrawal.

Finally, we are concerned that all licensing decisions are to be taken by the Chair of the NBC, with no possibility of appeal. This is contrary to internationally established principles of fair justice. For example, Article 27 of the Council of Europe Recommendation R(2000)23 stipulates that all such decisions should be “duly reasoned [and] open to review by the competent jurisdictions”.

²⁷ Information taken from the on-line City Population database:
[http://www.citypopulation.de/Country.html?E,Polen\\$Poland](http://www.citypopulation.de/Country.html?E,Polen$Poland).

Recommendations:

- Vague licensing requirements such as those relating to ‘good manners’ should be removed from the Act.
- The Act should provide for a graduated regime of sanctions.
- Licensing decisions should be subject to appeal.

The Lack of Independence of the Broadcast Regulator

Clauses 3-20 of the draft Act introduce a number of amendments to the position of the regulatory body for broadcasting, the National Broadcast Council (NBC). The NBC plays a pivotal role in broadcast policy, having the responsibility to draw up a national broadcast policy and frequency plan, issue licences and supervise broadcasters, among other things. It also plays an important role with regard to the public broadcaster (see below for detailed commentary).

Article 7 of the Act states that 4 of the members of the NBC will be appointed by the Lower Chamber of Parliament, 2 by the Senate and 3 by the President. Although this does involve various different State organs in the appointments process, it will often be the case, as at present in Poland and many other countries, that all of these are dominated by one party or a coalition of parties. Furthermore, no provision is made for openness of the process, or for the involvement of civil society. There is no stipulation that the NBC should function independently; on the contrary, it is described in Article 5 as “the state authority competent in matters of radio and television broadcasting”.²⁸ The only stipulation of independence is in Article 8 which holds that NBC members should suspend their membership of a political party as well as their activities in governing bodies of associations such as trade unions, or churches, and that NBC members should not have any economic ties with broadcasters.

In the past, there have been frequent allegations that the NBC acts as a political body rather than an independent broadcast regulator. These concerns were echoed by the United Nations Special Rapporteur on Freedom of Expression who, in his 1998 report on Poland, expressed concern about political interference with the broadcast regulator.²⁹ In particular, he reported that the appointments process to the Broadcasting Council was widely believed to be influenced by political considerations. He recommended that steps be taken to ensure the independence of the Broadcasting Council, “with its members refraining from any interest, financial or political, that could impair their ability to discharge their duties in a fair and impartial manner. It should be considered whether it is advisable to prohibit members of the NBC on completion of their six-years term of office from accepting a remunerated office in government. Members should see themselves as independent trustees of the public interest in broadcasting, not as representatives of any special interests. Appointment procedures could include public hearings and be organized according to

²⁸ The web address of the NBC ends in gov.pl, indicating a government organ. *Cf* the UK’s Independent Television Commission, which has an org.uk address, indicating a non-governmental organisation.

²⁹ Report on the mission of the Special Rapporteur to the Republic of Poland, E/CN.4/1998/40/Add.2, 13 January 1998.

criteria providing for diversity and selection depending on professional expertise. Safeguards against any interference by political or financial interests should be included.”³⁰ Although the Broadcasting Act has been amended since the Special Rapporteur’s report in 1998, many of his criticisms remain valid.

It is clear that the appointments process to the NBC does not ensure sufficient independence from government. It would be preferable if all appointments were made by a multi-party body; the power of nomination should not be given exclusively to a political actor such as the president. Civil society organisations might also be given the power to nominate members, subject to acceptance by the legislature. The law should also require the appointments process to be open, so that members of the public are aware of the steps being taken. Indeed, explicit provision for public involvement should be made. This could involve the publication of a shortlist of candidates, with an opportunity for public comment, or some other mechanism.

Recommendations:

- The appointments procedure for NBC members should be revised to minimise the potential for political interference.
- All appointments should take place in an open and transparent manner and include civil society involvement.
- The Act should include an explicit stipulation that NBC members should carry out their tasks independently from political or economic interference.

The Public Broadcasters

Many of the criticisms outlined above with regard to the lack of independence of the NBC apply equally to the functioning of the public broadcaster. The NBC plays an influential role with regard to public broadcasting services. Under new Article 21a, it will issue the four-yearly concessions for the public radio and television broadcasting companies, detailing programme policies. The NBC will also appoint all but one of the members of the Supervisory Council for the public broadcasters; the remaining member is to be appointed by the Minister of State Treasury (new Article 28). Importantly, the NBC also appoints all members of the Program Councils of the public radio and television broadcasting companies (new Article 28a). There is no requirement in the Act that any of the members of these Councils should carry out their functions independently of political or economic influence. Finally, the NBC will supervise the performance of the public broadcasters (new Article 21a). Given the significant risk of political interference with the NBC itself, there is a real danger that the political interference complained of by the UN Special Rapporteur will be carried through to the public broadcaster.

The organisational structure of the public broadcaster links it to the government in a number of other respects as well. First, under new Article 26 the State will retain sole ownership of all public radio and television companies (at present, there are two). A government representative will be present at the general meetings of the public broadcasters (new Article 29). Finally, while the public broadcaster has been allowed to diversify its funding through running advertisements and sponsorship for programmes, it will remain dependent on the State for a significant part of its funding,

³⁰ *Ibid.*, at paragraph 81.

including direct programme funding. Direct State funding is notoriously susceptible to political interference. Therefore, if direct State subsidies are retained, they should at least be prohibited from being used for programme production.

The independence of the public broadcasters would be further enhanced if they were required to submit a detailed annual report to Parliament. Although the draft Act does include a reporting requirement for public broadcasters, this is to the NBC (new Article 21). In addition, consideration should be given to including two other public accountability mechanisms in the law. First, consideration should be given to requiring the public broadcaster to establish an internal complaints mechanism. This should be in addition to any general system for complaints, including self-regulatory systems, which apply to broadcasters or the media as a whole. Individuals who felt that programmes were inappropriate or unfair could lodge complaints and, where appropriate, receive an apology or correction. Second, the public broadcaster could be required to keep itself under continuous public review. Such obligations have been imposed, for example, on the BBC in Britain, which fulfils this requirement through public meetings, surveys and the like.

Furthermore, commercial broadcasters will be competing with the public broadcasters for advertising income. While it is important that a public broadcaster is sufficiently funded, public broadcasters should not be allowed to use their public funding to engage in unfair advertising competition (for example by price dumping). This would be detrimental to the development of the sector and could be addressed by including a direct prohibition on such practices, which could then be invoked by private broadcasters. Additionally, the draft Act could place an overall limit on the proportion of total funds that the public broadcaster may raise through advertising, for example of 25%. This would have the additional advantage of preventing the public broadcaster becoming too dependent on a single source of income.

Recommendations:

- The independence of the public broadcaster from government should be guaranteed in law as well as in practice and funding should be limited to non-programming expenditure.
- Appointments to the Supervisory Council and Program Councils should take place in an open and transparent manner and include civil society involvement.
- Members of the Supervisory Council and the Program Councils should be required to carry out their tasks independently.
- Public broadcasters should be accountable to a multi-party body, such as Parliament and better accountability mechanisms, in line with the suggestions above, should be introduced.
- The draft Act should prohibit price-dumping and other unfair competition in relation to advertising and programme sponsorship by the public broadcaster.
- An overall limit should be placed on the proportion of funding the public broadcaster may derive from advertising and sponsorship.

‘Must carry’ requirements

Under Article 22, public broadcasters are obliged to “facilitate ... direct presentation and explanations of State policy by supreme State authorities.” This will allow

government representatives direct access to the airwaves not only in exceptional situations such as national emergencies, but on a regular basis to ‘present’ or ‘explain’ State policies. While it is certainly important that the public broadcaster should carry news on important government policies, a provision such as this is both unnecessary and open to abuse. It is unnecessary because any responsible public broadcaster will carry information of public importance without a specific requirement to do so. Experience in countries all over the world shows that both public and private broadcasters provide ample coverage of government policies in various areas of activity even in the absence of formal obligations to do so. Should the public broadcaster fail in this regard, it is up to the Supervisory Council to require it to address the problem. Furthermore, the provision is open to abuse because officials may use them in circumstances for which they were not intended.

Recommendation:

- Article 22 should be removed from the draft law.

Privileged access to Events

New Article 20b of the draft Act prohibits television stations whose programme coverage does not extend to the whole population from broadcasting certain important sporting events such as the World Cup, the Olympic Games and various European football championships. This provision is designed to ensure that the whole populace will be able to view these events, a legitimate goal. It should be made clear, however, that this provision does not prevent television stations which have organised themselves into networks or made other arrangements so that together they cover the whole territory from acquiring exclusive rights to these events.

Recommendation:

- It should be made clear that new Article 20b does not prevent networks or other groupings of television stations which cover the whole country from acquiring rights to the listed sporting events.