ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

The Draft Law of Ukraine Amending the Law of Ukraine 'On Television and Radio Broadcasting'

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the draft Law of Ukraine Amending the Law of Ukraine 'On Television and Radio Broadcasting' (the draft Law) against international standards on freedom of expression.[1]

The draft Law has been proposed as part of the ongoing effort to reform Ukraine's media laws. In particular, it complements a law reforming the National Broadcasting Council (Council) adopted in October.[2] Whereas that law focused on appointment procedures and other matters concerning the Council, which is the central regulatory body in the broadcasting sector, the current draft Law deals with licensing matters, content restrictions and other requirements. We understand that the Parliamentary Committee on Freedom of Expression and Information is likely to discuss the draft Law

[1] ARTICLE 19 received a translation of the draft Law in September 2004. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation, which we believe is an unofficial version of the draft Law.

[2] "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.

following the presidential election, the second round of which is due to be held on 21 November 2004.

ARTICLE 19 welcomes the effort to reform legislation in the broadcasting sector. The draft Law generally represents a progressive attempt to enhance protection for the right to freedom of expression in broadcasting and as such is to be welcomed. However, we have some serious concerns with the draft Law which, if not addressed, would lead to the imposition of unwarranted restrictions on broadcasters. The draft Law includes language requirements that may have a detrimental effect on broadcasting in minority languages; and there are absolute restrictions on broadcasting material that encroaches on individuals' honour and dignity or that would reveal a state secret. We are also concerned about the proposed role for the Cabinet of Ministers in broadcast regulation, which may undermine the work of the Broadcasting Council, and about the proposed continuation of state broadcasting and 'municipal' broadcasting. These and a range of other 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 as developed by the European Court of Human Rights (ECtHR) and constitutional courts around the world. Two documents will, in particular, be relied on in the analysis: Council of Europe Recommendation No. (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (the COE Recommendation)[3] and ARTICLE 19's *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (*Access to the Airwaves*).[4] 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.

This Memorandum first outlines Ukraine's international and constitutional obligations, emphasising the importance of freedom of expression and its implications for broadcast regulation. It then provides an in-depth analysis of our key concerns with the draft Law, offering recommendations for reform.

II. International and Constitutional Obligations

II.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[5] guarantees the right to freedom of expression 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.

[3] Adopted by the Committee of Ministers on 20 December 2000.
[4] London, April 2002.
[5] UN General Assembly Resolution 217A (III), adopted 10 December 1948.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[6]

The *International Covenant on Civil and Political Rights* (ICCPR),[7] a legally binding treaty which Ukraine ratified in November 1973, 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 1995, Ukraine is also a party to the *European Convention on Human Rights*,[8] which guarantees freedom of expression at Article 10. Freedom of expression is also guaranteed in the other regional human rights systems, at Article 13 of the *American Convention on Human Rights*[9] and Article 9 of the *African Charter on Human and Peoples' Rights*.[10]

Article 34 of the Constitution of Ukraine safeguards the right to freedom of expression in the following terms:

- Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.
- Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.
- The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

International bodies and courts have emphasised that freedom of expression and information is a pivotal human right. In its very first session in 1946, the United Nations General Assembly adopted Resolution 59(I)[11] which states:

> Freedom of information is a fundamental human right […] the touchstone of all the freedoms to which the United Nations is consecrated.[12]

The European Court of Human Rights has held:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to

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[6] See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.

[7] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

[8] Adopted 4 November 1950, in force 3 September 1953.

[9] Adopted 22 November 1969, in force 18 July 1978.

[10] Adopted 26 June 1981, in force 21 October 1986.

[11] 14 December, 1948.

[12] The phrase 'freedom of information' is used in this Resolution in its broad sense, incorporating the right to freedom of expression.

> [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[13]

Similar statements are abundant in the case-law of the European Court, constitutional courts and human rights bodies worldwide.

As these statements note, freedom of expression is fundamentally important both in its own right and also as the cornerstone upon which all other human rights rest. Only in societies where the free flow of information and ideas is permitted and guaranteed is democracy able to flourish. In addition, freedom of expression is crucial for the unveiling and exposure of violations of human rights and the challenging of such violations.

II.2 Restrictions on Freedom of Expression

The right to freedom of expression is not an absolute right; it may, in certain narrow circumstances, be restricted. However, because of its fundamental status, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim. Article 10(2) ECHR lays down the general formula. It states:

> The exercise of [freedom of expression], 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.

This has been interpreted as establishing a three-part test, requiring that any restrictions (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.[14] The European Court of Human Rights has stated that the first requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[15] Second, the interference must pursue one of the aims listed in Article 10(2); the list of aims is an exhaustive one and thus an interference which does not pursue one of those aims violates Article 10. Third, the interference must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the interference.[16] The reasons given by the State to justify the interference must be

[13] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[14] See, for example, *Sunday Times v. the United Kingdom*, 26 April 1979, Application No. 6538/74 (European Court of Human Rights).
[15] *Ibid.*, at para. 49.
[16] See, for example, *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40.

"relevant and sufficient" and the State must further show that the interference is proportionate to the aim pursued.[17]

II.3 Media Freedom

The guarantee of freedom of expression applies with particular force to the media, including both private and public broadcasters. 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."[18]

Because of their fundamental role in informing the public, the media as a whole warrant special safeguard. As the European Court has stated:

> [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 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'.[19]

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.[20]

This does not imply that the broadcast media should be entirely free and unregulated; Article 10 of the ECHR states that the right to freedom of expression "shall not prevent States from requiring the licensing of broadcasting … enterprises". However, there are a number of constraints to such regulation. First, and generally, any licensing system established by States must pass the 'prescribed by law' and 'necessary in a democratic society' parts of the three-part test for restrictions stipulated in Article 10(2) of the ECHR.[21] Second, an important goal of regulation must be to promote pluralism and diversity in the airwaves.[22] The airwaves are a public resource and must be used for public benefit, of which an important part is the public's right to receive information and ideas from a variety of sources. Third, any bodies with regulatory powers in this area must be independent of government.[23]

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[17] *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.
[18] *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. 34.
[19] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[20] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights), para. 45.
[21] See, for example, *Informationsverein Lentia and Others v. Austria*, 28 October 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 32.
[22] *Ibid.*, para. 38.
[23] Council of Europe Recommendation (2000)23, note 3.

II.3.1 Promoting Pluralism

The need for pluralism in the media goes to the heart of the public's right to receive information. 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."[24] The Inter-American Court has similarly stated 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."[25]

The obligation to promote media pluralism incorporates both freedom from unnecessary interference by the State, as well as the need for the State to take positive action to promote pluralism.[26] States may not impose restrictions which have the effect of unduly limiting or restricting the development of the broadcasting sector and, at the same time, States should put in place systems to ensure the healthy development of the broadcasting sector, and that this development progresses in a manner that promotes diversity and pluralism. This has been affirmed at the constitutional level in a number of countries. Both the German and French constitutional courts, for instance, have held that the State is under an obligation, when designing a regulatory framework for broadcasting, to promote pluralism. The French Conseil Constitutionnel, when assessing the legitimacy of a 1986 law on communications, found that the principle of pluralism of information was of constitutional significance.[27] Similarly, the German Constitutional Court has held that broadcasting must be structured in such a way as to ensure the transmission of a wide range of views and opinions.[28]

II.3.2 Public Service Broadcasting

An important contribution to pluralism in the broadcast media can be made by 'public service' broadcasters, whose status and founding charters bind them to provide programming that caters to the needs of different groups in society. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism. For example, an EU Resolution adopted in 1999 recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public and notes that they are of direct relevance to democracy, and social and cultural needs, and media pluralism. As a result, funding by States to such broadcasters is exempted from the general prohibition in EU law on state-funding for broadcasters.[29] 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.[30]

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[24] *Informationsverein Lentia and Others v. Austria*, note 21, para. 38.
[25] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* note 18, para. 34.
[26] See Principle 3 of *Access to the Airwaves*.
[27] Decision 86-217 of 18 September 1986, Debbasch, 245.
[28] See the *First Television* case, 12 BverfGE 205 (1961).
[29] Official Journal C 030, 5 February 1999, clause 1.
[30] 9 October 1992, endorsed by the General Conference at its 28th session in 1995, Clause 5.

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994, promotes very similar principles. This resolution notes the importance of public service broadcasting to human rights and democracy generally, and the role of public service broadcasting in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the resolution recommends that member States guarantee at least one comprehensive public service broadcaster which is accessible to all.

III. Analysis of the draft Law

III.1 Overview

The draft Law proposes a set of principles that should underpin broadcasting policy, identifies the main regulatory bodies in the broadcasting sector, outlines the different proposed types of broadcasting, provides a set of general broadcasting restrictions and requirements and prescribes the licensing procedure for broadcasters. This part of the Memorandum provides a detailed analysis of the draft Law against the general standards outlined in the previous section. Recommendations and suggestions for further improvement are provided throughout.

III.2 Principles of Broadcasting Policy

Article 4 of the draft Law sets out the main premises of public policy in the area of broadcasting, which include:

- a "policy of protectionism in respect of domestic broadcasting television and radio organisations";
- self-regulation by the broadcasters;
- prevention of monopolisation of the broadcasting sector;
- protection of broadcasters from economic and financial pressure from political groups;
- free and public discussion of socially important issues;
- the promotion of ideological and political plurality in the audio-visual media; and
- 'prevention' of "systematic, intentional, unreasonable concentration of attention or positive portrayal … of war, violence and cruelty, inciting of racial, ethnic or religious hostility.

Article 5 guarantees the editorial independence of broadcasters and prohibits all forms of censorship. It specifies further that "no interference of public authorities, local self-government bodies, organisations, civil or religious associations, of their officials or employees, as well as the owners, with professional independence of television and sound broadcasting organisations which is not stipulated by law shall be inadmissible."[31]

[31] We presume that the 'no' at the start of this sentence should be omitted.

The draft Law envisages that there will be four different levels of broadcasting activity: public service broadcasting, private broadcasting, State-funded broadcasting and municipal broadcasting (Article 11). Under Article 13, State broadcasters may be established by public authorities, shall be government enterprises and shall pursue the following goals:

- to provide information on "political and other developments in Ukraine and abroad and on emergencies which may threaten life or health of the public";
- to distribute official communications;
- to "explain decisions of public authorities and bodies of local self-government";
- to "compose and distribute economic, public affairs, cultural and educational, health education, art, instructional, entertainment and sports program services, and also programs for children and youth"; and
- to "promote international relations of Ukraine and its prestige in the world".

Article 15 of the draft Law provides that public service broadcasting will be regulated in a separate Act. Under Article 17, private broadcasting corporations may be established by any physical or legal person in accordance with the Law on Enterprises, while Article 16 provides that 'municipal broadcasting organisations' may be set up by "the territorial community, ie. the inhabitants of a village or that of a rural community made voluntarily of several villages, or of a town or city". Furthermore, "[a] decision to establish and finance a municipal broadcasting organisation shall be taken by the competent body of local self-government" (Article 16).

Analysis

We welcome the statement, in Article 4, that the promotion of public debate and the exercise of the right to freedom of expression will be at the basis of broadcasting policy in the Ukraine. Similarly, we welcome the prohibition in Article 5 on interference with the editorial independence of broadcasters. Statements of intent such as these are important as they will guide the interpretation and implementation of the law. To that end, we recommend that these provisions be strengthened further by requiring the draft Law to be interpreted consistently with relevant international treaties, including the European Convention on Human Rights. We also recommend that the obligation on regulatory bodies to promote pluralism, in Article 4, should extend not only to "ideological and political plurality", but to pluralism in its widest sense. This implies that all sectors of society should find themselves represented in the audio-visual media, including, for example, people from cultural or linguistic minorities and different age groups.

We are concerned, however, at the proposed structure of the broadcasting spectrum which we do not believe will advance the principles of pluralism and freedom of expression outlined in Article 4. We are particularly concerned about the continued existence of State broadcasting organisations alongside public service broadcasters, and the proposed structure of 'municipal broadcasting organisations' which we believe should be replaced with community broadcasters.

As outlined in Section II.3, States have a positive obligation to ensure pluralism in the media. The transformation of State broadcasters into public service broadcasters is key among the measures that a State can take in this respect. While the draft Law does envisage public service broadcasting as one of the four different forms of broadcasting, it also envisages the continued existence of State broadcasters. There are two key problems with this. First, where there is a public service broadcaster, there is no need for a State broadcaster. Second, it is not legitimate to allocate public funds to State broadcasters.

Under Article 13 of the draft Law, State broadcasters are to provide information on political and other developments in Ukraine, provide news and current affairs programmes, and provide cultural and educational programmes. This confuses State broadcasters with the role played by public service broadcasters. As is made clear in the Explanatory Memorandum to the Council of Europe's Recommendation R(96)10,[32] as well as in Resolution No. 1 of the Fourth Council of Europe Ministerial Conference on Mass Media Policy, it is the role of public service broadcasters to provide this kind of programming. State broadcasters' lack of independence means that they cannot provide quality, independent programme services in these areas. Furthermore, there is simply no need to duplicate the services already provided by public service broadcasters. We note, in this regard, that European democracies generally have not felt the need to provide for both public service and State broadcasters.

Second, and even more importantly, State-controlled broadcasting is an illegitimate use of public funds which has the dangerous potential to undermine the future of public service broadcasting. The risk of political interference with State broadcasters means that there is no warrant for using public funds in this way, particularly given the ability of public service broadcasters to fulfil any role allocated to State broadcasters. As *Access to the Airwaves* stipulates:

> Where State or government broadcasters exist, they should be transformed into public service broadcasters, in accordance with this Section.[33]

Given the illegitimacy of State broadcasters, and in particular that any role they might play is subsumed by public service broadcasters, we recommend that State broadcasting be removed from the draft Law as a form of broadcasting.

We are also concerned about the envisaged fourth form of broadcasting, "municipal broadcasting organisations". The draft Law envisages these to be run by and for a small community, and established by local self-government. It is not quite clear what this phrase refers to but, if it refers to local government, our view is that this again confuses State broadcasting, this time with "community broadcasting". The latter is a form of broadcasting that allows a small group of individuals to set up broadcasters, typically radio stations, on a not-for-profit basis specifically to serve the interests of their

[32] On the Guarantee of the Independence of Public Service Broadcasting, adopted by the Committee of Ministers on 11 September 1996.
[33] Note 4, Principle 34.

community. Central to this form of broadcasting is that the broadcaster is run for and by the community it serves and that it operates on a not-for-profit basis. Broadcasting policies and (draft) laws in countries such as Serbia and Montenegro,[34] Georgia[35] and Ireland[36] aim to promote this kind of broadcasting as it makes an important contribution to pluralism on the airwaves, providing a form of access to people who would otherwise likely not find themselves represented by other broadcasters. If this is what is intended by Article 16 of the draft Law, it is crucial that such a broadcaster should be free from political interference; it should not be controlled by the local body of self-government. Typically, in recognition of the value of this form of broadcasting in small communities, and given its not-for-profit status, community broadcasters enjoy a reduced licence fee or are exempt from paying a licence fee.[37]

Recommendations:

- State broadcasting organisations as defined in the draft Law should either be abolished or be transformed into public service broadcasting organisations.
- The draft Law should specifically provide for community broadcasting organisations which are not under the control of local governments.
- Consideration should be given to providing for lower licence fees for community broadcasters or to exempting them from the fee altogether.

III.3 Regulation

Article 7 of the draft Law deals with public administration and regulation in the domain of television and sound broadcasting. It emphasizes the role of the National Broadcasting Council as "a special constitutional independent public authority". Regulations pertaining to the composition, power, status, operation and so on of the Council are set out in a separate law.[38]

At the same time, the draft Law envisages additional regulatory involvement by a number of State bodies. Thus, Article 4 sets out a number of general policy principles to be implemented by "the government" and Article 7 states that public policy shall be determined by Parliament. Under Article 7, the Cabinet of Ministers "shall make provision for the implementation of the public policy … and coordinate the activities of ministries and other central executive authorities in this sector." To this end, a special "central executive agency" will be set up within the Cabinet of Ministers. Throughout

[34] See http://www.coe.int/T/E/Human_Rights/media/3_Assistance_Programmes/3_Legislative_expertises/Serbia_and_Montenegro/ATCM(2004)019%20E%20Montenegro%20Braod%20Dev%20Strategy.asp.

[35] See http://www.coe.int/T/E/Human_Rights/media/3_Assistance_Programmes/3_Legislative_expertises/Georgia/ATCM(2003)004rev%20E%20Comments%20Georgian%20Law%20Communications%20&%20Broadcasting.asp.

[36] See http://www.dcmnr.gov.ie/files/BroadcastingFinal.doc.

[37] See Council of Europe Recommendation 99(1), under VI.

[38] See the Law of Ukraine 'On the National Television and Broadcasting Council of Ukraine' as amended. Available at: http://www.nradatvr.kiev.ua/national.htm. ARTICLE 19 produced an analysis of this law, along with proposed amendments, in January 2004. Available at: http://www.article19.org/docimages/1708.doc.

the draft Law, a number of other bodies with some regulatory control over the sector are mentioned:

- the State Committee for Statistics, which supervises company registration;[39]
- the Ministry of Finance, which is involved in setting the licence fee;[40]
- the Central Electoral Commission, which regulates election broadcasting;[41]
- the Ministry for Foreign Affairs, which accredits foreign correspondents;[42] and
- the Anti-Monopoly Committee of the Ukraine, which implements anti-monopoly rules.[43]

Article 4 of the draft Law provides a commitment to reducing bureaucracy by not establishing any more bodies with regulatory powers over broadcasters other than those that already exist. Article 65 provides for coordination between the different bodies involved in the sector by requiring that the Cabinet of Ministers, Anti-Monopoly Committee and the Central Electoral Commission shall refer any violations of the Law within their area of expertise to the National Broadcasting Council.

Analysis

We welcome the emphasis in Article 7 on the Council's role as a special constitutional independent public authority.[44] We are concerned, however, that the draft Law appears to envisage that a central executive agency created within the Cabinet of Ministers will have a significant role to play in both setting and implementing broadcasting policy, apparently alongside the Council. We believe this will undermine the independence of the regulatory system.

Council of Europe Recommendation 2000(23) emphasises that "it is important that member States should guarantee the regulatory authorities for the broadcasting sector genuine independence…" and provides a number of recommendations to achieve such independence. Likewise, the UN Special Rapporteur on Freedom of Expression and Opinion, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression have made clear, in a Joint Declaration issued in 2003, that "[a]ll public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature…"[45]

It is clear that an agency created within the Cabinet of Ministers cannot be politically independent and therefore should not be involved in the implementation of broadcast regulation. It is, of course, the role of government to set policy in this area but a strict

[39] Article 21.
[40] Article 31.
[41] Article 46.
[42] Article 64.
[43] Article 65.
[44] We commented on the rules relating to the composition of this body and the appointment of its members in a Memorandum of January 2004. See note 38.
[45] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003.

demarcation should be maintained in this area between setting general policy and implementing that policy in practice. A legitimate role that the Cabinet of Ministers could play would be the periodic review of the national broadcasting policy, as set by Parliament. It would also be preferable if the Council, not the Ministry of Finance, set the licence fee. If the latter were to undertake this role, it should be limited to establishing a schedule of fees for the different types of broadcasters.

Recommendations:

- As far as possible, regulatory functions should be concentrated with the Council. Ideally, this should include setting licence fees.
- The Cabinet of Ministers and the Ministry of Finance should not be involved in direct regulatory matters or in the implementation of policy.

III.4 Anti-monopoly and Local Content Measures

Article 8 of the draft Law lays down a number of restrictions to prevent monopolies forming in the sector. Paragraph 1 states that no individual may control "through its influence on the formation of the governing and/or supervisory organs, any broadcasting organisations which carry out more than 35% of the total amount in their corresponding geographical element (local, regional, national) of the broadcasting market." Paragraph 2 states that a broadcaster may only hold one local, regional or national licence, unless different licences are necessary for different kinds of delivery. Paragraph 3 prohibits broadcasters from offering advertising time at less than the real cost of producing them. Article 9 of the draft Law aims to promote local content by requiring broadcasters to ensure that at least 50% of their output is produced in the Ukraine.

Analysis

The restriction on broadcasters to control more than 35% of any segment of the broadcasting market appears reasonable but there are certain problems with it. The rule relates to any geographic area. This could have unfortunate results, for example where the availability of broadcasters is low in a (small) part of the country leading to the result that a certain individual has more than 35% share there, but elsewhere far less. It is more common to use as a base for such rules national markets. On the other hand, consideration should be given to providing for segmentation of this measurement into radio and television broadcasting, given the great differences between these two genres. Consideration could also be given introducing rules regarding cross-media ownership, so that domination of the print media market is also factored into broadcast ownership rules.

The second anti-monopoly restriction is also problematic in that it limits ownership of local, regional and national licences to one each. This would mean that a broadcaster that has a licence to broadcast in one small locality could not apply for a licence to broadcast in another such locality. This would inhibit investment and be detrimental to the development of the broadcasting sector as a whole. Furthermore, it is hard to see what threat it addresses. There is no comparison between the power and potential threat posed by a national broadcaster and local broadcasters. Other options that might be

considered here include differentiating between radio and television licences, as well as local and national licences. In terms of enhancing pluralism, which is the aim of the anti-monopoly measures, consideration might be given to requiring the Council to take ownership and the need for a plurality of voices on the airwaves into account as a consideration in the licensing process.[46]

The local content rule envisaged in Article 9 is also problematic. Local content rules which are designed to protect and promote the local broadcasting sector and local programming are seen as essential in many countries to protect the identity, unity and sovereignty of the nation, as well as to protect local voices and to promote pluralism. So long as such rules actually promote pluralism and diversity, they are consistent with the right to freedom of expression. However, local content rules which do not in practice promote diversity, for example because they are excessively stringent and actually prevent new broadcasters from emerging, become illegitimate restrictions on freedom of expression. Rules which impose unreasonably high quotas, which do not make distinctions between different types of programming or which do not phase in quotas progressively may actually harm local production. This is because, in countries with limited markets for local productions, it will be hard for existing broadcasters to meet strict requirements or for new broadcasters to enter the field. The resulting impact on the sector will actually mean less money for local productions.

We are concerned that the 50% quota in Article 9 is unreasonably high and will actually serve to harm, rather than promote, local production. This quote for local content is far stricter than the European norm, based on Article 10(1) of the European Convention on Transfrontier Television,[47] which only requires 50% *European* content, as opposed to *national* content.

Furthermore, the quota is rigid and applies equally to all forms of programming. In our view, this is not practical and a more layered and progressive approach should be taken. Variable quotas should be used for different forms of broadcasting (such as TV and radio) and for different types of programming (such as drama, children's programming, news, talk shows and the like). In accordance with the Transfrontier Television Convention, the transmission time devoted to news, sports events, games, advertising, tele-shopping and teletext services should not qualify as part of the quota. The primary purpose of a provision such as Article 9 should be to promote the development and dissemination of creative works, such as fiction, series, serials, films, documentaries, and arts and educational programmes.[48] Finally, the law should provide for periodic review and amendment of quotas, to take account of prevailing conditions in Ukraine over time.

Recommendations:

[46] For an example of such a provision, see Article 375 of the UK's Communication Act 2003: http://www.legislation.hmso.gov.uk/acts/acts2003/30021--n.htm.

[47] European Convention on Transfrontier Television, CETS No. 132, entry into force 1 May 1993. Ukraine signed the Convention on 14 June 1996 but has not so far ratified it.

[48] See, on this, the Explanatory Memorandum to the Convention on Transfrontier Television, note 47.

- The restrictions in Article 8 should be clarified and consideration be given to building the aim of ensuring pluralism into the licensing process generally.
- Consideration should be given to providing for overall limits on national broadcasting market share, rather than the share in any locality.
- Broadcasters should not be limited to holding only one local or regional licence.
- Consideration should be given to distinguishing between radio and television broadcasting in the application of the rules contained in paragraphs 1 and 2 of Article 8.
- The 50% quota for local content is too high and should be replaced with a more realistic quota, phased in over time to allow broadcasters to adapt to this rule.
- Variable quotas should be set in relation to local content for different types of broadcasters and programming.
- There should be provision for periodic review and amendment of local content rules.

III.5 Licensing Procedure

Licensing procedures are set out in Articles 23-37 of the draft Law. Article 23 identifies the National Broadcasting Council as the sole body responsible for issuing licenses for broadcasting and distinguishes between three different types of broadcasting distribution: terrestrial, satellite and the provision of programme services to users of multi-channel networks. The draft Law further distinguishes between national, regional and local licences. Terrestrial and certain air-to-cable licences will be auctioned from time to time; satellite and air-to-cable licences will be issued on application.

The licensing procedure is straightforward. For each (category of) licence(s) that becomes available, the Council calls a tender announcing technical details as well as programming and other requirements.[49]

Applications must be submitted within the deadline and should contain information regarding, amongst other things, the applicant organisation; its founders and, if applicable, shareholders; staff; the intended programme distribution area; the envisaged periodicity of broadcasting; the broadcasting language and the target audience.[50] Applicants are required to submit a programming policy statement, which sets out the envisaged share of local content and share of local production, a tentative programming list and the envisaged genre of broadcasts.[51] Applicants are also required to produce a security deposit, the amount of which is to be set by the Council but may not exceed ten percent of the licence tax. The deposit is non-refundable although successful applicants get the deposit back in the form of a reduction on the licence tax.[52]

Article 25 requires the Council, in the consideration of applications, to prioritise applications that possess the following qualities:

[49] Article 25.
[50] Article 24.
[51] Article 28.
[52] Article 26.

- the applicant already broadcasts, pursuant to an earlier licence, over a smaller number of frequencies in the service area;
- the applicant has a physical address within the service area;
- the applicant prioritises socially important programming, such as children's programming, news and current affairs, and promotes freedom of expression and pluralism in broadcasting;
- the applicant "tends to satisfy" the information needs of ethnic minorities;
- the applicant assists in the development of frequency or expansion of broadcasting in the region; and
- the applicant "is better equipped, financially, economically and professionally, to carry out television and sound broadcasting".

Furthermore, Article 28 requires that the core of all programming in Ukraine must be made up of analytical newscasts and current affairs; culture and fiction; and popular science and education.

The Council makes a determination within one month after the deadline for applications has passed and notifies applicants of its decision in writing within five working days. The licence is formally issued within ten days of the broadcaster paying the licence tax; the precise terms of the licence are determined by the Council together with the broadcaster, on the basis of the terms of the tender and commitments made by the broadcaster. Terrestrial licences will be valid for seven years; satellite, cable and other licences are valid for ten years.

Article 31 stipulates that the licence tax rate will be "developed and approved" by the Council together with the Ministry of Finance and the relevant parliamentary committee. No guidance is given regarding the calculation of the fee; licence renewals or the issue of a duplicate licence are provided at a fix rate of five times the tax-exempt minimum income of the citizen. All licence fees are remitted to the State budget; no more than 20% of the proceeds collected may be remitted back into the Council to finance its operations.

Article 33 entitles every broadcaster to a licence extension, except where an application is filed late, the broadcaster has violated the terms and conditions of the previous licence or the broadcaster has failed to implement the broadcasting development plan as defined by the licence terms. A refusal to renew will be communicated to the broadcaster in writing, "with an indication of the grounds for refusal", within five working days of the "protocolary execution of the relevant decision".

Under Article 35, a broadcaster must apply for licence renewal "in case of change of any data, parameters or other information specified in the licence". The third paragraph of Article 35 specifies that licence renewal will be necessary, in particular, in case of a change in the organisational status of the broadcaster or if the broadcaster intends to change "organisational, technical or content-related characteristics of broadcasting".

Pursuant to Article 37, a licence may be revoked by the Council on the broadcaster's request, or if the broadcaster's registration as a commercial entity is cancelled, if the broadcaster declares that he is unable to comply with licence requirements or if the licence holder dies (this is applicable only when the licence holder was a natural person). A separate procedure exists whereby the Council may apply to a court for licence termination on the grounds that the licence has been 'sold on' to a third party who is not a licence holder, that the broadcaster has filed late his application for licence renewal, that an order by the Council to eliminate violations of the law have not been complied with, or if the licence holder refuses permission to officers of the Council to audit its activities. A decision of licence termination may be appealed by the broadcaster to the courts.

In addition to obtaining a licence, prospective broadcasters are required to be registered as a 'subject of information activity'. Applications need to be lodged with the Council; the procedure is set out in Article 21.

Analysis

While the licensing procedure is generally straightforward, we are concerned that it imposes unnecessary requirements on prospective broadcasters. This is particularly the case for the separate procedures for obtaining a broadcasting licence and for public registration as a 'subject of information activity'. This poses an unnecessary double hurdle for applicants to overcome; it would be better if there were a single procedure whereby all holders of a broadcasting licence are automatically entered onto the appropriate public register.

It is not entirely clear what is meant by the Article 28 requirement that the 'core of the programming policy' for all broadcasters should be made up of news and current affairs, culture and fiction, and popular science and education. If this means that all broadcasters must at least carry a substantial focus of programming in these areas, we do not believe that it is realistic. This would make it impossible for broadcasters to specialise in one area – for example, music radio – and also fails to take into account the importance of entertainment programming to the financial viability of the sector.

We also do not believe that it is appropriate to list, as statutory criteria for deciding between competing license applications, the extent to which a prospective broadcaster intends to serve the needs of minorities or provides socially important programming. While we recognise the positive motivation for these rules, as well as the need for the licensing procedure to ensure that the needs of different parts of the population are adequately met and that high quality or socially important programming is available, this cannot be achieved by requiring *all* broadcasters to provide these sorts of programming. Instead, diversity should be achieved by careful management of the available frequencies with an overall focus on diversity. In this way, broadcasters which serve minorities can be prioritised, without making all broadcasters do this.

Third, the prioritisation under Article 25 for broadcasters who "broadcasts, pursuant to an earlier license, over a smaller number of channels etc." (under the second paragraph

that is numbered "a)") appears to be inconsistent with the anti-monopoly restrictions in Article 8, limiting broadcasters to one frequency per region. This may be a translation issue; if not, it ought to be addressed.

Fourth, the remittal of tender security to the State budget in accordance with Article 26 raises an issue of concern. In our opinion, it is unreasonable to remit deposits of unsuccessful applicants to the State budget and thus the tenders should be refunded to these applicants. In the United States, for example, such deposits are refundable upon loss of the tender.[53]

Fifth, the draft Law does not provide any guidance on how the licence tax will be calculated, while providing the Ministry of Finance is involved in the process of calculating the licence tax rate. Ideally, the Council should be given the power to set these rates, after consultation with broadcasters. The draft Law might also specify that the licence tax rate should be set at a level that is objectively justifiable and proportionate.[54] In accordance with our recommendation regarding community broadcasting, we recommend that consideration be given to exempting this form of broadcasting from the licence tax altogether.

We furthermore note that a considerable fee is also applicable when issuing duplicate licenses. It is not quite clear what is meant by this but we note that it is charged at the same rate as a licence renewal. This appears to be quite unreasonable, assuming that a duplicate is simply a copy of the original licence. The fee for such a service, which is essentially an administrative formality, should be nominal.

Sixth, licence tax proceeds are to go to the State budget with a maximum of only 20% being remitted to the Council. In our view, the proceeds of licence tax go first to funding the Council, with any surpluses being returned to the State budget. This will provide it with a constant and foreseeable stream of income and will enhance its independence from the State.

Recommendations:

- Broadcasters should not be required to apply for registration in addition to a licence.
- The requirement that all broadcasters provide news, current affairs and other forms of 'core programming' should be removed.
- The criteria by which licence applications should be general in nature and not include specific criteria which may be met by highly specialised broadcasters. Generally, the licensing procedure should be geared towards promoting plurality without imposing unnecessarily strict rules on all broadcasters.
- Tender fees should be refunded to unsuccessful applicants in accordance with international practice.
- The licence tax rate should be set at a level that is objectively justifiable and

[53] Federal Communications Commission. Available at: http://wireless.fcc.gov/auctions/about/initiatingauctions.html.

[54] See, for example, the requirements in force in the UK under Section 347 of the Communications Act 2003: http://www.legislation.hmso.gov.uk/acts/acts2003/30021--i.htm.

proportionate, and ideally the Ministry of Finance should not be involved in setting the rate of licence tax.
- The proceeds of the licence tax should be used to fund the National Broadcasting Council.
- The fee for issuing a duplicate licence should be nominal in character.

III.6 Restrictions and Requirements on Broadcasters

III.6.1 General Restrictions and Requirements

The draft Law contains a number of general restrictions and requirements that apply to all broadcasters.

Article 6 provides for a number of restrictions regarding what is termed "misuse of freedom to act by broadcasting organisations". These include prohibitions on the following:

- the publication of State secrets or any other information protected by law;
- calling for the violent upheaval of the constitutional government;
- agitation for war;
- the portrayal of violence "without reason";
- the promotion of racial superiority;
- the broadcasting of programmes that may impair the mental development of children
- the broadcasting of pornographic material; and
- the broadcasting of any material that "encroaches upon honour and dignity of a person".

Additionally, Article 6 requires broadcasters to "present in their news programmes information on the official position, stated officially in any way, of all political forces represented in the government."

Further restrictions and requirements are stated in Sections V and VI of the draft Law. Article 54 lists the duties of all broadcasting organisations as including the following:

- to adhere to the legislation of Ukraine and the terms of the license;
- to disseminate unbiased information;
- to respect the national dignity, national identity and culture of all nations;
- to keep confidential, on the basis of documentary proof, any information about a person who has provided information or other materials on condition that his name would not be disclosed;
- not to disseminate any materials which may violate the presumption of innocence of a person under trial or prejudice a court verdict;
- not to disclose any information about a person's private life without their consent if such information is not of public necessity; and
- to retract any information disseminated where this has been found inadequate or defamatory.

Article 55 extends some of these duties to the production personnel of broadcasters, thus providing for a form of personal liability in addition to broadcasters' organisational liability provided for in Article 54.

Article 57 elaborates on broadcasting restrictions that have the aim of protecting minors and young people, restricting the following broadcasts:

- any programmes that "quite obviously compromise moral foundations of minors and young people";
- programmes portraying death and serious injury in a degrading way; and
- programmes that glorify criminal behaviour.

The third paragraph of Article 57 provides that programmes containing the above content may be broadcast only between the hours of 11pm and 6am, or on pay-TV, and must be preceded by a caution. Additionally, there is a requirement that "[t]he texts of such programs must not include non-standard expressions or swearwords or draw excessive attention to sexual issues."

Finally, Article 61 establishes liability for any "moral damages [suffered] … through the distribution … of any information that does not represent the facts, or is degrading to honour and dignity of the citizen, or causing any other injury …"

Analysis

A number of the provisions noted above are matters which are, or should be, contained in laws of general application. For content rules which have no specific application to broadcasters, there is no need to repeat the rule in the broadcasting law. This may be contrasted with matters where special rules may be developed for broadcasters, such as portrayal of violence or protection of children. Examples of such rules include Article 61, dealing with protection of honour and dignity, which is presumably already adequately provided for in the civil defamation law, and the rule against divulging State secrets.

A second problem with repeating these rules in broadcast-specific legislation is that the latter will normally fail to do justice to what are very complex balancing acts. The absolute prohibitions on the publication of State secrets and the publication of anything that encroaches upon honour and dignity, in Article 6, are problematic as they fail to recognise that there may be circumstances where it is legitimate for a broadcaster to publish material falling in these categories. For example, a journalist may receive documents that are classified as secret but that show widespread corruption in, for example, the military. In such a case, the journalist concerned would be under a virtual duty to publish.[55] Similarly, a cartoonist could choose to comment critically on a government minister's private business practices that are alleged to conflict with his public duties in a way that is seen as an insult to that minister's dignity. Insofar as the cartoon would feed into an on-going public debate, the cartoonist would have a right to publish it, even if it is seen as encroaching upon dignity.[56]

[55] See the remarks of the European Court of Human Rights in *The Observer and Guardian v. the United Kingdom*, 24 October 1991, Application No. 13585/88, para. 59(b).
[56] See, for example, *Ozgur Gundem v. Turkey*, 16 March 2000, Application No. 23144/93.