MEMORANDUM

on the

draft Public Service Broadcasting Law for Ukraine

London
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ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

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1. INTRODUCTION

This Memorandum analyses Ukraine's draft Law "On Public Television and Radio in Ukraine" (draft Law).[1] We wholeheartedly welcome this effort to introduce true public service broadcasting in Ukraine. The lack of a public service broadcaster in Ukraine has long been cause for concern; in 2004, the Parliamentary Assembly of the Council of Europe has recommended that "legislation in this area in line with European standards is adopted as soon as possible in … Ukraine".[2]

The draft Law contains a number of positive features. These include a clear statement of the principles of Ukrainian public broadcasting and a mandate for Ukrainian Radio and Ukrainian Television that recognizes and seeks to be responsive to the diversity of its audience, provide quality programming on a range of topics and balanced news on important events. We also welcome the Law's recognition of the importance of transparency in the operation of public television and radio through the mandatory mass publication of those organisations' annual audits.

There are, however, provisions that require attention and improvement. The structure of the supervisory and managerial bodies of Public Television and Radio Broadcasting could be refined to ensure maximum efficiency in administration and the responsibilities of each body clarified, particularly in the area of editorial policy development. Additional guidelines for the future funding of Ukrainian Television and Ukrainian Radio may prove a useful addition to the Law. Additional accountability mechanisms, beyond the annual audit, may help to promote transparency and public confidence in the organisations. Further, including a clear statement of the independence of these entities in the Law and not requiring them to carry State-mandated programming would help to ensure that Ukrainian Public Radio and Ukrainian public Television become truly public service organizations.

This Memorandum describes the key international standards in this area, identifies ARTICLE 19's main concerns with the draft Law and sets out recommendations on how to address these. It is based on international standards that are directly binding on Ukraine. It also cites international treaties from the various regional systems for the protection of human rights and authoritative international statements relating to the guarantee of freedom of expression. Although these latter are not directly binding on Ukraine, they offer authoritative interpretations of freedom of expression principles in various different contexts and hence good guidance on the content of this right which is binding on Ukraine. These standards are distilled in the ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (ARTICLE 19 Principles).[3]

[1] It is dated 15 May 2005 and contains some 34 articles. Our comments are based on the translation, not the original, and it may be that certain nuances of the draft Act got lost in translation. We take no responsibility for errors based on translation. The translation is attached as Annex 1.
[2] Recommendation 1641 (2004), adopted 27 January 2004.
[3] London: ARTICLE 19, 2002.

2. INTERNATIONAL AND CONSTITUTIONAL STANDARDS

2.1. The Importance of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, with some of its provisions, including Article 19, binding on all States as a matter of customary international law.[4] Article 19 of the UDHR 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.[5]

The *International Covenant on Civil and Political Rights* (ICCPR) is an international treaty, ratified by Ukraine in 1976, which imposes legally binding obligations on States Parties to respect a number of the human rights set out in the UDHR.[6] Article 19 of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found at Article 19 of the UDHR. Guarantees of freedom of expression are also found in all three major regional human rights systems, at Article 9 of the *African Charter on Human and Peoples' Rights*,[7] Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[8] and Article 13 of the *American Convention on Human Rights*.[9]

The Constitution of Ukraine also guarantees freedom of expression at Article 34 as follows:

- 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.

Freedom of expression is among the most important of the rights guaranteed by the ICCPR and other international human rights treaties, in particular because of its fundamental role in underpinning democracy. At its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." The European Court of Human Rights has stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as

[4] For judicial opinions on human rights guarantees in customary international law law, see *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). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, Human Rights and World Public Order, (Yale University Press: 1980), pp. 273-74, 325-27.
[5] Adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).
[6] UN General Assembly Resolution 2200A (XXI) of 16 December 1966, in force 23 March 1976.
[7] Adopted 26 June 1981, in force 21 October 1986.
[8] Adopted 4 November 1950, in force 3 September 1953.
[9] Adopted 22 November 1969, in force 18 July 1978.

> 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 pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[10]

The guarantee of freedom of expression applies with particular force to the media, including both private and public broadcasters. The European Court of Human Rights has consistently emphasised the "the pre-eminent role of the press in a State governed by the rule of law." [11] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[12]

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.[13]

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.[14] Second, an important goal of regulation must be to promote pluralism and diversity in the airwaves.[15] 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, including over public service broadcasters, must be independent of government.[16]

[10] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[11] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[12] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[13] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights), para. 45.
[14] 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.
[15] *Ibid.*, para. 38.
[16] In the case of the regulatory bodies of public service broadcasters, minimum principles are laid down in Recommendation 1996(10) of the Committee of Ministers of the Council of Europe on the Guarantee of the Independence of Public Service Broadcasting, adopted 11 September 1996.

2.2. Freedom of Expression and Public Service Broadcasting

2.2.1. Promotion of pluralism and the role of public service broadcasters

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

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[17] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media."[18]

One of the key rationales behind public service broadcasting is that it makes an important contribution to pluralism. The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.[19] For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

A *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural needs, and the need to preserve media pluralism. As a result, funding by States to such broadcasters is exempted from the general provisions of the Treaty of Amsterdam.[20] 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.[21]

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

[17] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 17 EHRR 93, para. 38.
[18] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985), para. 34.
[19] See *Fourth Television* case, 87 BverfGE 181 (1992). In Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 58.
[20] Official Journal C 030, 5 February 1999, clause 1.
[21] Adopted 9 October 1992. Endorsed by the General Conference at its 28th session, 15 November 1995, Resolution 4.6. Clause 5.

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.

2.2.2. Independence of public service broadcasters

The State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression, including publicly-funded broadcasters. This is clear from a case before the European Court of Human Rights which decided that any restriction on freedom of expression through licensing was subject to the strict test for such restrictions established under international law.[22] In particular, any restrictions must be shown to serve one of a small number of legitimate interests and, in addition, be necessary to protect that interest. Similarly, in the preamble to the European Convention on Transfrontier Television, States: "[Reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters."[23]

An important implication of these guarantees is that bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments.

Perhaps the most important of these is Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe.[24] The very name of this Recommendation illustrates the importance to be attached to the independence of public service broadcasters. The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and that these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.[25]

Several declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasters. The 1996 *Declaration of Sana'a*[26] calls on the international community to provide assistance to publicly-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia* notes the need for State-owned broadcasters to be transformed into proper public service broadcasters with guaranteed editorial independence and independent supervisory bodies.[27] The 1992 *Declaration of Alma Ata* also calls on States to, "encourage

[22] *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, Application No. 10890/84, 12 EHRR 321, para. 61.
[23] 5 May 1989, European Treaty Series No. 132.
[24] 11 September 1996.
[25] Articles 9-13.
[26] 11 January 1996, endorsed by the General Conference at its 29th Session, 12 November 1997, Resolution 34..
[27] Adopted 13 September 1997. Endorsed by the General Conference at its 29th session, 12 November 1997, Resolution 35. Clause 7.

the development of journalistically independent public service broadcasting in place of existing State-controlled broadcasting structures".[28]

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, noted above, reiterates these principles, including the need for independent governing bodies, and for editorial independence and adequate funding. These recommendations, particularly the requirement of effective independence from government – including financial independence – are reiterated in a number of resolutions and recommendations of the Parliamentary Assembly and other Ministerial Conferences on mass media policy of the Council of Europe.[29]

Principle 34 of the ARTICLE 19 Principles notes the need to transform government or state broadcasters into public service broadcasters, while Principle 35 notes the need to protect the independence of these organisations. Article 35.1 specifies a number of ways of ensuring that public service broadcasters are independent including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of goals, powers and responsibilities;
3. through the rules relating to appointment of members;
4. through formal accountability to the public through a multi-party body;
5. by respect for editorial independence; and
6. in funding arrangements.[30]

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[31]

Similarly, the Supreme Court of Ghana noted: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."[32]

Many of the standards set out above reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasters should be guaranteed, both in law and in practice. This is reflected, for example, in Principle 35.3 of the ARTICLE 19 Principles, which states: "The independent governing

[28] Note 21.
[29] For the former, see Res. 428(1970), Rec. 748(1975) and Rec. 1147(1991) and for the latter see Res. No. 2 (1st Conference, 1986) and Res. No. 2 (5th Conference, 1997).
[30] Note 3, Principle 35.1.
[31] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.
[32] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

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

This approach is reflected in Article 1 of Recommendation No. R(96)10 of the Council of Europe, which notes that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters. The Recommendation goes on to state that management should be solely responsible for day-to-day operations and should be protected against political interference, for example by restricting its lines of accountability to the supervisory body and the courts.[33] In a related vein, Articles 20-22 of the same Recommendation note that news programmes should present the facts fairly and encourage the free formation of opinions. Public service broadcasters should be compelled to broadcast messages only in very exceptional circumstances.

2.2.3. Funding of public service broadcasters

Similarly, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In addition, public service broadcasters can only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of Recommendation (1996) 10 of the Council of Europe note that funding for public service broadcasters should be appropriate to their tasks, and be secure and transparent. Funding arrangements should not render public service broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

ARTICLE 19's Principle 36 deals with funding, stating: "Public broadcasters should be adequately funded, taking into account their remit, by a means that protects them from arbitrary interference with their budgets". Similarly, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to ensure that sufficient resources are available to enable the public service broadcaster to discharge its functions.[34]

3. ANALYSIS OF THE DRAFT LAW

3.1. Overview of the draft Law

The draft Law creates a system of public broadcasting that establishes two separate entities, Ukrainian Radio and Ukrainian Television, as well as a system of oversight for these entities. This system includes a President and "Management" for each organisation, as well as a "Supervisory Council" which oversees both Ukrainian Radio and Ukrainian Television. An overview of the organisation of the public broadcasting system is set out in Article 1 of the draft Law. Articles 4-7 describe the structure and powers of the Supervisory Council. Articles 8-9 describe the structure and authority of the Management, and Article 10 describes the role of the Presidents of Ukrainian Radio and Ukrainian Television.

[33] Articles 4-8.
[34] Decision 826/1998 [1998] Guir. cost. 3893.

The draft Law also sets out the guiding principles of Ukrainian public broadcasting (Article 2), information regarding its funding (Article 11), a requirement for an annual audit (Article 12), and information regarding the content of public broadcasting (Articles 14 and 16). These provisions are analysed below.

3.2. Supervisory bodies

3.2.1. The Supervisory Council

The structure and powers of the Supervisory Council for public broadcasting are laid out in articles 5, 6, and 7 of the Law.

Article 5 describes the appointment process. The relevant parts establish that half of the members of the Council will be nominated by political parties and half will be nominated by Ukrainian NGOs. A committee of the Verkhovna Rada will choose from the submissions and determine the composition of the Council. The proposed membership will then be submitted to the full Verkhovna Rada to be approved or declined. Article 5 also specifies that a Council member may not be "a person who has the position of a People's Deputy, has any other representative mandate or is a state employee." Once elected, a Council member may be removed from her post only if she systematically fails to perform her duties by being absent at more than three meetings in a row, in the course of one year, without an important reason. If a Council member appointed by a political party so fails, the nominating political party must provide a new representative.

Article 6 establishes a rotation of members on the Supervisory Council, such that only half of the Council will be replaced every three years.

Article 7 establishes the powers of the Supervisory Council, which include the authority to elect and dismiss the Management of public television and that of public radio, to elect and dismiss the Presidents of these organisations, and to give assignments to the Managements of public television and radio to make changes to their editorial statutes, programming concept, and other acts. Article 7 also states that the Supervisory council may approve "internal acts" and define "editorial and programming policy" and control its implementation. However, the Council may not exercise prior control over programming.

ARTICLE 19 welcomes the evident intent in Articles 5 and 6 to make the process of appointments to the Council open, pluralistic and free of undue political influence by incorporating civil society. However, because public broadcasting is a service for and ultimately accountable to the entire community, we recommend a few further amendments. First, we believe that in order to avoid any politicisation of the Council, political parties should not nominate members; nominations should be made only by civil society and professional organisations. For the same reason, we are concerned at the power granted in the last paragraph of Article 5, for political parties to recall 'their' council members at any time. This means that members who do not adhere to party policy on regulatory matters can be recalled and replaced with someone who does, introducing a dangerous political element into the Council's functioning. We also recommend that further provisions be included to increase the potential for public participation in the appointments process. Consideration should be given to including a provision that would require the list of proposed Council members, selected by the appropriate committee of the Verkhovna Rada, to be published and allowing a

period of public debate between the time the list is proposed and the time it is voted on by the full body of the Verkhovna Rada. Allowing the public to make representations about the candidates in advance of a vote is an approach adopted in some other transitional democracies, which can significantly enhance openness and promote public confidence in the Board.

We also welcome the provision in Article 5, which prohibits Council members from serving in another representative mandate or working as a state employee. It is important for the autonomy of the Council as a supervisory body that its members not have a conflict of interest with the mandate of public broadcasting. However, we suggest that the provision go further, to also protect against conflicts of interest in the private sector. ARTICLE 19's *Model Public Service Broadcasting Law*[35] suggests the following language:

> No one shall be appointed to the Board if he or she: . . . .
> holds a position in, receives payment from or has, directly or indirectly, significant financial interests in broadcasting or telecommunications;

Also in the interest of protecting the autonomy of the Council, we are concerned that the provisions relating to the Supervisory Council (Articles 5, 6, and 7) do not contain a provision explicitly establishing its independence. This is a significant oversight, as the independence of the Council is critical to the independence of the public broadcasting organizations it oversees. We suggest that Article 7 of ARTICLE 19's *Model Public Service Broadcasting Law*[36] be looked to as an example. It provides:

> **Independence of Members**
> 7. (1) All members of the Board shall be independent and impartial in the exercise of their functions and shall, at all times, seek to promote the Guiding Principles set out in section 4.
> (2) Board members shall neither seek nor accept instruction in the performance of their duties from any authority, except as provided by law.
> (3) Board members shall act at all times in the overall public interest and shall not use their appointment to advance their personal interests, or the personal interests of any other party or entity.

Further, we are concerned with the articulation of the Council's power to remove the President of Ukrainian Public Television and the President. While it is appropriate that the Council be able to dismiss the President of these organizations before his term has expired, the power should be expressly limited to extraordinary circumstances in which the President has failed to satisfy his statutory obligations.

Finally, we are concerned about the provisions relating to the Supervisory Council's powers with regard to the editorial policy of Ukrainian Public Television and Ukrainian Public Radio. These concerns, however, are outlined below in Section 3.3.

Recommendations:

- Political parties should not be allowed to nominate 'their' members to the Council. If they are granted this power, they should not also have the power to recall 'their' member.

[35] ARTICLE 19, London: 2005.
[36] *Ibid.*

- A proposed list of appointees to the Supervisory Council should be published, and a period of public debate allowed before they are voted on by the Verkhovna Rada.
- The provision prohibiting those who hold public office or work as civil servants from being nominated to the Council should be extended to prohibit also those who have a conflict of interest within the private sector.
- The draft Law should contain a provision explicitly providing for the independence of the Supervisory Council.
- The power to dismiss a president of Ukrainian Television or Ukrainian Radio prior to the end of his term should be limited to exceptional cases where the president has failed to fulfil his or her statutory obligations.

3.2.2. Management of public Television and Radio

Articles 8 and 9 establish subsidiary oversight bodies, accountable to the Supervisory Council, referred to as "Management" of Ukrainian Television and "Management" of Ukrainian Television. The members of this body are appointed by the Supervisory Council and serve a term of 4 years. They cannot be civil servants or individuals who work in television or radio. They will meet at least once a month, are unpaid except for reimbursement of expenses, and they are responsible for:

- carrying out control over the administration and financial activities of the Presidents of Ukrainian Television and Ukrainian Radio;
- listening to quarterly reports of the Presidents of Ukrainian Television and Ukrainian Radio;
- Approving agreements that involve more than a fixed monetary amount;
- Approving budgets;
- Establishing the procedure for purchasing products and services; and
- Establishing the procedure for holding competitions for staff positions for Ukrainian Television and Ukrainian Radio.

ARTICLE 19's primary concern is that this body is largely unnecessary. It is responsible for tasks that are better suited for handling by either the Supervisory Council or the Presidents of Public Television and Radio Broadcasting and their senior staff.

Some tasks, such as listening to the quarterly reports provided by the presidents of Ukrainian Television and Ukrainian Radio for hiring staff seem well suited to a general supervisory body such as the Supervisory Council. Other tasks, such as establishing procedure for purchasing products and services, approving agreements that involve over a certain sum, and carrying out control over the financial management of public television and radio appear better suited to the President and senior staff of each organisation. For these tasks it is likely that knowledge of the day-to-day workings of radio and television will be required. As such, it will likely be difficult to find individuals who are competent, willing to accept a volunteer position and not involved in or receiving pay from any organization in the field of television or radio (as prohibited by the statute). It may be better, instead, to have such tasks performed by paid senior staff of the organisations.

While there is nothing inherently wrong with having two tiers of supervision over public Television and Radio Broadcasting, it is possible that this structure may lead to unnecessary duplication of powers and inefficiency in administration. Unless it is determined to be

genuinely necessary, ARTICLE 19 recommends that the supervisory structure be streamlined so that tasks are assigned only to either the Supervisory Council or the Presidents of Ukrainian Television and Ukrainian Radio and their senior staff.

Recommendations:

- Consideration should be given to streamlining the supervisory structure by eliminating the Management of Public Television and Radio Broadcasting and reassigning its tasks to the Supervisory Council or the senior staff of the organizations, depending on which is better suited to handle each task.
- In the absence of this, steps should be taken to reduce the conflict between a need for expert knowledge of the television and radio broadcasting field and the requirement that members of the Management work as volunteers, while not receiving pay from any source in radio or television. These steps could include:
    - Refining the responsibilities of the Management such that they do not require expert or technical knowledge of radio and broadcasting, so that competent individuals could be drawn from other areas of employment.
    - Providing pay to members of the Management, so that individuals with a background in radio and television may hold positions without continuing to rely on private sources of income within the field.

3.3. Editorial Policy

The management structure of public television and radio as currently established by the Law lacks clarity with regard to the establishment of editorial policy. Several different provisions operate to create confusion.

Article 7, outlining the powers of the Supervisory Council, states that the Council may give "assignments to the Management of Ukrainian Television and Ukrainian Radio to develop or to introduce the appropriate changes to … editorial statutes." This appears to indicate that the Management is responsible for developing the editorial policies of public Television and Radio Broadcasting. However, such authority is not mentioned in Article 9, which lists the powers of the Management. Instead, Article 9 provides the confusing statement that the "Management does not have the right to carry out tentative control over broadcasting." Further, Article 7 provides that it is the Supervisory Council that "approves internal acts; defines editorial and programming policy, and controls its implementation," while Article 10 states that the President of public Radio and Television Broadcasting is responsible for "ensuring the realization of editorial and programming policy."

The confusion, which arises in part from the ambiguous language "tentative control", "define" and "realize" editorial policy, may be in part a problem of translation. However, it appears that the Law does not clearly assign the task of developing a detailed editorial policy to any one group. It is extremely important that this be remedied. Only with the task of defining editorial policy clearly delegated to a particular body, and the relationship of the other/ supervisory bodies to this function clearly outlined, can Ukrainian Radio or Ukrainian Television achieve editorial independence.

ARTICLE 19's *Model Public Service Broadcasting Law* allocates the responsibility of defining editorial policy to the Managing Director (equivalent to the President in the draft Law) and his or her senior staff.[37] This is advisable because these individuals necessarily have professional experience in broadcasting and media and have the greatest knowledge of the day-to-day operations and needs of the organisation. It assigns to the supervisory body the task of ensuring that this editorial policy conforms to the Law's guiding principles for public broadcasting. The allocation of responsibility is set out clearly and precisely:

> The Managing Director shall … be responsible for day-today management and, along with his or her editorial staff, editorial policy.
>
> The Board shall not interfere with the day-to-day management of SBC or with the editorial independence of the Managing Director and his or her staff, although it does have responsibility for ensuring that, overall, editorial policy respects the Guiding Principles set out in section 4.

It is of the utmost importance that the draft Law be modified to clearly and precisely define the responsibilities of each level of management and supervisory authority with regard to the development of editorial policy. We recommend that this or similar wording be given serious consideration.

Recommendations:

- The responsibility for the development of editorial policy should be clearly and explicitly set out in the Law. The President and senior staff should be independent in editorial matters. Supervisory bodies should not interfere in day-today editorial matters nor exercise any form of prior censorship; its responsibility is limited to ensuring that overall editorial policy reflects the broadcaster's public service remit.

3.4. Funding

Article 11 of the draft Law establishes that public television and radio may be funded by any of the following:

- Subscriber fees;
- Sponsorship;
- Advertising;
- Budgetary financing;
- Philanthropic donations;
- Payments from the use of author and associated rights; and
- Other legal sources.

However, the draft Law omits to fix the precise funding mechanism, leaving this to be determined at a later time.

We recommend that, if possible, a funding scheme be determined as part of this legislation, in order to ensure that Ukraine Public Television and Ukraine Public Radio will be allocated sufficient resources to fulfil their public mandates. However, if this is not feasible, we strongly recommend that provisions setting certain guidelines be included.

Article 11 allows that public broadcasting may be funded both by advertising revenue and by various means of public funding. Such a mixed model is the overwhelmingly dominant model

[37] Note 35, Article 10.

for public broadcasters all over the world. There are, however, two key risks in allowing public broadcasters to have access to advertising revenue. The first is that public broadcasters may use their public funding to engage in unfair advertising competition (for example by price dumping). This can be addressed by including in the law a direct prohibition on such practices. The second is that despite the overall time limitation, the public broadcaster will become excessively dependent on advertising revenue and, as a result, be diverted from its core public service programming mandate. This can be addressed by an overall limit on the proportion of total funds that may be raised through advertising, for example of 25%. Both of these concerns could be addressed through a provision such as the following:[38]

> **Advertisements**
> 21. (1) SBC may carry advertisements, provided that it shall not: –
> (a) broadcast advertisements which exceed 7½% of the total broadcast time during any given day or 10% of any given hour or programme;[39]
> (b) obtain more than 25% of its total revenues from advertising and other commercial activities;[40] or
> (c) rely on the Public Broadcasting Fee or any other public financing to directly subsidise or unfairly promote its advertising.

Such a provision could be included in the legislation although the final funding scheme is not fixed. It would simply set an outer boundary for the amount of advertising funding that can be drawn on in the ultimate funding mechanism.

Recommendations:

- Consideration should be given to developing a full funding scheme for inclusion in the law.
- A clause prohibiting the use of public financing to subsidize or promote advertising should be included.
- A clause to limit the total amount of acceptable advertising revenue should be included.

3.5. Content Issues

Articles 14, 16 and 11 all establish requirements regarding the broadcasting content of Ukraine Public Television and Ukraine Public Radio. While some of these requirements are entirely legitimate, others give serious cause for concern.

Article 14, regarding "Programming Policy," sets out several requirements that we welcome, such as a requirement that the public broadcasting organizations provide programmes that reflect the diversity of the population, and promote democratic values and inter-ethnic

[38] From ARTICLE 19's *Model Public Broadcasting Law*, note 35, Article 21.

[39] The figures in this sub-section are indicative only. What is appropriate will depend on a number of factors including the size of the advertising market, the competition for advertisers, the size of the public broadcasting fee and so on. The idea, however, is to ensure that the public broadcaster has less access to advertising than commercial broadcasters for a number of reasons including that excessive advertising directly undermines public interest programming, as a quid pro quo for receiving public funding and to be fair to commercial broadcasters, and to limit the extent to which it is dependent on advertising revenues.

[40] The figure of 25% is, as with other numbers, indicative. The idea is to limit the overall influence of advertising revenue as a way of ensuring that markets do not exert a dominant influence over programming.

harmony. In addition, we welcome the provision which requires news to be independent, balanced and unbiased. However, we are concerned by the language, "News must be … honest." While it is completely legitimate to require that news providers "strive for" accuracy, a strict legal requirement that journalists or broadcasters transmit only information that can be proven to be true places an unnecessarily onerous burden on broadcasters and has a serious chilling effect on freedom of expression.

Second, we are concerned by the content-related requirement inserted into Article 11, which otherwise relates to the financing of Ukraine Public Television and Public Radio. This provision states that:

> The National Council of Ukraine on Television and Radio Broadcasting implements the programs on public Television and Radio Broadcasting ordered by state.
> Programs ordered by the state on public Television and Radio Broadcasting cannot be more than 30 percent of the average daily amount of broadcasting on one channel.

In order for Ukrainian Television and Ukrainian Radio to function as public broadcasters, rather than simply state broadcasters, it is imperative that they function independently and have control over their own programming choices. Any amount of State-mandated programming violates the independence of these organisations, much less an amount as substantial as 30% of daily programming.

Finally, we are also concerned about the provision in Article 16 that reads:

> Organizations of public Television and Radio Broadcasting are obligated to provide free broadcast time to the President of Ukraine, Head of the Verkhovna Rada, the Prime Minister of Ukraine, Head of the Supreme Court of Ukraine and the Head of the Constitutional Court of Ukraine, for official expert presentations related to the nation.
>
> The President of Ukraine will be provided with an hour for a New Year's greeting.

While we assume that these provisions are intended to ensure that the public receives important information about government affairs and situations of emergency, they are both unnecessary and open to abuse. They are unnecessary because any responsible broadcaster will carry information of public importance without a specific requirement to do so. Experience in countries all over the world shows that both public and private broadcasters provide ample coverage of emergencies and important political events, even in the absence of formal obligations to do so. Such provisions are open to abuse because officials may use them in circumstances for which they were not intended, simply using the public resource of free air time to promote their own views. What is important is that the public gets the information it needs, not that it hears statements made by State bodies. For these reasons, Council of Europe Recommendation (1996)10 states that these kind of obligations "should be confined to exceptional circumstances", implying that they are imposed in emergencies, when a public address can be considered truly 'necessary'.[41] An obligation for public broadcasters to provide a one hour slot for a New Year's greeting is a typical example of a provision that could not be described as 'truly necessary'; if the public really wants to see or hear it, there will be a broadcaster that will carry it without being legally obliged to do so.[42]

[41] Note 24, Principle VI.
[42] In the United States, broadcasters carry the President's State of the Union address, not because they are legally bound to do so but because it attracts viewers.

Recommendations:

- The requirement in Article 14 that "News must be … honest" should be amended to state that news providers "should strive for" accuracy.
- The free airtime requirement for State officials should be removed.
- The provision in Article 11 that allows the state to order even limited programming on public television and radio should be removed. All programming content should be strictly determined by public service broadcasters, under overall editorial policy guidance by the Council, without interference by the State.

3.6. Transparency and Accountability

Article 12 of the draft Law provides one means of ensuring accountability of public Television and Radio Broadcasting by mandating an annual audit. This audit of their financial practices is to be published in the mass media. While we welcome this mechanism for accountability, we strongly encourage the inclusion of additional means of ensuring the accountability of public Television and Radio Broadcasting to the Verkhovna Rada and to the public.

3.6.1. Annual Report

A key accountability mechanism in most countries is the requirement for the Board to place an annual report before the legislature. This not only provides for an open reporting system, which should also be accessible to the public at large, but also ensures that the legislature has an opportunity to discuss the public broadcaster at least on an annual basis. The draft Law fails to require the public broadcasting organisations of Ukraine to produce an annual report or for any other oversight by the legislature. ARTICLE 19 recommends the addition of such a requirement, which would incorporate the annual audit information as well as additional relevant information about public Television and Radio Broadcasting practices. ARTICLE 19's *Model Public Service Broadcasting Law*[43] suggests a provision along the following lines:

> (1) The Board shall provide to the President and the Parliament of the Kyrgyz Republic, and publish and distribute widely, an Annual Report, along with externally audited accounts, for the Public Broadcaster. Each Annual Report shall include the following information: –
>
> (a) a summary of the externally audited accounts, along with an overview of income and expenditure for the previous year;
> (b) information on any company or enterprise that is wholly or partly owned, whether directly or indirectly, by the Public Broadcaster;
> (c) the budget for the following year;
> (d) information relating to finance and administration;
> (e) the objectives of the Public Broadcaster for the previous year, the extent to which they have been met and its objectives for the upcoming year;
> (f) editorial policy of the Public Broadcaster;
> (g) a description of the activities undertaken by the Public Broadcaster during the previous year;
> (h) the Program Schedule and any planned changes to it;
> (i) a list of programs broadcast by the Public Broadcaster that were prepared by independent producers, including the names of the producers or production companies responsible for each independent production;
> (j) recommendations concerning public broadcasting; and

[43] Note 35, Article 23.

(k) information on complaints by viewers.

(2) The Board shall formally place the Annual Report and externally audited accounts before the Parliament for its consideration.

3.6.2. Public Review and Complaints Procedure

In line with international standards, ARTICLE 19 also submits that a public review mechanism, based on a Code of Broadcasting Practice, is an appropriate mechanism to promote ongoing public accountability of a public service broadcaster. There should be a complaints mechanism, either internal or integrated with the rest of the broadcasting system, administered by an independent body; and public service broadcasters should be required to conduct frequent meetings with members of the public. ARTICLE 19 suggests that consideration be given to including the following provisions in the draft Law:

Public Review

In order to ensure transparency and to improve its service in the public interest, the Public Broadcaster shall make an effort to ensure that it remains under constant review by the public, including by holding public meetings and seminars to look at ways it might better serve the public interest.

Complaints Procedure

(1) The Public Broadcaster shall develop a Code of Broadcasting Practice in consultation with interested stakeholders which shall govern its broadcasting practices and program content.

(2) The Code referred to in sub-section (1) shall, among other things, address the following issues: –

(a) accuracy, balance and fairness;
(b) privacy, harassment and subterfuge;
(c) protection of children and scheduling;
(d) portrayal of sexual conduct and violence, and the use of strong language;
(e) treatment of victims and those in grief;
(f) portrayal of criminal or anti-social behaviour;
(g) advertising;
(h) financial issues such as payment for information and conflicts of interest;
(i) discrimination; and
(j) leaked material and the protection of sources.

(3) Individuals may lodge a complaint against the Public Broadcaster for breach of the Code referred to in sub-section (1) and such complaints shall be dealt with by the Public Broadcaster in a fair and balanced manner.

(4) To give effect to sub-section (3), the Public Broadcaster shall establish an internal procedure for processing complaints.

(5) The procedure provided for in sub-section (4) shall provide for a range of remedies appropriate to any breach including rectification of any false statements of fact, a right of reply and apologies.

(6) Lodging an internal complaint shall not preclude an individual from pursuing any other remedies which may be available.[44]

Recommendations:

- A full annual report to the Verkhovna Rada, including information from the annual audit as well as other relevant information described above, should be required by the Law.

[44] *Ibid.*, Articles 25, 26.

- Consideration should be given to implementing a public review mechanism and a complaints procedure, along the lines suggested above.