



# MEMORANDUM

on the

draft Law Amending and Supplementing the  
Law of Ukraine 'On Television and Radio  
Broadcasting'

London  
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## Key Recommendations

### **National Television and Radio Companies of Ukraine:**

- The draft Law should clarify the status of National Television Company of Ukraine (NTCU) and the National Radio Company of Ukraine (NRCU) vis-à-vis other legal provisions referring to public broadcasters.
- NTCU and NRCU should specifically be required to promote pluralism on the airwaves.

### **Governing Bodies of NTCU and of NRCU:**

- The President should not have the power to appoint members of the Boards of the public broadcasters.
- A proposed shortlist of candidates for membership of the Boards should be published, and a period of public debate allowed, before they are voted on by the Verkhovna Rada.
- The number of Board members should be reduced.
- The draft Law should require Board members to have certain professional qualifications and experience.
- Rules on incompatibility should be included in the draft Law.
- The draft Law should provide a framework of rules for decision-making by the Boards, which ensure that there is a right of appeal for individuals whose rights are affected by a decision.
- The draft Law should limit the role of the Boards to general oversight, and preclude them from engaging in day-to-day oversight of the work of the broadcaster.
- The law should regulate the conditions for dismissal of Board members in a way which protects their independence.

### **Charters of NCTU and NRTU:**

- The Boards of NTCU and NRCU, as opposed to the Cabinet of Ministers, should be vested with powers to adopt their Charters.
- The law should clarify whether or not the Charters referred to in Article 14-2(1) are the same as the editorial Charters provided for in Article 57 of the 1994 law.

### **Funding Arrangements:**

- NTCU and NRCU should specifically be prohibited from engaging in unfair competition, particularly in relation to advertising.

### **Transparency and Accountability:**

- Annual reports prepared by NTCU and NRCU should be presented only to the Verkhovna Rada and the National Broadcasting Council, not to the President.

- Procedures should be developed for allowing viewers and listeners to comment directly on the way in which NTCU and NRCU carry out their missions.

## ***I. Introduction***

This Memorandum analyses the draft Law of Ukraine Amending and Supplementing the Law of Ukraine ‘On Television and Radio Broadcasting’ (the draft Law) in relation to international standards on freedom of expression.<sup>1</sup>

The draft Law has been proposed as part of the ongoing effort to reform Ukraine’s broadcasting legislation. It amends and supplements the Law of Ukraine ‘On Television and Radio Broadcasting’, originally passed in 1994 but amended several times since then.<sup>2</sup> In particular, it aims at strengthening the independence and operation of the governing bodies of the national radio and television companies.

ARTICLE 19 welcomes efforts to reform broadcasting legislation. The draft Law generally represents a progressive attempt to ensure the independence and structural effectiveness of the governing bodies of the National Television Company of Ukraine and the National Radio Company of Ukraine. There are a number of progressive provisions, including the right of broadcasting associations and media NGOs to nominate members to the Council, a clear division of responsibilities between the Boards of the national broadcasters and the Heads of the companies, and accountability systems for the work of the governing bodies. At the same time, there are still areas where the draft Law could be improved. These concerns are outlined in detail in Section III of this Memorandum.

The comments and recommendations in this Memorandum draw on international standards on freedom of expression and broadcast regulation. Two documents are, in particular, relied on in the analysis: *Recommendation No. (96)10 on the Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe (COE Recommendation No. (96)10)<sup>3</sup> and ARTICLE 19’s *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (ARTICLE 19 Principles).<sup>4</sup> The former represents standards developed under the Council of Europe system, while the latter takes into account wider international practice, including under UN mechanisms, as well as comparative constitutional law and best practice in countries around the world.

ARTICLE 19 is an international NGO based in London with a specific mandate to promote the right to freedom of expression and to information. Through the provision of legal expertise and training, ARTICLE 19 has been involved in the adoption and implementation of right to information legislation in many countries around the world. We have already been involved in the development of Ukrainian media legislation by providing legal

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<sup>1</sup> ARTICLE 19 received a translation of the draft Law in January 2009. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation, which is an unofficial version of the draft Law.

<sup>2</sup> See, for example, the “Law on the Introduction of Amendments to the Law of Ukraine ‘On the National Television and Radio Broadcasting Council of Ukraine’”. ARTICLE 19 published a Memorandum commenting on a draft version of that Law in January 2004, available at: <http://www.article19.org/docimages/1708.doc>.

<sup>3</sup> Adopted by the Committee of Ministers on 20 December 2000.

<sup>4</sup> London, April 2002.

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analyses of draft laws and laws in force, such as the amendments to the Press Law in January 2003<sup>5</sup> and to the Law on Information in November 2003,<sup>6</sup> the Election Law,<sup>7</sup> the draft Law amending Television and Radio Broadcasting Law,<sup>8</sup> and the draft Public Service Broadcasting Law.<sup>9</sup>

This Memorandum first outlines international standards on freedom of expression, in particular regarding the independence of regulatory and governing bodies. It then provides an in-depth analysis of the provisions of the draft Law, and offers recommendations for reform.

## ***II. Freedom of Expression and Broadcasting***

### **II.1 Independence of Public Service Broadcasters**

A number of Council of Europe recommendations and declarations<sup>10</sup> have established that bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or the Boards of publicly-funded broadcasters, must be independent.

Perhaps the most important of these is COE Recommendation No. R(96)10. The very name of this Recommendation illustrates the importance attached to the independence of public service broadcasters. The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and that these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointment process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest issues.<sup>11</sup>

Several declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 *Declaration of Sana'a*<sup>12</sup> calls on the international community to provide assistance to publicly-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The

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<sup>5</sup> Available at: <http://www.article19.org/pdfs/analysis/ukraine.prs.03.pdf>.

<sup>6</sup> Available at: <http://www.article19.org/pdfs/analysis/ukraine.foi.03.pdf>.

<sup>7</sup> Available at: <http://www.article19.org/pdfs/analysis/ukraine-election-law-october-2004.pdf>.

<sup>8</sup> Available at: <http://www.article19.org/pdfs/analysis/ukraine-public-service-broadcasting-law.pdf>

<sup>9</sup> Available at: <http://www.article19.org/pdfs/analysis/ukraine.psb.05.pdf>.

<sup>10</sup> Particular reference should be made to the following: Recommendation No. R (96)10 on the guarantee of the independence of public service broadcasting, adopted by the Committee of Ministers on 11 September 1996; Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000; Declaration on the guarantee of the independence of public service broadcasting in the member states, adopted by the Committee of Ministers on 27 September 2006; and Declaration on the independence and functions of regulatory authorities for the broadcasting sector, adopted the Committee of Ministers on 26 March 2008.

<sup>11</sup> Recommendation No. R (96)10, Articles 9-13.

<sup>12</sup> 11 January 1996, endorsed by the General Conference at its 29<sup>th</sup> Session, 12 November 1997, Resolution 34.

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1997 *Declaration of Sofia*<sup>13</sup> notes the need for State-owned broadcasters to be transformed into proper public service broadcasters with guaranteed editorial independence and independent supervisory bodies. The 1992 *Declaration of Alma Ata*<sup>14</sup> also calls on States to, “encourage the development of journalistically independent public service broadcasting in place of existing State-controlled broadcasting structures”.

*Resolution No. 1: Future of Public Service Broadcasting* of the 4<sup>th</sup> Council of Europe Ministerial Conference on Mass Media Policy reiterates these principles, including the need for independent governing bodies, and for editorial independence and adequate funding.

A number of non-governmental organisations have endorsed the above standards relating to the independence of the regulatory bodies.<sup>15</sup> Principle 10 of the ARTICLE 19 Principles notes a number of ways in which the independence of regulatory bodies should be protected:

Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.

The 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.”<sup>16</sup>

Many of the standards set out above 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

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<sup>13</sup> Adopted 13 September 1997. Endorsed by the General Conference at its 29<sup>th</sup> session, 12 November 1997, Resolution 35. Clause 7.

<sup>14</sup> 9 October 1992, Endorsed by the General Conference at its twenty-eighth session – 1995, Available at: <http://www.hkhrm.org.hk/PSB/04.%20The%20Declaration%20of%20Alma%20Ata%20%5BUN%5D.pdf>.

<sup>15</sup> Apart from ARTICLE 19’s Principles, it is worth mentioning the Open Society Institute [OSI]’s report, *Television across Europe: regulation, policy and independence*. The report published by OSI’s EU Monitoring and Advocacy Program and Media Program and covers 20 European countries. Available at: [http://www.soros.org/initiatives/media/articles\\_publications/publications/eurotv\\_20051011](http://www.soros.org/initiatives/media/articles_publications/publications/eurotv_20051011)

<sup>16</sup> *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

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to broadcast content, should respect the principle of editorial independence and should never impose prior censorship.” The governing body may set direction and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

This approach is reflected in Guideline 1 of Recommendation No. R(96)10, 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.<sup>17</sup>

### II.2 Funding Public Service Broadcasters

True independence for public service broadcasters is only possible if their funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In addition, public service broadcasters can only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of COE Recommendation No. R(96)10 highlight that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public service broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

ARTICLE 19’s Principle 36 deals with funding, stating: “Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets”. The Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to ensure that sufficient resources are available to enable the public service broadcaster to discharge its functions.<sup>18</sup>

### II.3 State Responsibilities for Public Service Broadcasters

At the 4th European Ministerial Conference on Mass Media Policy,<sup>19</sup> Council of Europe Member States, including Ukraine, set out to guarantee the independence of public service broadcasters against political and economic interference.

In particular, Council of Europe Members agreed on a number of specific guarantees of independence, including:

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<sup>17</sup> See also Guidelines 4-8.

<sup>18</sup> Decision 826/1998 [1998] Guir. cost. 3893.

<sup>19</sup> 4th European Ministerial Conference on Mass Media Policy, Prague, 7 and 8 December 1994, *The media in a democratic society*, Resolution No. 1: The Future of Public Service Broadcasting.



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[D]ay to day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.

The independence of public service broadcasters must be guaranteed by appropriate structures such as pluralistic internal boards or other independent bodies.

The control and accountability of public service broadcasters, especially as regards the discharge of their missions and use of their resources, must be guaranteed by appropriate means.

Public service broadcasters must be directly accountable to the public. To that end, public service broadcasters should regularly publish information on their activities and develop procedures for allowing viewers and listeners to comment on the way in which they carry out their missions.<sup>20</sup>

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.”<sup>21</sup>

At the 4th European Ministerial Conference on Mass Media Policy,<sup>22</sup> Council of Europe Member States also agreed on a number of guarantees with respect to funding of public broadcasters:

Participating states undertake to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their missions. There exist a number of sources of funding for sustaining and promoting public service broadcasting, such as: licence fees, public subsidies, advertising and sponsorship revenue; sales of their audio-visual works and programme agreements. Where appropriate, funding may also be provided from charges for thematic services offered as a complement to the basic service.

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<sup>20</sup> *Ibid.*

<sup>21</sup> 5 May 1989, European Treaty Series No. 132.

<sup>22</sup> Note 19.

### **III. Analysis of the Draft Law**

#### **III.1 Overview**

The draft Law includes 3 key provisions – Articles 14, 14-1, and 14-2 – which amend and supplement Article 14 of the Law of Ukraine ‘On Television and Radio Broadcasting’. The law was adopted in 1994 and has been amended several times since then. Article 14, which is part of Chapter II relating to the structure of national television and radio broadcasting, deals with the National Television Company of Ukraine (NTCU) and the National Radio Company of Ukraine (NRCU).

The new Article 14 establishes NTCU and NRCU, specifies their tasks and legal character, and prohibits censorship and interference with the programming and editorial policies of both companies. Article 14-1 regulates the management of NTCU and NRCU, providing that they will be governed by the Boards and the Heads and determining members’ number, election and functions. Article 14-2 establishes that NTCU and NRCU have Charters and territorial registrations, and issue annual reports. Paragraph 4 concerns the funding of NTCU and NRCU.

The draft Law also determines the responsibilities of the Cabinet of Ministers, the President of Ukraine and the Boards of NTCU and NRCU in relation to changes to the Charter of the national television and radio, the formation of the Boards and the appointment of the Heads of NTCU and NRCU.

#### **III.2 National Television and Radio Companies of Ukraine**

##### Overview

Article 14(1), establishes that the National Television Company of Ukraine and the National Radio Company of Ukraine shall be created for the purpose of ensuring citizens’ rights to freedom of thought and speech, to receive complete, reliable and timely information, and to open and free discussion of public issues.

Article 14(2), determines the principle tasks of NTCU and NRCU. These include to inform about developments of public importance; to satisfy the cultural and educational needs of different sections of the population; to promote the consolidation of the Ukrainian society; to produce and distribute different types of programmes (economic, political, social, etc); to promote the evolution of the Ukrainian language and culture and the languages of ethnic minorities; to ensure high standards of tolerance, respect for human beings; to introduce high standards of journalism; to provide airtime for election campaigning; and to strengthen international ties.

Article 14(3) provides that the activities of NTCU and NRCU shall not be subject to censorship and their editorial Boards shall be independent. Their creative activities, programming or editorial policies are protected from interference from public authorities,

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corporations and individuals. Article 14(4), provides that NTCU and NRCU shall be public institutions, while their legal status shall have “special features of organization as specified herein.”

#### Analysis

As noted, the draft Law states that NTCU and NRCU are “public institutions”, whereas in the existing law they are described as ‘state companies’. Furthermore, the principal tasks of State broadcasters are set out in (old) Article 13, while the principal tasks of NTCU and NRCU are set out separately in the proposed Article 14. This suggests that the draft Law aims to transform NTCU and NRCU from State to public broadcasters

The establishment of NTCU and NRCU as public broadcasters does not, however, seem compatible with Article 18 of the existing law, which states that such organisations “shall be established by physical and/or legal persons”. Furthermore, the establishment of public broadcasters through the draft Law seems to be in conflict with the 1997 Law of Ukraine ‘On the System of Public Service Broadcasting’,<sup>23</sup> which provides that public service broadcasters are created by a *decision* of the Verkhovna Rada following a procedure determined by it.<sup>24</sup>

We welcome the definition in the draft Law of the main tasks of NTCU and NRCU. This is in line with international standards, which require that the mandate of public service broadcasters be well defined, both in terms of immediate aims and the manner in which those aims should be achieved.

We note that States are under an obligation to take positive steps to promote pluralism, and to ensure equal access of all to the media.<sup>25</sup> The draft Law could incorporate stronger provisions promoting pluralism.

#### **Recommendations:**

- The draft Law should clarify the status of NTCU and NRCU vis-à-vis other legal provisions referring to public broadcasters.
- One of the tasks of NTCU and NRCU should be to secure the dissemination of a range of different ideas and viewpoints.

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<sup>23</sup> Adopted on 18 July 1997.

<sup>24</sup> See Article 2.

<sup>25</sup> 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.” *Informationsverein Lentia and Others v. Austria*, Judgment of 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17202/90, 17 EHRR 93, para. 38. 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.” *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34. See also Principle 3 of the ARTICLE 19 Principles.

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### III.3 Governing Bodies of NTCU and NRCU

#### Overview

Article 14-1 includes a number of provisions relating to the governing of NTCU and NRCU. Paragraph 1 provides that the governing bodies of NTCU and NRCU shall also be the Boards of NTCU and NRCU, which each consist of 17 members. The members shall perform their functions for a period of three years, during which period they may not be 'recalled' (i.e. dismissed). Nine members are to be elected by the Verkhovna Rada (parliament) of Ukraine, 4 members by the President and 4 members by a congress of civic associations operating in the areas of freedom of speech, journalism or media, which have been established for at least 2 years. The State Committee for Broadcasting is responsible for ensuring that this congress is held.

Paragraph 2 provides that the Boards of NTCU and NRCU shall act solely in the interests of the people of Ukraine and shall exercise all the powers that the legislation of Ukraine vests in the owners (members) of a broadcasting organisation.

Paragraph 3 defines the powers of the Boards of NTCU and NRCU. They undertake the following tasks:

- approving programming and editorial policies and overseeing implementation;
- approving the annual report on the results of their organisation's performance and referring it to the Verkhovna Rada, the President and the National Broadcasting Council;
- making proposals for improvement of the legal regulation of public broadcasters;
- electing and dismissing, subject to this law and its Charter, the head of their broadcaster;
- supervising the administrative and financial activities of the head;
- approving the budget and controlling compliance therewith; and
- performing other functions in accordance with the legislation and its Charter.

Paragraph 4 stipulates that the heads of NTCU and NRCU shall be appointed and dismissed by votes of at least 10 members of their respective Boards. The appointment of the heads of the broadcasting organisation shall be by competitive selection and for a period of 3 years.

Paragraph 5 defines the powers and responsibilities of the heads of the public broadcasters in some detail.

#### Analysis

We welcome the inclusion of a more detailed legal framework for the governance of NTCU and NRCU. The proposed Article 14-1 includes a number of important guarantees of their independence. These guarantees are largely in line with international standards. However, in a number of respects, they could be further improved upon.

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#### *III.3.1 Appointment of Board Members and Heads*

The power of the President to election four members to the Boards of the NTCU and NRCU fails to secure their independence and is contrary to Principle 35.2 of the ARTICLE 19 Principles.<sup>26</sup> These appointees may be seen as political appointees. The rules regarding the appointment of members of governing bodies of the broadcasting sector are a key element of their independence and should be defined so as to protect them against any interference, in particular by political forces or economic interests.

We also recommend that overall public participation in the appointment process be increased. Consideration should be given to including a provision that would require a shortlist of Board members proposed by the Verkhovna Rada to be published and allowing for a period of public debate about these proposed members. This is an approach adopted in some other transitional democracies, and is a method which could significantly enhance openness and promote public confidence in the Boards of the NTCU and NRCU.

We note that the draft Law contains few provisions concerning the status of elected Board members. It is, for example, unclear whether members are fully or partially employed or conduct their functions voluntarily, and what remuneration they receive. We recommend the adoption of specific provisions in this respect to further guarantee the independence of the Boards.

Finally, we recommend that the drafters consider reducing the number of Board members, as it will be both unwieldy and expensive to run a Board with 17 members. We note that in other countries these boards tend to be smaller. Among other things, fewer members will help ensure that each member assumes responsibility for his or her decisions.

#### **Recommendations:**

- The President should not have the power to appoint members of the Boards of the public broadcasters.
- A proposed shortlist of candidates for membership of the boards should be published, and a period of public debate allowed, before they are voted on by the Verkhovna Rada.
- Specific provisions regarding the employment status and remuneration of members should be adopted.
- The number of board members should be reduced.

#### *III.3.2 Status of Board Members*

The appointment process for members of the Boards of the NTCU and NRCU set out in Article 14-1 does not require individuals to have appropriate qualifications and experience. Requirements of relevant expertise and professional experience help ensure that professionally competent individuals are appointed, as opposed to those who are politically loyal. This approach is followed in many other countries. For example, Article 59 of the

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<sup>26</sup> See also COE Recommendation, Guidelines 2 and 3 and ARTICLE 19 Principle 13.

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Bulgarian law on Radio and Television states: “Members of the managing boards of the Bulgarian National Radio and the Bulgarian National Television may be persons of Bulgarian nationality who reside on the territory of the country, have higher education and professional experience in the field of radio and television activities, culture, journalism, audio-vision, telecommunications, law, or economics.”<sup>27</sup>

The draft Law does not include any specific rules regarding incompatibilities for Board members in order to ensure that they are not under the influence of political powers and businesses or other organisations in the media or related sectors.<sup>28</sup>

Principle 13.3 of the ARTICLE 19 Principles is an exemplary rule of incompatibility:

The following exclusions or ‘rules of incompatibility’ should apply. No one should be appointed who:

- is employed in the civil service or other branches of government;
- holds an official office in, or is an employee of a political party, or
- holds an elected or appointed position in government;
- holds a position in, receives payment from or has, directly or indirectly, significant financial interests in telecommunications or broadcasting; or
- has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime, and/or a crime of dishonesty unless five years has passed since the sentence was discharged.

We recommend that the draft Law include specific provisions regarding incompatibility. Article 14-1(2) is an attempt to restrict influences in the work of the Boards members but it is too broad and cannot substitute for specific rules on incompatibilities.

#### **Recommendations:**

- The draft Law should require Board members to have certain professional qualifications and experience.
- Rules on incompatibility should be included in the draft Law.

### *III.3.3 Powers and Duties of the Board*

Articles 14-1(3) and (5) provide detailed lists of powers and responsibilities of Board members. However, neither the 1994 ‘Law On Television and Radio Broadcasting’ nor the draft Law amending it assigns the power to the Boards of the NTCU and NRCU to adopt regulations, for example on the structure and organisation of the broadcaster, on advertising or on joint productions.

The draft Law also fails to set out rules governing Board meetings including how often the Boards meet, who convenes them, whether meetings are public or closed, whether the heads of NTCU and NRCU participate in the meetings, and quorum and voting rules. The

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<sup>27</sup> Adopted in 1999 and subsequently amended a number of times.

<sup>28</sup> See in this respect Guideline 4 in COE Recommendation No. R (2000) 23, note 10.

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draft law also fails to ensure that decisions that affect individual rights should be subject to court appeals.

We also recommend that the draft Law explicitly limit the supervisory role of the Boards so as to respect the editorial independence of the broadcasters. The role of the Boards is to provide overall direction and oversight, and not to engage in day-to-day management. This is important as an additional protection against political or commercial interference in the work of the broadcaster.

#### **Recommendations:**

- The Boards should be given the power to adopt regulations relevant to their mandate.
- The draft Law should provide a framework of rules for decision-making by the Boards which ensure that there is a right of appeal for individuals whose rights are affected by decisions.
- The draft Law should limit the role of the Boards to general oversight, and preclude them from engaging in day-to-day oversight of the work of the broadcaster, so as to protect editorial independence.

#### *III.3.4 Dismissals*

The draft Law contains no rules regarding the dismissal of Board members, a matter of some concern. Recommendation No. R (96)10 gives specific guidance with respect to dismissals:

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

In particular, dismissal 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.<sup>29</sup>

#### **Recommendations:**

- The law should regulate the conditions for dismissal of Board members in a way which rules out the possibility of dismissals motivated by political or other considerations which undermine the independence and autonomy of the Boards.
- Individual members of management should have a right to written reasons for any serious disciplinary action against them, including dismissal, and to judicial review of such actions.

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<sup>29</sup> Guidelines 6 and 7.

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### III.4 Charters of NCTU and NRCU

Article 14-2(1) provides that the Cabinet of Ministers of Ukraine approves the Charters of NTCU and NRCU. The Boards of NTCU and NRCU have the right to submit proposals seeking to amend their respective Charters to the Cabinet of Ministers of Ukraine.

The Cabinet of Ministers, a highly political body, should not have the power to adopt the Charters for NTCU and NRCU since this would provide an opportunity to interfere in the operations of these broadcasters. Instead, this power should be vested in the Boards of these broadcasters.

We also note that the draft Law does not specify what the stipulated Charters address and so it is not clear whether or not these are the editorial Charters envisaged in Article 57 of the 1994 Law ‘On Television and Radio Broadcasting’.

#### **Recommendations:**

- The Boards of NTCU and NRCU, as opposed to the Cabinet of Ministers, should be vested with powers to adopt their Charters.
- The law should clarify whether or not the Charters referred to in Article 14-2(1) are the same as the editorial Charters provided for in Article 57 of the 1994 law.

### III.5 Funding Arrangements

Article 14-2(4) of the draft Law states that funding for NTCU and NRCU shall be provided for as a separate item in the State Budget of Ukraine. NTCU is to receive public funding of not less than 0.1 % of the State Budget, while NRCU is to receive not less than 0.05 %. Both companies are allowed to pursue economic activities, as long as all funds raised are used to further the organisations’ ends, as defined in law. NTCU and NRCU will be non-profit organisations.

A mixed funding model coming from both the State budget and commercial activities, as applies to both NTCU and NRCU, is the preferred option in most of Europe. We welcome the decision to guarantee stable public funding for these public broadcasters of not less than a set percentage of the budget, and as separate items in the budget. This should help prevent arbitrary interference with the budgets of NTCU and NRCU.

At the same time, the public broadcasters should be prohibited from using their public subsidies to engage in unfair competition with commercial broadcasters, particularly in relation to advertising. The law should specifically prohibit them from doing this.

#### **Recommendation:**

- NTCU and NRCU should specifically be prohibited from engaging in unfair competition, particularly in relation to advertising.



## ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

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### III.6 Transparency and Accountability

Article 14-2(3) requires NTCU and NRCU to prepare annual reports on their performance during the preceding year. Upon approval by the respective Board, these reports must be sent to the Verkhovna Rada, the President and the National Broadcasting Council. They must also be published on the websites of the respective public broadcaster. These reports must contain a range of information about the activities, budget and plans of the broadcaster.

As noted, the President should have no powers with respect to public broadcasters and so there is no need to send the President the annual report. Instead, NTCU and NRCU should be formally accountable to the public through a multi-party body, such as the Verkhovna Rada, or through the National Broadcasting Council.

Resolution No. 1 adopted at the 4th European Ministerial Conference on Mass Media Policy, calls on public service broadcasters to be directly accountable to the public. The draft Law fails to establish any direct accountability mechanisms of this sort. In different countries, these take the form of audience surveys, public forums, complaint mechanisms and so on.

#### **Recommendations:**

- Annual reports prepared by NTCU and NRCU should be presented only to the Verkhovna Rada and the National Broadcasting Council, not the President.
- Procedures should be developed for allowing viewers and listeners to comment directly on the way in which NTCU and NRCU carry out their missions.