

ARTICLE 19

Transparency of Media Ownership by Off-Shore Companies in Ukraine: Problems and Solutions

September 2011

Policy Brief

Executive summary

This policy brief, *Transparency of Media Ownership by Off-Shore Companies in Ukraine: Problems and Solutions*, highlights the impediments for transparency of media ownership in Ukraine. Similar to other countries in Eastern Europe, viewers and listeners in Ukraine do not know who owns the media. Beneficial owners are the physical persons owning or controlling the media companies.

ARTICLE 19's Policy Brief identifies two main reasons for the lack of transparency: the companies which own media outlets are under no obligation to disclose the identity of their physical owners. Moreover, some media, especially broadcast media, are owned by companies registered in off-shore zones, mainly in Cyprus.

The legislation in off-shore zones not only provides companies with tax benefits for but also protects the confidentiality of their physical owners. As a result, Ukrainians do not know who actually owns media companies, which in turn does not allow for them to formulate an opinion about the information disseminated by the latter. Moreover, the lack of transparency raises question about the affiliation of media owners with political and business groups, which makes it impossible to take steps to address excessive media concentration.

In order to address these issues, ARTICLE 19 examines in this policy brief the existing international standards on transparency of media ownership and the legal models for regulating media ownership by offshore companies. After making an assessment of these models, the policy brief proposes recommendations for legislative responses to the problems identified in Ukraine and elsewhere.

On the basis of this analysis, ARTICLE 19 proposes the following principles for effectively regulating media ownership by off-shore companies in Ukraine and other countries:

- Principle 1: Transparency of media ownership means disclosure of beneficial owners, including beneficial owners of offshore companies.
- Principle 2: All media and news agencies are responsible for disclosing annually their beneficial owners before a relevant national body and to make this information publicly available by publishing it on their websites, for example.
- Principle 3: All media and news agencies are responsible for disclosing information concerning the ownership of their beneficial owners and of their next of kin of other media.
- Principle 4: All media and news agencies are responsible for disclosing information concerning the persons or bodies likely to exercise a significant influence on the programming policy of this service.
- Principle 5: All offshore companies willing to establish or acquire media and news agencies are responsible for presenting to a relevant national body a certificate of their beneficial owners issued by the company registration authority in the off-shore zone.

Principle 6: Everyone has a right to access the certificate about the beneficial owners of off-shore companies owning media and news agencies.

Principle 7: Although limitations on off-shore companies from owning media and news agencies are permitted they should be established by law, pursue a legitimate interest and be necessary in a democratic society.

Principle 8: A relevant national body is entitled to oversee the disclosure of beneficial owners and impose sanctions for the enforcement of this obligation.

Principle 9: Total bans on off-shore companies from owning media companies are not permitted.

This Policy Brief has been commissioned by International Media Support (IMS) and is part of a joint IMS and ARTICLE 19 project supporting media development in Ukraine.



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Introduction

Media pluralism is one of the basic conditions of the right to freedom of expression and freedom of information, enshrined in Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention of Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union. The concept of media pluralism embraces the variety in the sources of information and the diversity of media ownership. Under Article 10 of the European Convention on Human Rights, democratic states are obliged to protect and, where necessary, take positive measures to ensure diversity of opinion in the media.

The fall of totalitarian regimes and the privatisation of media in Central and Eastern Europe in 1990s brought an end to state control of information. Media pluralism became a reality with the establishment of new private media. However, twenty years later, the state of media pluralism in this part of Europe remains influenced by the political and economic conditions of the period of transformation to democratisation and market economy.

The liberalisation of media markets, a parallel process at the time, brought in foreign media owners. In the case of the Czech Republic, for example, a combination of German and Swiss companies obtained the ownership of 80% of Czech newspapers and magazines.¹ Foreign capital, mostly German, Austrian, Swiss, French, and Scandinavian, dominate print media in Hungary, Bulgaria, Poland, and the Baltic states.² Such foreign investments were initially welcome because they introduced advanced technology and added variety in media choice in Central and Eastern Europe. However, the lack of transparency of foreign media ownership has become a matter of concern as some foreign media owners in Eastern Europe are registered in off-shore zones whose laws protect the confidentiality of owners and prevent media consumers from shaping judgement as to the value of information, ideas and opinion disseminated by the media.

The aim of this Policy Brief is to examine the legal models for regulating the transparency of media ownership by offshore companies and to propose principles for respective regulation of the subject. It is based on the understanding that the availability of accurate and up-to-date data on media ownership lies at the very heart of any media pluralism regulation. Without transparency of media ownership it would be impossible to take steps to address excessive media concentration and to form an opinion on the value of information disseminated by the media.

The Policy Brief starts with analysing problems and shortcomings in the Ukrainian legal framework related to foreign media ownership, and in particular the broadcasting media

¹ Media Pluralism in the Member States of the European Union; available at

http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf

(last accessed 27 January 2011).

² Media Pluralism in the Member States of the European Union, Commission Staff of the European Communities Working Document, page 9; available at

http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf (last accessed 27 January 2011).

ownership of off-shore companies registered in Cyprus. Following the description of the current situation in Ukraine, the lack of legislative requirements for transparency of ownership and the political and business culture of secrecy are identified as key reasons for the existent situation. Then, the Policy Brief compares regulation models for media transparency in other European countries. Finally, the Policy Brief makes recommendations for Ukraine legislators and policy makers on how to address the current problems in line with international obligations and proposes set of principles that should govern the regulation of this issue.

Lack of Transparency of the Ukrainian Media Ownership

Ukrainians do not know who the real owners of their broadcast companies are. This is the conclusion of an analytical report by the Media Law Institute, an NGO based in Kyiv.³ The Institute researchers and their colleagues from the Ukrainian Helsinki Human Rights Union discovered that there is more information on the founders of media outlets in Ukraine than on their owners. They established that:

[N]either the audience nor the expert community have accurate and reliable information as to those persons that control the media in the long run. Information regarding such persons is based only on hearsay. Legally, there is no way one can prove or disprove the fact that *Inter* is controlled by Khoroshkovsky and that Pinchuk controls *ICTV*, *STB* and *Novy*.⁴

International experts have also recognized the problem with transparency of broadcasting companies in Ukraine. In its Resolution No. 1466 (2005) On Ukraine's Honouring its Commitments and Obligations⁵, the Parliamentary Assembly of the Council of Europe has called upon the Ukrainian authorities to "...secure transparency in media ownership". Furthermore, after their fact-finding mission in the beginning of 2008, two co-rapporteurs of the Council of Europe called on Ukraine's Cabinet of Ministers to "support adoption by the Parliament in the final reading of the law on transparency of media ownership".⁶ In 2010, ARTICLE 19 and International Media Support raised concerns about the lack of transparency of media ownership in Ukraine and petitioned President Viktor Yanukovich on the subject, stating that the need for transparency in media ownership is a vital component to ensuring freedom of the media in Ukraine.⁷ Most recently, the OSCE Representative on Freedom of the Media highlighted the need for laws on transparency of ownership in Ukraine, noting that the lack of transparency raises question about the affiliation of media with political and business groups.⁸

The media in Ukraine are not transparent because it is impossible to obtain information about the beneficial owners of the media. Beneficial owners are the physical persons owning or

³ *State of Transparency of Media Ownership in Ukraine*, Analytical Report by the Media Law Institute, 19 April 2006; available (in Ukrainian) on request from ARTICLE 19.

⁴ *Ibid.* Khoroshkovsky and Pinchuk are Ukrainian oligarchs.

⁵ Resolution No. 1466 (2005) On Ukraine's Honouring its Commitments and Obligations, adopted by the Parliamentary Assembly on 5 October 2005 (28th sitting); available at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/eres1466.htm#_ftn1

(last accessed 27 January 2011).

⁶ *Honouring of obligations and commitments by Ukraine*, Information note by the co-rapporteurs on their fact-finding visit to Ukraine (14-16 January 2008) Co-rapporteurs: Mrs Hanne Severinsen (Denmark, ALDE) and Mrs Renate Wohlwend (Liechtenstein, EPP/CD); available at http://assembly.coe.int/CommitteeDocs/2008/20080318_amondoc06r.pdf (last accessed 27 January 2011).

⁷ Letter of ARTICLE 19 and IMS to President Viktor Yanukovich, 25 February 2010; available at <http://www.article19.org/pdfs/letters/ukraine-president-of-ukraine.pdf>.

⁸ *OSCE media freedom representative: Ukraine should take swift and resolute measures to entrench its exemplary record in media pluralism*, Press release, October 2010; available at <http://www.osce.org/fom/73983> (last accessed 27 January 2011).

controlling the media companies. There are two reasons for the lack of information on the beneficial owners:

- a) Media companies are not required by law to disclose their beneficial owners as well as persons influencing their editorial policies;
- b) Media outlets are owned by companies registered in offshore zones whose legislation protects the confidentiality of owners.

Both these issues are discussed in more detail below.

a) Media companies are not required by law to disclose their beneficial owners

Domestic media legislation, in particular the TV and Radio Broadcasting Law⁹ and the Print Media Law¹⁰, do not require disclosure of beneficial owners of media companies.

According to the Broadcasting Law, broadcasting organisation can be owned by an individual or a legal entity. It is mandatory to provide information to the National Television and Radio Broadcasting Council of Ukraine about the broadcaster's owners in the application for obtaining or extending a broadcasting licence.¹¹ The information is to be entered in the State Register of Ukrainian Broadcasters of Subjects of Information Activities¹² and includes: name, legal address, and bank information for legal entities and full name, birth date, nationality and residence for individuals, and the shares in the statutory fund (for a stock company, full list of stakeholders holding stock in excess of 5 per cent). Therefore, the Law does not require disclosure of the individuals owning legal entities in possession of broadcast companies.

The Print Media Law provides for registration of the founders, both individual and legal entities, of publications.¹³ The Law does not provide for such registration of beneficial owners of print media companies. It is therefore possible for individuals to own print media companies without disclosing their identities.

Information about the beneficial owners of media companies cannot be obtained from the State Statistical Committee administering the state registry of legal entities in Ukraine. The Civil Code of Ukraine requires that public registration records be filed with the publicly accessible unified state registry.¹⁴ The data collection in the Registry contains the following records: account's ID code and name, information as to its establishment, location, last name

⁹ *Закон України Про телебачення і радіомовлення*, referred here as "Broadcasting Law", available (in Ukrainian) at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=1&nreg=3759-12> (last accessed 27 January 2011).

¹⁰ *Закон України «О печатных средствах массовой информации (печати) в Украине»* ("Print Media Law"); available (in Russian) at <http://www.medialaw.ru/exussrlaw/1/ua/media.htm> (last accessed 27 January 2011).

¹¹ Article 24 of the Broadcasting Law.

¹² Article 38 of the Broadcasting Law.

¹³ Article 12 of the Print Media Law

¹⁴ Article 89 of the Civil Code of Ukraine.

of its most senior manager, information on the founders, their interest in the authorised capital etc. This means that only information on founders, as opposed to beneficial owners, can be obtained from the State Statistical Committee.

b) Ukrainian media outlets are owned by offshore companies

Ukrainian legislation does not restrict media ownership by foreign companies. As a result some Ukrainian media are owned by offshore companies of Ukrainians.¹⁵

Although it is very difficult to establish the ownership structures of media companies in Ukraine, the Kyiv-based Media Law Institute has been trying to reveal the owners of key radio and TV channels. For example, it established that the Cyprus-registered UA Inter Media Group Limited owns the Ukrainian media project LTD which in turn owns 61% of the TV Corporation JSC, broadcaster of the most popular Ukrainian TV channel Inter.¹⁶ Some periodical publications like the news magazine “*Ukrayinsky Tyzhden*” [Ukrainian Week] are owned by offshore companies.¹⁷

Offshore zones offer attractive tax benefits and a strong protection of confidentiality of companies’ beneficial owners. By owning the media through offshore companies individuals can influence public opinion without having to reveal their identities.

i. Foreign companies can own media in Ukraine

According to the Ukrainian Broadcasting Law, foreign legal entities and individuals cannot found broadcast companies.¹⁸ Some interpret the silence of the law as to whether foreigners can acquire broadcasting companies as an indication that they are not prohibited from owning media companies. One of the arguments used in support of this interpretation is the fact that the terms “owner” and “founder” of broadcasting company are used often interchangeably in the law. In practice, the National Council on TV and Radio, the authority with powers to oversee enforcement of the broadcasting legislation, allows companies registered outside Ukraine to own broadcasters.¹⁹

¹⁵ The flight of Ukrainian business to Cyprus is common. It has been considered that Ukraine is losing 2% of annual gross domestic product growth through legal Cyprus tax avoidance schemes. According to a media report, since 2007 Ukrainian funds from \$5.5 billion to \$6 billion leak to Cyprus annually. Direct Ukrainian investment in Cyprus from 2007 to 2010 accounted for 92% percent of all foreign investment by Ukrainian companies. See Graham Stack, *Public Likely to Pick up Tab for Havens Abused by Rich*, Kyiv Post, July 30, 2010.

¹⁶ Information from the Media Law Institute, 31 January 2011.

¹⁷ Diana Dutsyk, “Media Ownership Structure in Ukraine: Political Aspect”, p. 2, available at: http://www.rundfunk-institut.uni-koeln.de/institut/tagungen/2010-Cologne/Dutsyk_e.pdf (last accessed 27 January 2011) p. 8.

¹⁸ Article 12 of the Broadcasting Law.

¹⁹ State of Transparency of Media Ownership in Ukraine, *supra note 3*.

The Print Media Law does not prohibit foreign ownership of print media. Some print media are owned by foreigners, mainly Russian businessmen and companies, but also offshore companies.²⁰

ii. The confidentiality of the beneficial owners of offshore companies registered in Cyprus is strictly protected

The lack of transparency of media ownership in Ukraine is due to the fact that the media owners are often offshore companies registered in Cyprus. The Cypriot offshore legislation does not require beneficial ownership to be disclosed to any government body. Upon formation offshore companies must disclose beneficial ownership to the Central Bank only. The Central Bank employees are bound to protect the confidentiality of the beneficial owners.²¹ Trustees do not have to register the beneficiaries of a trust. Even though the opening of a bank account by a trustee requires disclosure of beneficial ownership, the confidentiality on the part of commercial banks is covered by the Banking Law 1997.²²

Cyprus is not bound to exchange information with foreign states concerning individuals and corporations except in cases of money laundering and terrorist financing. To harmonise domestic legal order with EU Directive 2005/60/C against money laundering, in 2007 Cyprus adopted a law allowing disclosures of beneficial ownership information as a measure against money laundering and terrorist financing.²³ The Central Bank of Cyprus is designated as the competent supervisory and monitoring authority for persons engaged in banking activities and money transfer business. Except in the cases concerning money laundering and terrorist financing Cypriot banks are not bound to comply with foreign court orders for disclosure.

²⁰ According to Diana Dutsyk, Russians either have a share in the daily newspaper "Izvestiya v Ukraine" [News in Ukraine] or the weekly newspaper "Argumenty i Fauty v Ukraine" [Arguments and Facts in Ukraine] and "Komsomolskaya Pravda v Ukraine" [Komsomol truth in Ukraine], or are the only owners like in the case of the daily newspaper "Kommersant Ukrain" (the owner is a Russian businessman Alisher Usmanov); *supra* note 17.

²¹ Section 29 of the Banking Laws 1997 to 2009; available at http://www.centralbank.gov.cy/media/pdf/ENG_Unof_consolidation_BANKING_LAW_2007_to_2009_4.pdf (last accessed 27 January 2011).

²² The Bank Law of 1997; available at http://cypruslaw.narod.rau/laws/BANKING_LAWBASIC.pdf (last accessed 27 January 2011).

²³ Prevention and Suppression of Money Laundering and Terrorist Financing Laws 2007 and 2010; available at http://www.cysec.gov.cy/Downloads/LawsRegulations/N188%28I%29-2007_EN.pdf (last accessed 27 January 2011).

European Regulation on Transparency of Media Ownership

The lack of international standards is an impediment to regulation of media ownership by offshore companies in Ukraine. In view of the specific issues arising from this type of ownership, the European standards and rules concerning transparency of media ownership and prevention of media concentration apply. The relevant standards are outlined below.

The standards on media ownership transparency in Europe have recommendatory as opposed to legal character. Furthermore these standards are general and do not contain specific recommendations concerning media ownership by offshore companies.

The Council of Europe has adopted two recommendations - Recommendation No. R (94)13 and Recommendation CM/Rec (2007)2 - emphasising the importance of transparency of all media and the need for state action.²⁴

Recommendation No. R (94) 13 obliges member states to guarantee media transparency and to allow exchanges of information on media ownership. The Recommendation proposes a system of media transparency based on the following 6 guidelines:

Guideline No: 1 The members of the public should have access to basic information on the media;

Guideline No. 2: The state bodies appointed to collect data on media transparency should be competent to communicate these data to their foreign counterparts;

Guideline No. 3: Transparency in regard to broadcasting services may be guaranteed by obliging applicants for broadcasting licenses to release “fairly wider ranging” information. The Recommendation divides this information into three categories:

First category: information concerning the identity of the persons or bodies participating in the structure which is to operate the service;

Second category: information on the interests of the above persons and bodies held in other media by the publishing structure or the persons or bodies participating in the latter;

Third category: information concerning the persons or bodies likely to exercise a significant influence on the programming policy of this service.

Guideline No. 4: Transparency in regard to the operation of broadcasting services may be guaranteed by requiring broadcasters to provide information aimed at accounting for changes and relating to other categories of data linked to the operation of the broadcasting service;

²⁴ Recommendation no. R (94) 13 of the Committee of Ministers to Member States on Measures to Promote Media Transparency, adopted by the Committee of Ministers on 22 November 1994 at the 521st meeting of the ministers' deputies; available at: http://www.medialaw.ru/e_pages/laws/ero_union/transp.htm (last accessed 27 January 2011). Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies, available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec%282007%292&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (last accessed 27 January 2011).

Guideline No. 5: The mission and powers of the authorities responsible for ensuring transparency in the running of broadcasting services should be defined in national legislation clearly enough to ensure effective exercise of their tasks;

Guideline No. 6: Transparency in the press sector may be guaranteed with obligations for disclosure of information. The Recommendation divides this information into five categories:

First category: information concerning the identity of the persons or bodies participating in the publishing structure of a press undertaking;

Second category: information on the interests of the above persons and bodies in other media by the publishing structure or the persons or bodies participating in the latter;

Third category: information concerning the persons or bodies other than those directly involved in the publishing structure who are likely to exercise a significant influence over the editorial line of the publications which they manage;

Fourth category: information on any statements of either editorial policy or political orientation of newspapers and publications;

Fifth category: information concerning the financial results of the publishing structure and the distribution of its publication.

Recommendation CM/Rec (2007) 2²⁵ includes provisions concerning media transparency and ownership regulation. The provision in relation to media transparency guarantees the access of the public to five categories of information on existing media outlets. The first three of them repeat the three categories of information on transparency of broadcasters and print media outlet defined in Recommendation No. R(94)13. The other two categories include information regarding the support measures granted to the media and information on the procedure applied in respect to the right of reply and complaint.

The provision in Recommendation CM/Rec (2007)2 concerning ownership regulation recognises the power of member states to adopt rules aimed at limiting the influence of a single person, company or group in one or more media sectors. The rules may include introducing thresholds and should make it possible to take into account the horizontal integration - mergers in the same branch of activity – of mono-media and multi- media concentrations, as well as vertical integration, where a single person, company or a group controls some of the key elements of production, distribution and related activities such as advertisement or telecommunication.²⁶

Requirements for ownership disclosure exist also in the legally binding Council of Europe Convention on Transfrontier Television.²⁷ Article 6 paragraph 2 provides that as a minimum the following information about broadcasters should be made available upon request: the name or denomination, seat and status of the broadcaster, the name of the legal representative, the composition of the capital, the nature, purpose and mode of financing of

²⁵ *Ibid*, Recommended measures, III. Media transparency.

²⁶ *Ibid*, Recommended measures, I. Measures promoting structural pluralism of the media, 2 Ownership regulation.

²⁷ European Convention on Transfrontier Television, Strasbourg, 5.V.1989; available at <http://conventions.coe.int/treaty/en/treaties/html/132.htm> (last accessed 27 January 2011).

the programme service the broadcaster is providing or intends providing. As the title suggests, the convention applies to cross border television only.

The Council of Europe requirements are currently being revised to bring the Convention into line with the EU Audiovisual Media Services Directive (AVMSD). The proposed new Article 12 includes two paragraphs, the second of which states that 'Parties will promote full transparency of ownership of media service providers'.²⁸

Within the European Union, the non-binding European Parliament Resolution of 25 September 2008, aiming at media pluralism, specifically states in paragraph 35 that it '[e]ncourages the disclosure of ownership of all media outlets to help achieve greater transparency regarding the aims and background of the broadcaster and publisher'.²⁹

Directive 2007/65/EC (Audiovisual Media Service Directive)³⁰, applying to broadcast and online television programme services, and the Electronic Commerce Directive³¹, applying to other on-demand electronic media services, such as online newspapers or radio services, have requirements for identification of the media rather than disclosure of its ownership structure.

The EU legislation designed to ensure fair competition and the control of mergers, including media mergers and information relating to major shareholdings in companies listed in regulated markets, does not require information on ownership of every media outlet. The EU rules apply on a case by case basis whenever there is a danger or a dispute regarding unfair competition.³²

In conclusion, the overview of the relevant Council of Europe standards and EU legislation demonstrate that the recommendations and rules are insufficient to ensure transparency of media ownership by offshore companies. Nevertheless they are useful for setting up the framework for ensuring transparency based on up-to-date collection and disclosure of ownership structures and public access to economic information on providers and operators (turnover, audience share, etc.).

²⁸ Revision of the European Convention on Transfrontier Television, Draft Council of Europe Convention on Transfrontier Audiovisual Media Services, T-TT(2009)013FIN.

²⁹ European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union (2007/2253(INI)); available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0459&language=EN> (last accessed 27 January 2011).

³⁰ Article 5 of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0027:0045:EN:PDF> (last accessed 27 January 2011).

³¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *Official Journal L 178*, 17/07/2000 P. 0001 – 0016; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML> (last accessed 27 January 2011).

³² Merger Directive, Transparency Directive and Commission Directive 2007/14/EC.

A recent academic study established that many member states of the Council of Europe have not taken any legislative steps to implement the recommendations.³³ Where special provisions on transparency of ownership have been adopted (for example, in Croatia, Portugal and Lithuania) the legal models for transparency vary widely. Normally domestic laws contain general provisions on the disclosure of ownership structures, which in most cases do not require disclosure of beneficial owners. This means that physical owners remain unknown.

The transparency models with stricter requirements for disclosure of ownership structures should be mentioned because they can serve as examples for the regulation of media ownership by offshore companies. Examples of stricter requirements for disclosure include Article 24 of the Lithuanian Law on Provision of Information to the Public³⁴, which requires that producers and disseminators of public information (not including those licensed by the Lithuanian Radio and Television Commission) submit data annually to a government institution regarding shareholders or co-owners of the enterprise who have the right of ownership or administer at least 10 percent of all the shares or assets³⁵, and Article 16 of Portugal's Press Law, obliging publishing companies to inform the High Authority for Social Communication (Alta Autoridade para a Comunicacao Social, AACS) annually of the details regarding shareholders in the company.³⁶ Despite the stricter requirements for disclosure of media ownership these provisions cannot ensure transparency of ownership by offshore companies because they do not require the disclosure of beneficial owners of shareholders. It means that the requirements will be met if the information of legal entities owning shares or stock of a media company is provided.

³³ Yolande Stolte and Rachael Craufurd Smith, *The European Union and Media Ownership Transparency: The Scope for Regulatory Intervention*, 2010 (unpublished paper); available on request from ARTICLE 19.

³⁴ Available at: <http://www.rtk.lt/downloads/Law.doc> (last accessed 27 January 2011).

³⁵ Deirdre Kevin, Thorsten Ader, Oliver Carsten Fueg, Eleftheria Pertziniidou, Max Schoenthal, *The Information of the Citizen in the EU: Obligations for the Media and the Institutions concerning the Citizen's Right to be Fully and Objectively Informed*, Study of the European Parliament, ID. N°: IPOL/C/IV/2003/04/01, August 2004, page 130; available at <http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/04/pe358896-en.pdf>, (last accessed 27 January 2011), page 130.

³⁶ *Ibid*, p. 167; the law also obliges members of the government, parliament and other state institutions to declare any interests they have in the media sector.

Legal Regimes for Transparency of Media Ownership by Offshore Companies

ARTICLE 19 sought to identify the measures taken across Europe to ensure transparency of media ownership by offshore companies. We established that offshore companies exist only in the media market of some Eastern European countries. As a result the problem with the lack of transparency of this type of ownership is geographically specific.

It can be assumed that the following two reasons have led to media ownership by offshore companies in Eastern Europe:

- Although foreign media ownership is allowed in all states across Europe, most Western states have restrictions on foreign media ownership with respect to scope and geographical origin. The restrictions apply to offshore companies inasmuch as they are regarded as foreign actors on the domestic media markets.
- In Eastern Europe owning a newspaper or a TV channel is viewed both as a protection measure against political or economic pressure and an opportunity to get political support for other business enterprises in exchange for positive media coverage of business patrons. Coincidentally some of the big business players are companies registered for tax purposes in offshore zone.

a) Restrictions on foreign ownership in EU

The EU states have adopted different approaches to regulation of foreign media ownership. Some countries do not have any restrictions on foreign media ownership at all. These are mainly Eastern European states that underwent a transition to democracy, whose more liberal market policies aim to attract investors in the media field.

The Western European media market is less in need of foreign investments. Moreover, the more powerful US media players have been seen as a danger to national culture. Restrictions on foreign media ownership have therefore been seen in the West as a means of protecting the national way of life. Since EU law prohibits restrictions on media ownership within member states, the domestic legislation of the latter imposes restrictions on investments from outside the EU.³⁷ The table below provides information on the limitation on foreign media ownership in some EU states:

Country	Foreign Media Ownership Restrictions in Print Media and TV
Austria	There is a 49% limit of ownership share for non EEA [European Economic Area] members
Bulgaria	No restrictions
Cyprus	There is a 5% limit for non-EU ownership
Estonia	No restrictions
France	Non-EU investment is limited to a share of 20% of a capital of a daily

³⁷ State of Transparency of Media Ownership in Ukraine, *supra note 2*.

	newspaper or of a terrestrial broadcasting in French language
Hungary	No restrictions for the press A minimum of 26% of the shares of a broadcasting company must be owned by Hungarian citizens and residents.
Ireland	Foreign media ownership is subject to IRTC approval (Independent Radio and Television Commission)
Italy	Restrictions on investments in the media market from outside the EU depend on reciprocal arrangements between Italy and other states.
Latvia	Non-EU owner of a mass media is restricted to 49% ownership share
Lithuania	No restrictions
Poland	Non-EU ownership of broadcast outlet is restricted to 49% No restrictions for print media
Romania	No restrictions
Slovakia	No restrictions
Spain	No restrictions for print and TV. Non-EU nationals cannot hold more than 25% of share capital of a licence-holder in the radio sector.

In the research carried out for this Policy Brief, ARTICLE 19 established that at present offshore companies own media in Ukraine, Bulgaria, Romania, Latvia and Georgia. Although it is certainly the more liberal media market of these Eastern European countries that has attracted offshore companies it remains to be established why this type of media ownership exists only in some of the states from the region.

Not surprisingly, the lack of transparency of media ownership has already been identified in the countries where offshore companies own media. Some domestic laws include provisions directly or indirectly regulating media ownership by offshore companies, while in others no legal measures have been undertaken yet to ensure transparency of media ownership.

i. Bulgaria

International and national experts have noted with concern that media ownership in Bulgaria is not transparent.³⁸ Although the question of the lack of media transparency is raised mainly in the context of concerns about the external influence over media editorial policy, the appearance of offshore companies on the media market is also a worrisome fact. For example, in 2010 the Cyprus-registered international financial investor *Mancelord Limited* acquired 50% of the national transmission company NURTS and later the Bulgarian subsidiary of Slovakia's Towercom, which will operate one of the country's two national commercial DTT multiplexes.

A new amendment to Bulgaria's Law on Mandatory Deposit of Print and Other Works,³⁹ adopted in 2010, ensures transparency of ownership of print media. According to an adviser

³⁸ Deutsche Welle, "*Медиите в България жълтеят, считат немски експерти*" (Media in Bulgaria is becoming sensational), citing Mattias Barner, head of the media programme of Konrad Adenauer Foundation, 15 October 2010 and "*Expert: Bulgarian Media is Corruption Breeding Ground*", citing Ivo Indzhev, mass communication expert, Novinite, 17 May 2010; available at http://www.novinite.com/view_news.php?id=116258 (last accessed 27 January 2011). Both media experts identified the lack of transparency in Bulgaria as a matter of concern.

³⁹ ЗАКОН ЗА ЗАДЪЛЖИТЕЛНОТО ДЕПОЗИРАНЕ НА ПЕЧАТНИ И ДРУГИ ПРОИЗВЕДЕНИЯ (Law on

of the Prime Minister, cited in the media, the bill was drafted on the initiative of the Union of Bulgaria's Publishers, who demanded that the ownership of all print media become fully transparent "all the way to physical persons owning shares or stocks".⁴⁰ The Union wrote a letter to the Government requesting regulation of the origins of investments in the media sector, as well as of media concentration.

The specific provision concerning transparency of media ownership is stipulated in the new Article 7a. It requires publishers of periodic print media to publish in the first issue of each calendar year information indentifying the beneficial owner. The law defines "beneficial owner" as "individuals who are beneficiaries of the legal entity, which alone or through affiliates owns a publisher".⁴¹

In cases where the publisher is a public company under the Public Offering of Securities or under national legislation, information identifying the beneficial owner is considered the designation of the competent body supervising the company.

Publishers have the obligation to publish any change of the information in the first issue of the printed work after the change has occurred, as well as on their websites. They are also obliged within 7 days of the printing of the first issue of each calendar year to submit to the Ministry of Culture a declaration identifying the beneficial owner.

The Ministry of Culture is obliged to publish on its website information about beneficial owners of publishers.

The local municipalities supervise the implementation of the transparency requirements of media ownership. In cases of violations, publishers can be fined by the minister of culture from 1000 to 1500 leva (EUR 500 to EUR 760). For a repetitive violation the fine is from 3000 to 5000 leva (EUR 1500 to EUR 2500).

ii. Georgia

In April 2011 Georgia passed a law banning offshore companies from owning media.⁴² The legislation aims at two of Georgia's largest broadcasters, *Rustavi 2* and *Imedi TV*.⁴³ *Rustavi 2*, which is considered to be strongly pro-government, is owned by a company registered in the British Virgin Islands tax haven, and the identity of the company's owners is unknown. The

Mandatory Deposit of Print and Other Works), published in State Gazette, issue 108 of 29 December 2000, in force since 1 January 2001.

⁴⁰ Рада Георгиева, „Печатните меди ще трябва да направят собствеността си напълно прозрачна” (*Print Media Should Make Their Ownership Fully Transparent*), *Дневник*, 20 юни 2010.

⁴¹ Additional Provision of the Law on Mandatory Deposit of Print and Other Works, para 1.

⁴² *Georgia passes law to make media ownership more transparent*, Doha Center for Media Freedom, April 2011; available at <http://www.dc4mf.org/en/content/georgia-passes-law-make-media-ownership-more-transparent> (last accessed 27 January 2011).

⁴³ Eurasia Review: “Georgia to Make Media Ownership ‘Fully Transparent’”; available at www.eurasiareview.com/201010289281/georgia-to-make-media-ownership-fully-transparent.html+offshore+media+ownership&cd=6&hl=en&ct=clnk&gl=uk (last accessed 27 January 2011).

legislation requires broadcasting companies to make public information about their owners and sources of finance.

iii. Greece

Prior to 2005 some media outlets, including television (*Star Channel, Teletypos*), television production (*Audiovisual*), and magazines (*Attikes Ekdoseis*) were controlled through off-shore companies by the Vardinogiannis family.⁴⁴ This type of ownership came to an end in 2005 with the adoption of Law 3310/2005 on “measures to ensure transparency and prevent infringements in the process of awarding public works contracts”⁴⁵, which prohibited offshore companies from participating in media companies with more than 1% stake or to hold shares or to be a shareholder of a shareholder of a media company.⁴⁶

The Law 3310/2005 sets up the legal framework for transparency of media ownership as required by Article 14 (9) of the Constitution. Adopted in 2001, this constitutional provision establishes that the means of financing newspapers and periodicals should be disclosed in accordance with a law.

The Law (3310/2005) prohibits off-shore companies from participating with more than a 1% stake in a media company or in a company bidding for public contracts. In addition it prohibits media companies and offshore companies from undertaking any kind of public works⁴⁷⁴⁸.

The implementation of the Law 3310/2005 is entrusted to the “Transparency Department” of the National Council for Radio and Television. This Department is responsible for keeping an archive of the media companies⁴⁹. In case of violation of the law, there are administrative fines calculated on the basis of the company’s participation in the media enterprise⁵⁰, and up to 70% of the value of the latter⁵¹. In case of recidivism the operation of the media outlet can be suspended for one month.⁵²

iv. Latvia

In 2005 two Latvian-registered companies, Belokon New Sia and TV Berline SIA, bought the private channel TV5 in Latvia. While the first company is a known media company owning the

⁴⁴ Kelly, Mary J, “The Media in Europe: the Euromedia Handbook” [2003]

⁴⁵ Government Journal (ФЕК) А’30/14.2.2005. The law was amended by Law 3414/2005, Government Journal ФЕК А’ 279/10.11.2005)

⁴⁶ *Ibid*, Article 4 para 4 (b).

⁴⁷ *Ibid*, Article 4 para 1.

⁴⁸ *Ibid*, Article 4 para 4 (a).

⁴⁹ *Ibid*, Article 5 para 1.

⁵⁰ *Ibid*, Article 7 para 1.

⁵¹ *Ibid*, Article 7 para 2 a.

⁵² *Ibid*, Article 7 para 2 b.

daily Telegraf newspaper, TV Berline SIA was registered weeks before the acquisition. Its owner appeared to be an offshore company Unifors Investment Management Limited registered in the British Virgin Islands.⁵³

Latvia has been criticised recently for the lack of transparency in media ownership by OSCE election observers who reported affiliations of some leading broadcasters and newspapers with influential businessmen and politicians during the 2010 election campaign.⁵⁴

Latvia's legislation requires broadcasters to notify the regulatory broadcasting authority in cases of ownership changes. However, broadcasters have no duty to disclose its ownership structure up to the beneficial owners.

v. Romania

In Romania, off-shore companies own media. According to a report the following broadcasters were owned by offshore companies in 2008: Channel B1TV with its major shareholder Ismar International NV based in the Netherlands Antilles; Radio Total controlled by a Comac Ltd. Cyprus, and Pratech TV owned by the Cyprus-based Central and Eastern European Investment Fund Ltd (CEEIF).⁵⁵

Online media are also owned by offshore companies in Romania. Ziare.com is the media division of a large Cyprus-based investment company in Romania, Broadhurst Limited, which also holds a software developing IT unit.⁵⁶ The privately-owned news agency, Mediafax, which covers the needs of 90% of the Romanian printed media and 70% of the national TV and radio stations, is owned by Mediapro BV holding behind which is a Caribbean company, registered in Curacao, Netherlands Antilles. The real beneficial owners of Mediafax have been kept secret.⁵⁷

Recognizing the lack of transparency regime in Romania, a media expert pointed out that the recent clashes between media and the President have contributed to a disclosure of media ownership.⁵⁸

⁵³ Ieva Berzina, *Radio and Television Commission of Lithuania Shareholders Change in One of Major Private TV Channels*; IRIS 2005-9/27; available at: <http://merlin.obs.coe.int/iris/2005/9/article27.en.html> (last accessed 27 January 2011).

⁵⁴ Latvia, Parliamentary Elections, OSCE/ODIHR Limited Election Observation Mission Final Report, 2 October 2010, p. 12; available at <http://www.osce.org/odihr/74757> (last accessed 27 January 2011).

⁵⁵ Open Society Institute, *Television across Europe. More channels less independence*. Budapest: Open Society Institute (2008), p. 395-396.

⁵⁶ *Ibid.*

⁵⁷ Manuela Preoteasa, *Report on Romania in Media Ownership and Its Impact on Media Independence and Pluralism*; available at http://www2.mirovni-institut.si/media_ownership (last accessed 27 January 2011).

⁵⁸ Cristian Ghinea and Alina Mungiu-Pippidi, *Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of Romania*, October 2010; available at <http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/Romania.pdf> (last accessed 27 January 2011).

vi. *Multinational media ownership by offshore companies*

The Central Media Enterprise (CME), registered in Bermuda, an off-shore tax haven, is a key player in the 2011 broadcasting market in Central and Eastern Europe. The majority of the company is held by Lauder. Time-Warner owns 31% of the shares. In Romania Central Media Enterprise owns Pro TV SA, Pro TV, Pro Cinema, Pro TV international, Acasă TV, MTV Romania, Sport.ro and three radio stations. In Bulgaria it owns bTV, bTV Cinama, bTV Comedy, bTV action, Ring.bg and radio stations N-Joy, Z-Rock, Pro.FM, Classic FM, Jazz FM, Melody Radio, in Croatia CME owns Nova TV, Mini TV, Doma TV, Nowa world. In Czech Republic, CME owns TV Nova, Nova Cinema, Nova Sport, MTV Czech. In Slovakia Makiza and TV Doma belong to CME. In Slovanie CMA owns Kanal A, POP TV and POP Brio TV channels.

According to Manuela Preoteasa, who has studied the ownership structure of CME, there are no problems in finding out the beneficial owners of CME despite the fact that it is registered for tax purposes in Bermuda.⁵⁹ This is due to the fact that CME is listed on NASDAQ and Prague Stock Exchange. Both stock exchanges have rigid requirements for transparency of ownership for all the companies listed by them.

b) Analysis of the Legal Regimes of Media Ownership by Offshore Companies

Analysis of the regulatory models of media ownership by offshore companies in Bulgaria, Georgia and Greece reveal two tendencies. Georgia and Greece restrict offshore companies from owning media companies. In the case of Georgia, this restriction is complete inasmuch as no offshore company can own a broadcaster. In Greece, the stake of participation by offshore companies in media outlets is capped and amounts to up to 1%. The regulation of media ownership in Bulgaria (as well as in Georgia) contains requirements for the disclosure of beneficial owners. In this second approach every company, including offshore companies, can participate in media market as long as it discloses its beneficial owners. It means that in order to own media offshore companies have to do without one of the benefits of their offshore status; namely, the confidentiality of their owners.

The key question is which regulatory approach best ensures transparency. The Bulgarian regime can be commended for ensuring disclosure of beneficial owners. However, it is uncertain whether this regulation will be effective with respect to offshore companies. This uncertainty arises from the fact that it is impossible to establish whether offshore companies declare genuine as opposed to fictitious beneficial owners. The strict protection of confidentiality by offshore legislation makes it impossible to verify the data from offshore companies' declarations with respect to their beneficial owners. In contrast, the Georgian regime entirely bans off-shore companies from entering the media market. While the Georgian regime ensures the transparency of offshore ownership, however, it is problematic for two reasons. Firstly, it is unclear how this regime will affect offshore companies which already own media companies. Are these companies going to lose their licences or will they be given time to sell their business? Secondly, it is unclear whether complete bans on offshore companies from entering the media market accords with international law.

⁵⁹ Interview with Manuela Preoteasa, 12 May 2011.

c) Banning offshore companies from the media market

A complete ban on off-shore companies from the media market will affect off-shore companies which already own media companies. Any revocation of licences or time given to sell business will amount to an interference with these companies' right to freedom of expression. Banning offshore companies from entering the media market will likewise affect their right to freedom of expression. Under international law everybody – including offshore companies – have a right to freedom of expression which they can exercise through all media.

According to Article 10 para 2 of the European Convention of Human Rights, to be in compliance with international law any interference with the right to freedom of expression should meet a three-part test: i.) it should be established by law; ii.) it should pursue a legitimate aim; iii.) it should be necessary in a democratic society.

Referring to the list of legitimate aims for interference with the right to freedom of expression set out in paragraph 2 of Article 10⁶⁰, transparency of media ownership is obviously not included. In addition, it is difficult to justify a ban on offshore companies exercising their right to freedom of expression as necessary in a democratic society, since a ban is a very severe restriction on this freedom. In conclusion, therefore, a complete ban on offshore companies from the media market will be in violation with Article 10 of the European Convention of Human Rights.

⁶⁰ According to Article 10 paragraph 2 of the European Convention, the right freedom of expression can be restricted only 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Principles for Regulation of Media Ownership by Offshore Companies

On the basis of our analysis, ARTICLE 19 concludes that the following principles for regulation of media ownership by off-shore companies can be established:

Principle 1: Transparency of media ownership means disclosure of beneficial owners, including beneficial owners of offshore companies.

Principle 2: All media and news agencies are responsible for disclosing annually their beneficial owners before a relevant national body and to make this information publicly available by publishing it on their websites, for example.

Principle 3: All media and news agencies are responsible for disclosing information concerning the ownership of their beneficial owners and of their next of kin of other media.

Principle 4: All media and news agencies are responsible for disclosing information concerning the persons or bodies likely to exercise a significant influence on the programming policy of this service.

Principle 5: All offshore companies willing to establish or acquire media and news agencies are responsible for presenting to a relevant national body a certificate of their beneficial owners issued by the company registration authority in the off-shore zone.

Principle 6: Everyone has a right to access the certificate about the beneficial owners of off-shore companies owning media and news agencies.

Principle 7: Although limitations on off-shore companies from owning media and news agencies are permitted they should be established by law, pursue a legitimate interest and be necessary in a democratic society.

Principle 8: A relevant national body is entitled to oversee the disclosure of beneficial owners and impose sanctions for the enforcement of this obligation.

Principle 9: Total bans on off-shore companies from owning media companies are not permitted.

Conclusions

ARTICLE 19 believes that it is fundamental to the proper functioning of all forms of national media that media pluralism is respected and safeguarded by legislation if necessary. Without regulation of media ownership by off-shore companies there is a risk of media concentration and a lack of clarity about who influences the media. Ukraine, like any other state, therefore has an obligation to set out a legal regime for the transparency of media ownership by offshore companies. In addition, it should regulate this type of media ownership to ensure media pluralism, prevent concentration and inform media consumers about the persons who own or influence the media.

Based on the comparative law analysis and international standards of freedom of expression, the principles proposed in this Policy Brief aim to serve as guidance for ensuring transparency of media ownership by offshore companies in Ukraine and other countries.