



Abigail Browne Fellowship – Cullen International

Public service broadcasting at the crossroads of Ukraine and Europe



Olha Hrubá
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Abigail Browne Fellowship 2018

In memory of Abigail Browne, who sadly passed away on 7 May 2015.

We remember her as a dear colleague and friend.

The fellowship remembers Abigail's life and recognises her work in the field of communications regulation, which had a particular focus on European countries outside the EU.



1976-2015

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Olha Hrubá

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Summary

This research assesses the level of independence of the Ukrainian National Public Broadcasting Company against European standards.

The research shows that the Ukrainian Law on PSB provides enough guarantees for the independence of the broadcaster. Nevertheless, the Ukrainian PSB faces numerous challenges because of a lack of political and public support. For instance, despite clear provisions of the Law of Ukraine on PSB which guarantee its stable financing, the Ukrainian government used its budgetary powers to cut the budget of the PSB by 24% in 2017 and by 50% in 2018.

This research shows that the Ukrainian PSB is at a very different stage of development than other PSBs in Europe. PSB in Ukraine has been recently created replacing a state broadcaster. In the EU, where transformation from state into PSB took place in the 70s, PSBs are already adapting to new realities related to digitisation. It seems that Ukraine must jump in the train at full speed. Without appropriate budget for the PSB, this will of course be impossible.

Like in some EU states, the government in Ukraine is trying to use its power to limit the independence of the PSBs due to different reasons. The most common way to do that is through budget cuts and by limiting the powers of independent media regulators.

However, in Europe people in general support existence of a dual broadcasting system (commercial broadcasting together with an independent PSB). The level of trust in traditional media (including PSB) is higher than in a 'new media'.

In Ukraine, where commercial broadcasters are dominant on the market and are often used by politicians and private actors to protect their respective interests, many people do not know what PSB means and cannot estimate its value.

Introduction

This research is aimed to assess independence of PSB in Ukraine in relation to existing European standards. Independence of PSB from state and private actors is an essential feature of PSB which distinguishes it from state and commercial media.

It is crucial to make such an assessment now, when Ukraine is undergoing media reform under the supervision of the Council of Europe (CoE), of which Ukraine is a member, and of the European Union (EU).

According to the EU-Ukraine Association Agreement of 2014, Ukraine should gradually approximate its legislation on audiovisual policy within 2 years of the entry into force of the Agreement.¹ Some important changes have already taken place i.e. launching of a public broadcasting system (that replaces state-controlled broadcasting); adoption of the law on the reform of state-owned and municipal media; the amendments to several laws introducing transparency of media ownership. Ukraine is one of the last countries in Europe (only Belorussia remains) to launch a public broadcasting system.

PSBs now face numerous challenges.² They have to adapt to an increasing competition from online platforms such as Netflix, that enjoys considerably larger budget than any PSB.³ Moreover, the subscription fee for Netflix is almost the same as an average licence fee in Europe. Finally, Netflix-like services are regulated much less than traditional broadcasters. PSBs in Europe therefore need to adapt to the new realities while also fulfilling their public service remit.

Together with an increased competition and the issue of legitimisation, PSB in Europe is facing political pressure. The most straightforward examples are Poland and Hungary where the right-wing governments undermined the independence of PSB by limiting the powers of the national media regulators.

Nevertheless, PSB remains important for the Europeans especially in relation to news and current affairs programmes. A growing amount of online disinformation seems to be increasing trust in traditional media in contrast to online platforms and search engines.⁴

¹Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part [Official Journal L 161 of 29.05.2014].

² Ofcom. Public service broadcasting in the digital age: Supporting PSB for the next decade and beyond. 2018. https://www.ofcom.org.uk/data/assets/pdf_file/0026/111896/Public-service-broadcasting-in-the-digital-age.pdf (Accessed 12.04.2018).

³"Netflix will spend \$12bn-13bn this year—more than any studio spends on films, or any television company lays out on stuff that isn't sport." (How Netflix became a billion-dollar titan. *The Economist*. 04.07.2018. <https://www.economist.com/graphic-detail/2018/07/04/how-netflix-became-a-billion-dollar-titan?fsrc=scn/tw/te/bl/ed/hownetflixbecameabilliondollartitandailychart> (Accessed 04.07.2018)).

⁴European Commission DGs communication. Fake news and disinformation online. 2018. <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/flash/%20survey/ky/2183> (Accessed 12.03.2018).

Results of the referendum in Switzerland and of the public survey in Germany showed that people want a dual system of broadcasting to remain.⁵

This study is drawing a parallel between Europe where PSB is undergoing its second transformation: from PSB to public service media (PSM) and Ukraine where state media has recently transformed into PSB (de facto into PSM).

Methodology

This study is largely based on the findings of the Council of Europe (CoE) Institutional Mapping Analysis in the Sphere of Information Policy and Media in Ukraine (report), presented in September 2016.

While the report contains detailed conclusions and specific recommendations on how to eliminate the *“out-dated, dysfunctional and conflicting remits of the institutions operating in the media and access to information spheres,”*⁶ this study concentrates solely on the issue of independence of PSB.

This study draws on the conclusions and recommendations made by the CoE in its 2016 report in relation to the independence of PSB, including the independence of the national media regulatory authority (NRA). This paper adds some new developments and points at the new issues that appeared in the process of implementation of the legislation on the PSB in Ukraine and during the first year of functioning of the National Public Broadcasting Company of Ukraine (UA: PBC).

This paper is divided into two parts.

The first part describes existing CoE and EU standards in the area of independence of PSB.

For the first (“PSB versus state broadcasting”) and the second sections (“Independence of PSB. European standards”) EU and the CoE legislation were used as the main sources. Desk research was also carried out to analyse the situation in different EU member states.

Among the main reviewed CoE documents were:

⁵European Audiovisual Observatory. Switzerland. Majority want a strong public radio and television service. IRIS 2018-3:1/22. <http://merlin.obs.coe.int/iris/2018/6/article11.en.html> (Accessed 20.03.2018).

⁶Council of Europe (CoE). Strengthening freedom of media and establishing public broadcasting system in Ukraine. Summary of result. <https://rm.coe.int/ukraine-project-2016-2018-media-summary-of-results-vc3369/16808c4093> (Accessed 14.09.2018).

- Resolution on the future of PSB of 1994;⁷
- Recommendation on the guarantee of the independence of PSB of 1996;⁸
- Resolution on the role of public service television in a multi-media society of 1996;⁹
- Recommendation on measures concerning media coverage of election campaigns of 1999;¹⁰
- Recommendation on the independence and functions of regulatory authorities for the broadcasting sector of 2000;¹¹
- Recommendation on PSB of 2004;¹²
- Recommendation on funding of PSB of 2009;¹³
- Recommendation on public service media governance of 2012.¹⁴

Reviewed EU documents:

- Commission Communications on the application of state aid rules to PSB of 2001 and 2009;¹⁵

⁷CoE Resolution on the future of public service broadcasting (adopted on the 4th European Ministerial Conference on Mass Media Policy, Prague, 1994).

⁸CoE Committee of Ministers, Recommendation R(96)10 on the guarantee of the independence of public service broadcasting (Adopted by the Committee of Ministers on 11 September 1996 on the 573rd meeting of the Ministers' Deputies).

⁹ European Parliament Resolution on the role of public service television in a multi-media society [Official Journal C 320 of 28.10.1996].

¹⁰CoE Committee of Ministers, Recommendation R(99)15 on measures concerning media coverage of election campaigns (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e3c6b (Accessed on 12.02.2018).

¹¹CoE Committee of Ministers Recommendation R(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies).

¹²CoE Parliamentary Assembly Recommendation 1641 (2004) on Public service broadcasting (Adopted on the Assembly debate on 27 January 2004 (3rd sitting). <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17177> (Accessed 12.03.2018).

¹³CoE Parliamentary Assembly Recommendation 1878 (2009) on funding of public service broadcasting (Adopted on the Assembly debate on 25 June 2009 (25th Sitting)). <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17763&lang=en> (Accessed 12.03.2018).

¹⁴CoE Committee of Ministers, Recommendation on public service media governance R(2012)1 (Adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cb4b4 (Accessed on 20.03.2018).

¹⁵European Commission Communication on the application of state aid rules to public service broadcasting, 2001 [Official Journal C 320 of 15.11.2001]; European Commission Communication on The application of state aid rules to public service broadcasting [Official Journal C 257 of 27.10.2009]).

- Audiovisual Media Services (AVMS) Directive 2010;¹⁶
- Commission Proposal for a Directive of the European Parliament and the Council amending AVMS Directive of 25.06.2016.

The second part benchmarks Ukrainian legislation on PSB with existing European standards, taking into account how the national legislation has been applied in practice.

For the third (“Media landscape in Ukraine”), the fourth (“Assessment of the independence of UA: PBC in relation to the European standards”) and the fifth (“The lack of appropriate financing that undermines the functioning of the UA: PBC”) sections Ukrainian legislation was analysed and interviews were carried out with the Ukrainian media experts during the 4th week of February 2018.

During the week of 26th of February in Ukraine I attended a round table “Financing models for public service media: International experience and Ukrainian context” organised by the CoE and the National Council on Television and Radio Broadcasting (media regulator) of Ukraine. The discussion developed around the alternative ways of financing of the UA: PBC. Information obtained at the round table was used for the fifth section of the study.

Among the analysed national legislation were:

- Law of Ukraine on Television and radio broadcasting of 1994;¹⁷
- Law of Ukraine on Advertising of 1996;¹⁸
- Law of Ukraine on The National Council on Television and Radio Broadcasting of 1997;¹⁹
- Law of Ukraine on Radio frequency resource of 2000;²⁰
- Law of Ukraine on Public television and radio broadcasting of 2014;²¹
- Law of Ukraine on The State Budget for 2018;²²

¹⁶Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [Official Journal L 95 of 15.04.2010].

¹⁷Law of Ukraine on Television and radio broadcasting of 1994 as amended by the law on Amendments to some laws of Ukraine on ensuring transparency of media ownership and implementation of the principles of state policy in the field of television and radio broadcasting (The Vidomosti Verkhovnoi Rady (VVR), 2015, No.45, page 409).

¹⁸Law of Ukraine on Advertising (The Vidomosti Verkhovnoi Rady (VVR), 1996, No.39, page 181) (As amended in accordance with the Law No 2484-VIII of 26.07.2018).

¹⁹Law of Ukraine on The National Council on Television and Radio Broadcasting of Ukraine (The Vidomosti Verkhovnoi Rady (VVR), 1997, No.48, page 296) (As amended in accordance with the Law N 2415-VIII from 15.05.2018).

²⁰Law of Ukraine on Radio frequency resource of Ukraine (The Vidomosti Verkhovnoi Rady (VVR), 2000, No.36, page 298) (As amended in accordance with the Law No 2244-VIII of 11.02.2018).

²¹Law of Ukraine on Public television and radio broadcasting (The Vidomosti Verkhovnoi Rady (VVR), 2014, No.27, page 904) (As amended in accordance with the Law№ 2210-VIII from 16.11.2017) (further, Law of Ukraine on PSB).

²²Law of Ukraine on The State Budget of Ukraine for 2018 (The Vidomosti Verkhovnoi Rady (VVR), 2018, No.3-4, page 26) (As amended in accordance with the Law No 2513-VIII of 22.08.2018).

- Decision of the National Council on Television and Radio Broadcasting on The procedure of electing and dismissing of the members of the Supervisory Board of 2015.²³

Interviewees:

- Tatjana Lebedeva, Head of Supervisory Board of the UA: PBC of Ukraine;
- Heads of the departments of the National Council on Television and Radio Broadcasting of Ukraine i.e. departments of: licencing, legal affairs, monitoring, radio frequencies and press;²⁴
- Ihor Rozkladai, Media Lawyer of the Centre for Democracy and Rule of Law of Ukraine, Chief Expert of the Media Reform Group of the Reanimation package of reforms

²³Decision of the National Council on Television and Radio Broadcasting of Ukraine of 21.05.2018 No 707 on The procedure of holding the conferences of civil society organizations, electing and dismissing the members of the Supervisory Board of the public joint stock company UA: PBC {As amended in accordance with the decision of the National Council No 593 of 26.04.2018}.

²⁴Press department is competent in holding conferences on the election of members of the Supervisory Board nominated by the civil society organisations.

I. Public broadcasting versus state broadcasting

This part shortly describes what PSB is and what makes it different from the state broadcasting. It speaks about the role of PSB in the society, about the challenges it faces and the level of trust in Europe to PSB. It does not cover the community media since this research concentrates on a transformation from state broadcasting to PSB. The term public service media covers a broader variety of platforms and technical devices on which TV content can be viewed, however I am using the term PSB which is more often used in the CoE and EU documents.

A. From state monopoly to PSB

From its beginning in the 1920s and until the 1980s broadcasting was a state monopoly in Western Europe. Such monopoly was justified by “public good characteristics”²⁵ attributed to broadcasting and to radio frequencies’ scarcity. Only Luxembourg had no state broadcasting, instead two commercial broadcasters, CLT and RTL, had private monopoly positions there until 1991.²⁶

In 1970, European countries started to licence commercial broadcasters. Despite opening the broadcasting market to a competition, PSB was maintained “as a way to ensure the coverage of a number of areas and the satisfaction of needs that private operators would not necessarily fulfil to the optimal extent.”²⁷

Coexistence of commercial broadcasters together with a state funded broadcaster raised an issue of a level playing field. Most of the complaints, brought to the European Commission by private actors, alleged infringements of EU rules in relation to the public funding schemes established in favour of PSBs (see below Funding model. EU standards).²⁸

Post-communist governments in Central and Eastern Europe started licencing private broadcasters and transforming state broadcasters into PSB in the 1990s.²⁹

In the United States, on the opposite, commercial broadcasting appeared prior to state broadcasting. According to ‘a free market of ideas’ rationale in the US, the market ought to secure a free flow of content and ideas. The Corporation of public broadcasting was established in 1967 by the Public Broadcasting Act.³⁰

²⁵Donders, Karen. *Public service media and policy in Europe*, p.9.

²⁶Ibid, pp. 9-10.

²⁷European Commission Communication on the application of state aid rules to public service broadcasting, 2001 [Official Journal C 320 of 15.11.2001].

²⁸Ibid. European Commission issued a new communication on the application of state aid rules to PSB in 2009. The latter communication addresses the development of new digital technologies and of Internet-based services.

²⁹CoE report on institutional mapping analysis in media in Ukraine, p.29.

³⁰Hoyne, William. Public Broadcasting for the 21st Century: Notes on an Agenda for Reform. *Critical Studies in Media Communication* 24, no.4 (2007):370-376. doi: [10.1080/07393180701560955](https://doi.org/10.1080/07393180701560955)

B. Defining PSB

For defining PSB it might be useful first to determine how PSB is different from state and commercial broadcasting.

While the commercial model is rooted in the idea that market powers can respond to consumer tastes and denies any intrusion of the state,³¹ PSB and state broadcasting involve (some) state control.

So, what is PSB and what makes it different from the state broadcasting? With PSB, the state, while in many cases still funds PSB, is barred from exercising any kind of editorial control over its content.

PSB in contrast to state media and commercial media is supposed to be independent from state and private actors.

Like this, Article 19 and the Helsinki Foundation for Human Rights (HFHR) define PSB as:

*“an independent media company which is funded by the public, with a board appointed by public bodies, to broadcast public interest content – contribute to pluralism and diversity in media landscape. In combination with commercial and community media it is an essential component of a balanced media landscape.”*³²

C. Mission and principles of PSB

C.1. PSB as a source of a trustworthy information

In Europe, an exemplary model of PSB is the BBC formed in 1922. From the very beginning its mission was to inform, educate and entertain all people regardless of their social and economic class. The core goal of BBC was to make people interested in politics so that they could form their political decision.³³

³¹The United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Radio and Television Council. Public broadcasting - Why, How? <http://unesdoc.unesco.org/images/0012/001240/124058eo.pdf> (Retrieved 12.03.2018).

³²Article 19 and the Polish Helsinki Foundation for Human Rights (HFHR). Poland: independence of public service media.2017. <http://www.hfhr.pl/wp-content/uploads/2017/02/170208-PolandMediaA19HRHF.pdf> (Accessed 13.04.2018).

³³Genders, Amy. A brief history of public service broadcasting [Video file].2015 https://www.youtube.com/channel/UC_mVGKIFmonFhjtTM3QwBcA

According to Vienna Declaration of 1993, “A primary mission of public broadcasting should be to inform people of the issues – past, present and future – that are of direct concern to them.”³⁴

Providing trusted and impartial news remains one of the most important tasks of the PSB. This role is even more important today, when the world including Europe is fighting online disinformation or fake news. According to Varade Publictseerije, Commissioner for Human Rights in the CoE,

*“The problem of disinformation will not be solved by restricting content or by arbitrary blocking, but by ensuring that the public has access to impartial and accurate information through public broadcasters which enjoy their trust.”*³⁵

Due to a growing amount of online disinformation, trust in new media (online platforms, search engines) has been reduced.³⁶

According to the Digital News Report 2018 by Reuters,

*“Public broadcasters and their websites tend to have the highest trust scores [...], at least in countries where their independence is not in doubt.”*³⁷

C.2. PSB as a quality standard and marketplace for opinion

Programming of PSB should have high ethical and quality standards, serve as a national point of reference and a marketplace for public opinion.³⁸

Universality, diversity, independence and distinctiveness are essential goals for PSB.³⁹ It means that PSB should:

- be available in the whole country, ensuring that everyone can understand and follow its programming for free;
- offer different types of programmes for different groups of population;

³⁴International Press Institute (IPI). The Vienna Declaration on Public Broadcasting (passed at the IPI European Media Symposium "From State-Controlled Broadcasting to Public Broadcasting", Vienna, Austria, 1993).

³⁵CoE. Human rights comments. Public service broadcasting under threat in Europe.2017. <https://www.coe.int/et/web/commissioner/-/public-service-broadcasting-under-threat-in-europe?inheritRedirect=true> (Accessed 12.04.2018).

³⁶European Broadcasting Union (EBU). Market insights. Trust in media 2018.

³⁷Nic Newman with Richard Fletcher, Antonis Kalogeropoulos, David A. L. Levy and Rasmus Kleis Nielsen. *Digital News Report 2018*. Reuters Institute for the Study of Journalism (RISJ) 2018. <http://media.digitalnewsreport.org/wp-content/uploads/2018/06/digital-news-report-2018.pdf?x89475> (Accessed 01.09.2018).

³⁸CoE Resolution on the future of public service broadcasting of 1994; European Parliament Resolution on the role of public service television in a multi-media society of 1996.

³⁹UNESCO and World Radio and Television Council. Public broadcasting - Why, How?

- be independent from political pressure or any private entities to serve its role of a platform “*where ideas should be expressed freely, where information, opinions and criticisms circulate.*”⁴⁰
- be distinct from other broadcasting audiovisual media services.⁴¹

According to the European standards, PSB plays an active role in promoting national culture and increasing the knowledge of the population of foreign and especially European countries.⁴² Like this, PSB is often subject to higher quotas in relation to showing European works and works in the national languages.⁴³

European states abide differently to the above rules, depending on their legal systems and traditions, territory, diversity of the population, social realities etc.⁴⁴ E.g., the BBC should be of high quality, original, innovative, challenging and widely available, it must ensure that certain types of programmes are made that would be less provided if left to the market alone (i.e. arts, religion, classical music, and original children’s TV). Besides that, BBC should provide trusted and impartial news, UK originated content addressed to different communities and nations of the UK, and distinctive programmes.⁴⁵

An interesting example is the Estonian PSB which operates a Russian-speaking TV channel launched in 2015. The channel is aimed at better inclusion of ethnic Russians living in Estonia into Estonian society and “*to provide alternative viewpoints to those of Russian channels.*”⁴⁶

In Finland, public service programming must among others:⁴⁷

- produce, create and develop Finnish culture, art and inspiring entertainment;
- take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and study, give focus on programming for children, and offer devotional programmes;

⁴⁰Ibid.

⁴¹Ibid.

⁴² EBU. Public service broadcasting model law.2007 p.3.

⁴³Audiovisual Media Services Directive imposes an obligation on the broadcasters to dedicate at least 50% of their transmission time to European works.

⁴⁴EBU. Public service broadcasting model law, p 3.

⁴⁵Ofcom. Public service broadcasting in the digital age: Supporting PSB for the next decade and beyond. 2018.

⁴⁶Estonian pubcaster expanding reach of Russian-language channel.*Digital TV*.1.05.2018.

<https://www.digitaltveurope.com/2018/05/01/estonian-pubcaster-expanding-reach-of-russian-language-channel/>

(Accessed on 09.06.2018).

⁴⁷Rai. Report on Public audiovisual services in Europe.2011.

- treat in its broadcasting Finnish-speaking and Swedish-speaking citizens on equal grounds and produce services in the Sami, Romany, and sign languages as well as, where applicable, in the languages of other language groups in the country.

D. Challenges for PSB

D.1. Political pressure

Strong and independent PSB plays a key role in guaranteeing democracy and the rule of law. Results of the study conducted by the European Broadcasting Union (EBU) show that countries with a strong PSB face less right-wing extremism and corruption and enjoy more press freedom.⁴⁸

Governments' attempts to turn public broadcasting into state broadcasting remain widespread in Europe.⁴⁹ The most obvious examples are Poland and Hungary where the right-wing governing parties targeted independence of the judiciary and limited media freedom.⁵⁰ The European Commission started infringement procedure against Poland to protect the independence of the Polish Supreme Court⁵¹ and in September 2018 the EU Parliament called on the Council of the EU to act against Hungary *"to prevent a systemic threat to the Union's founding values."*⁵²

In Poland it is widely reported that the reform of PSB in 2016 put PSB under a direct control of the government and limited the powers of the National Broadcasting Council (constitutional media regulator). Since December 2015 the Polish government has put in place a series of legislative measures aimed at limiting independence of PSB. Among them, the power to appoint and dismiss the senior manager of PSB, which was in the hands of the National Media Council.⁵³

Similarly, in Hungary, it is reported that PSB became one of the first targets of the FIDESZ party (party of the current prime minister Victor Orban) which obtained a two thirds

⁴⁸EBU. PSM correlations: links between public service media and societal well-being.2010. <https://www.ebu.ch/publications/psm-correlations-public-version> (Accessed 12.03.2018).

⁴⁹CoE. Public service broadcasting under threat in Europe. Human rights comments. 2017. <https://www.coe.int/et/web/commissioner/-/public-service-broadcasting-under-threat-in-europe?inheritRedirect=true> (Accessed 12.03.2018).

⁵⁰Grzymala-Busse, Anna. Poland's right-wing government has a new prime minister. Here are the 5 things you need to know. *The Washington Post*. 12.12.2017. https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/12/polands-right-wing-government-has-a-new-prime-minister-here-are-the-5-things-you-need-to-know/?noredirect=on&utm_term=.6c8fc334385a (Accessed 15.03.2018).

⁵¹Commission launches infringement procedure to protect the independence of the Polish Supreme Court. European Commission press release. http://europa.eu/rapid/press-release_IP-18-4341_en.htm (Accessed 15.09.2018).

⁵²Rule of law in Hungary: Parliament calls on the EU to act. European Parliament press room. <http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act> (Accessed 15.09.2018).

⁵³Article 19 and the HFHR. Poland: independence of public service media.

majority in the parliament in 2010. National Media and Infocommunications Authority (media authority) with its “*vulnerability to political influences*,”⁵⁴ obtained managing powers over MTVA – organization bundling all public broadcasters whose leader is the leader of the media authority.⁵⁵

Besides limiting the powers of the media regulator, governments can also limit the powers of PSB by reducing its budget. It is important to note here, that in Europe, PSB depends mostly on public financing (from the state budget or a licence fee).

Budget cuts took place, among other, in Bulgaria (2015) and are analysed widely as a reaction to the PSB coverage of the anti-governmental protests. Significant budget cuts also took place in Romania (2016) and the Netherlands (2018).⁵⁶ Despite the decrease of the revenues from advertising from €218mln in 2014 to €178mln in 2018, the Dutch minister for media reduced the budget of PSB by €62mln.⁵⁷

In Denmark, the centre right government decided in March 2018 to cancel within a five-year period a licence fee for its public broadcaster, which constitutes 20% of the broadcaster’s budget.⁵⁸

D.2. Online competition

Besides political pressure, traditional media including PSB has to adapt to the new viewing trends. A study by Ofcom, the media regulator in the UK, shows that young people prefer watching on-demand television instead of a scheduled TV and this is a permanent trend. More youngsters have a less brand awareness of some traditional broadcasters, including PSB than of YouTube and Netflix.⁵⁹

Regarding the reduced regulation of video streaming services in contrast to broadcasters, Tony Hall, the BBC’s Director General, said “*the UK’s media industry is competing against global giants with one hand tied behind its back.*”

⁵⁴CoE. Hungary: progress needed on media freedom, anti-discrimination measures and migrants’ rights. <https://www.coe.int/sl/web/commissioner/-/hungary-progress-needed-on-media-freedom-anti-discrimination-measures-and-migrants-rights> (Accessed 12.09.2018).

⁵⁵Dunai, Marton. How Hungary’s government shaped public media to its mould. *Reuters*. 12.02.2014. <https://www.reuters.com/article/us-hungary-media-insight-idUSBREA1I08C20140219> (Accessed 15.03.2018).

⁵⁶CoE. Public service broadcasting under threat in Europe. Human rights comments.

⁵⁷Who else will speak up for the public broadcasting? *Financial Times*. 21.07.2018 [in Dutch]. https://fd.nl/weekend/1261451/wie-neemt-het-nog-op-voor-de-publieke-omroep?utm_source=nieuwsbrief&utm_campaign=fdochtendnieuwsbrief&utm_medium=email&utm_content=20180721&s_cid=671 (Accessed 21.07.2018).

⁵⁸Denmark to scrap mandatory public service broadcasting fee. *Reuters*. 05.04.2018. <https://www.reuters.com/article/us-denmark-media/denmark-to-scrap-mandatory-public-service-broadcasting-fee-idUSKCN1HC1TR> (Accessed 06.09.2018).

⁵⁹Ofcom. Public service broadcasting in the digital age: Supporting PSB for the next decade and beyond.

The CoE in its recommendation of 2004 already said:

*“[PSB] is suffering an identity crisis, as it is in many instances striving to combine its public service obligations with chasing ratings and the need to secure an audience to justify its public character or simply to attract advertising revenue.”*⁶⁰

A public debate on reforming PSB is on-going in a number of countries, among others in the UK, the Netherlands and France. In France, PSB is already undergoing a reform and it must make savings of €160mln by 2022 (compared with the 2018 budget). Besides that, according to the proposed budget of the French PSB, the whole sector will face a decrease of €36mln, which corresponds to reduction of 1% of the total budget (€3.86bn) compared with 2018.⁶¹ The reforms are aimed among others to make PSBs more competitive online. Like this, a new “telemedia” remit for PSB has also been introduced in Germany.⁶²

D.3. Public opinion on the importance of PSB

Despite political pressure and technological challenges, traditional media remains the most trusted source of news. Recent referendum in Switzerland showed that population wants to have PSB, albeit reformed.

According to a Eurobarometer survey, citizens perceive traditional media as the most trusted sources of news: radio (70%), television (66%) and print newspapers and news magazines (63%). The least trusted sources of news are video hosting websites (27%) and online social networks (26%). Younger respondents however are more likely to trust news and information they access online.⁶³

Results of a survey published in Cologne on 4 May 2018 on behalf of the private media group, RTL, show that 74% of German citizens are in favour of maintaining the coexistence of public and commercial broadcasters. However, only half of those surveyed believe that public broadcasters fulfil their programme mandate well or very well.⁶⁴

Similarly, in Switzerland 71,6% of the population voted against a proposal to cancel a licence fee for PSB which constitutes 75% of its funding. Surprisingly, many young people,

60CoE Recommendation on public service broadcasting.

61Cullen International. French PSB to face cuts. Country update. 01.10.2018.

62Cullen International. Public service broadcasters’ online remit to be amended. Country update. 26.07.2018.

63European Commission DGs communication. Fake news and disinformation online. 2018.

<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/flash/%20survey/ky/2183> (Accessed 12.03.2018).

64Cullen International. Majority of German citizens support dual broadcasting system. Country update. 23.05.2018.

<https://www.cullen-international.com/product/documents/sections/?section=4e321884-250d-4ae7-bbcc-37ff15754ac9&orderBy=country&uniqueNumber=B5MEEU20180003> [restricted access] (Accessed 15.09.2018).

Results of the survey are available here: <http://meedia.de/2018/05/04/forsa-umfrage-von-rtl-weniger-als-die-haelfte-der-deutschen-sieht-programmauftrag-der-oeffentlich-rechtlichen-sender-erfuellt/>

*“a Netflix generation,”*⁶⁵ also voted against the proposal. Nevertheless, 58% of those who voted on the referendum want PSB to be reformed and downsized.⁶⁶

D.4. Provisional conclusions

PSB started in Europe in 1920s as a state monopoly which lasted until 1970s. With the liberalization of the market, commercial broadcasters started sharing the audience with PSBs. Now PSB is transforming again: from public broadcasting into public service media, covering more technologies and platforms.

PSB is different from state broadcasting (from which it derived) because the state is now barred from exercising any kind of editorial control over its content. In contrast to state and commercial media, PSB is supposed to be independent from both state and private actors. At the same time, together with commercial and community media, PSB forms a balanced media landscape.

In addition to that, PSB has a special mission and principles, in contrast to commercial broadcasters. Universality, diversity, independence and distinctiveness are essential goals of PSB while its main mission remains providing trusted and impartial news.

PSB in Europe has been facing challenges since the very beginning, they became acute, first, when the purpose of PSB had to be justified in a liberalised market and now, when PSB and broadcasters in general face increased competition from online platforms like Netflix.

Probably the biggest challenge for PSB is a political pressure. A link could be seen between undemocratic developments in the states and limitation of the powers of PSB. Like this, in Poland and Hungary, the independence of PSBs was usurped by exercising governmental control over PSBs while limiting the powers of the national media regulator. Another form of political pressure is a reduction of public financing of the PSB.

⁶⁵European Audiovisual Observatory. Switzerland. Majority want a strong public radio and television service.

⁶⁶ibid.

II. Independence of PSB. European standards

This part describes existing European standards in relation to the independence of PSB i.e. rules on independent governance and management, on independent editorial policy and sufficient financing for PSB. Principles to guarantee the independence of the national media regulatory authority (NRA) are also described here because the level of independence of the latter body has a direct influence on PSB.

The CoE issued a number of declarations, resolutions and recommendations in relation to the impedance of PSB and the NRAs. Although these are non-binding, they play a significant role in influencing best practice.

On the EU level, the role of PSB for democracy and media pluralism is recognised in the Amsterdam Protocol. According to the EU law, PSB is a competence of member states which means that the EU cannot act in this area. Member states themselves decide on the remit of PSB, its organization and funding.

However, EU is competent in creating and maintaining a single EU market. Like this, EU actions are aimed at the creation of a single market in broadcasting through harmonization rules. The Television Without Frontiers (TVWF) Directive (1989) which was substituted by the AVMS Directive (2010) with amendments from 2018 and competition law principles are the main instruments to reach this harmonization.⁶⁷

The TVWF Directive introduced two main principles in the EU law: the freedom of reception/retransmission⁶⁸ and the requirement to linear TV services to reserve more than a half of the transmission time to European works. In the 2010 Directive the scope was extended to on-demand services. These directives do not specifically address PSB.

According to the EU competition rules, European Commission is competent to approve the national funding schemes for PSB under state aid rules (see below part on Funding model. EU standards).

International principles

According to the Vienna Declaration, PSB should be independent from political and commercial pressure. This should be assured by constitutional and statutory measures.⁶⁹ The Declaration is a non-binding instrument adopted at the International Press Institute (IPI) European Media Symposium "From State-Controlled Broadcasting to Public Broadcasting" in Vienna in 1993.

According to the CoE principles, to be independent, PSB should:

⁶⁷Donders. *Public service media and policy in Europe*, p.16.

⁶⁸On the CoE level, the same principle is stipulated in the European Convention on Transfrontier Television of 1989. 69 IPI. The Vienna Declaration on Public Broadcasting <https://ipi.media/the-vienna-declaration-on-public-broadcasting/> (Accessed 15.03.2018).

- enjoy independent governance, management and editorial policy; and
- have sufficient funding which is independent from state and private pressure.

Besides that, there should be an independent regulatory authority i.e. a public body that oversees the broadcast media sector in the country.

A. Independent governance and management

The following sections derive from requirements contained in the CoE recommendations.

A.1. Governing body

PSB should be governed by an independent body, e.g. supervisory board.⁷⁰

The supervisory board ensures that PSB fulfils its public service remit and protects it against interference.⁷¹ It is responsible for appointing senior management of PSB (see below).⁷²

According to the European standards:

- powers, goals and responsibilities of the supervisory board should be clearly stated in law;
- the supervisory board must represent the interests of society and be accountable to the society;
- members of supervisory body must be appointed in an open and pluralistic manner, they may not directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with their functions within the supervisory body;
- the supervisory board is only accountable to the independent media regulator and society;
- the supervisory board should respect a principle of editorial independence of PSB and never apply prior censorship.

A.2. Senior management

⁷⁰CoE Committee of Ministers, Recommendation No. R(96)10 on the guarantee of the independence of public service broadcasting.

⁷¹Article 19. A model public service broadcasting law. 2018. <https://www.article19.org/wp-content/uploads/2018/02/model-psb-law.pdf> (Accessed 12.04.2018).

⁷²CoE Recommendation on the guarantee of the independence of PSB.

Senior management is responsible for running the daily tasks of the PSB, including programming matters.⁷³

According to the European standards, members of management board:⁷⁴

- are appointed in an open and fair way;
- are required to have certain qualifications and experience;
- may not directly or indirectly exercise a function, receive payment or hold interest in enterprises or other organizations in media or media related sectors where this would lead to a conflict of interest with the management functions;
- are only accountable for the exercise of their functions to the supervisory board;
- have the right to written reasons for disciplinary actions against them, including dismissal, and for a judicial review of such actions.

B. Independent editorial policy

As mentioned before, one of the main features that distinguishes public broadcaster from the state broadcaster is that the former enjoys editorial independence from the state and private actors. Moreover, editorial independence of PSB should also be respected inside the broadcasting company: as mentioned before, the supervisory body should respect editorial independence of PSB and should never apply prior censorship.⁷⁵

According to the CoE recommendation, the funding system of PSB set by the state as well as the process of deciding the level of funding should not be able to interfere with the PSB's editorial autonomy.⁷⁶

Editorial independence should be respected by political actors, especially during elections but also in a period before elections. According to the CoE principles, paid political advertising on PSB can be allowed only when advertising space is available to all parties, on equal conditions and payment rates. In addition to that, public should be aware that the message is a paid political advertising.⁷⁷ Similar rules should also apply to free airtime allocated to political parties/candidates on PSB.⁷⁸

⁷³Ibid.

⁷⁴Ibid.

⁷⁵CoE Recommendation on the guarantee of the independence of PSB.

⁷⁶CoE Committee of Ministers, Recommendation on public service media governance.

⁷⁷CoE Committee of Ministers, Recommendation No R(99)15 on measures concerning media coverage of election campaigns of 1999.

⁷⁸Ibid.

There is no common approach in Europe regarding showing political advertising on television in a non-election period. In more liberal countries like Finland, Poland, Spain, Sweden and the Netherlands, political advertising can be shown on television against a payment but often, there can be no payment to PSB. France, Germany and the UK ban paid political advertising altogether. Italy has a concept akin to political advertising but on national television no payment can be sought. Only local commercial broadcasters can be paid to air such content.⁷⁹

Finally, the NRAs should refrain from influencing editorial decisions of the audiovisual media services, including PSB, which goes beyond what is provided by law.⁸⁰ This leads us to the next chapter which concerns the independence of the NRA itself.

C. Independent media regulatory authority

C.1. CoE standards

Together with internal independence, not less important is the independence of the NRA responsible among others for granting broadcasting licences, monitoring the activity of broadcasters, including of PSBs, examining complaints against broadcasters (including PSBs) and imposing sanctions.⁸¹

The CoE encourages member states to establish independent NRAs for the broadcasting sector.⁸²

To be independent, NRAs should:

- be legally distinct and functionally independent from their respective governments and other public or private bodies. This however does not preclude supervision by the state in accordance with the national constitutional law. NRAs can also be constituted as public authorities or bodies;
- have their competences and powers set by law;

⁷⁹Cullen International. Political/government advertising on television - Regulatory focus. Cross-country table. 07.22.2018 <https://www.cullen-international.com/product/documents/CTMEEU20180060> [restricted access] (Accessed 09.04.2018).

⁸⁰CoE Committee of Ministers, Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector.

⁸¹ibid.

⁸²ibid.

- exercise their power impartially and transparently and without taking instructions from other persons and bodies;
- have adequate enforcement powers, separate budget and adequate financial and human resources.

C.1.a) Appointment, composition and functioning

The CoE in its report points that *“there is no ‘right’ way to go about the appointment of members to a regulatory authority. However, what should be avoided is an appointments process which is based on political favour, or left solely to Presidential, Ministerial or Governmental discretion.”*⁸³

The rules governing the NRAs, especially the rules on membership is a core of their independence.⁸⁴ According to European standards, in the independent NRAs:⁸⁵

- the process of appointing the members allows for public participation and consultation;
- members of regulatory authorities do not exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority;
- dismissal of the members is possible only in case of non-respect of the rules of incompatibility or incapacity to exercise their functions. Such decision is subjected to a judicial review.
- dismissal on the grounds of an offence is only possible in serious instances clearly defined by law, subject to a final sentence by a court.⁸⁶

C.1.b) Funding

According to the CoE standards,

⁸³Article 19, Helsinki Foundation for Human Rights. Country report. “Poland: Independence of Public Service Media”, January 2017, p49.

⁸⁴CoE Committee of Ministers, Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322 (Accessed 12.03.2018).

⁸⁵Article 19, HFHR. Country report. “Poland: Independence of Public Service Media.”

⁸⁶CoE Recommendation on the independence and functions of regulatory authorities for the broadcasting sector.

“arrangements for funding [of the NRA] should be specified in law in accordance with a clearly defined plan, and with reference to a transparent budgeting process.”⁸⁷

The CoE also recognises that the best method for funding the broadcasting regulator is having its costs paid by the industry it regulates through licence and other fees.⁸⁸ However, this applies only to the countries with a sufficiently large broadcasting industry. If it is not the case, a part of funding should be paid from the state budget.⁸⁹

C.1.c) Accountability

NRA should be accountable before public for its actions and to justify its receipt of public funds. To this end, the regulator should publish regular or ad hoc reports on its activities.⁹⁰

C.2. EU framework

In the current AVMS Directive there is only a mention of independent NRA, but member states are not obliged to have one according to the Directive.⁹¹

According to the INDIREG study (a study conducted on behalf of the European Commission in 2011),

“A regulator is independent if its governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary.”⁹²

The newly adopted AVMS Directive, which will be transposed into national legislation 21 months after its publication in the official journal, introduces an obligation for member states to have independent NRA and contains a list of requirements for its independence which are similar to those of the CoE.⁹³

D. Funding model

D.1. Council of Europe standards

⁸⁷CoE report on institutional mapping analysis in media in Ukraine, p50.

⁸⁸Ibid, p.51.

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹AVMS Directive, Art.30, recitals 94,95.

⁹²INDIREG: Indicators for independence and efficient functioning of audiovisual media services regulatory bodies. 2011. <https://www.indireg.eu/> (Accessed on 12.03.2018).

⁹³Commission Proposal for a Directive of the European Parliament and the Council amending AVMS Directive, 2016 COM/2016/0287 final - 2016/0151 (COD), 25.05.2016, Art. 30. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618463840&uri=COM:2016:287:FIN> (Accessed 12.03.2018).

Stable and adequate funding is one of the core principles for public funding of PSB. Such funding must be independent from political interference, fair and justifiable, transparent and accountable.⁹⁴

The CoE recognises the sole competence of the states in setting the level and the method of funding of PSB. The CoE however stipulates that PSBs should be consulted over the level of funding and the funding provided should be adequate to meet the agreed role and remit of PSB. Besides that, such funding should offer a sufficient security for future planning.⁹⁵

D.2. EU standards

Financing of PSB is not covered in the AVMS Directive and is a matter for member states to decide. However, the European Commission is competent to control if state funding is compliant with EU competition rules (so-called state aid rules). The Commission checks if such funding:⁹⁶

- is granted for the fulfilment of the public service remit; and
- does not affect trading conditions and competition in the Community to an extent that would be contrary to the common interest, while taking into account the realisation of the remit of that public service.

Already in the 1980s when the market was liberalised, the Commission received complaints from the private broadcasters regarding state funding received by public broadcasters. As a result, in 2001 Commission issued its first communication on the application of state aid rules to PSB. Its second communication that covered digital services of PSBs, was published in 2009. This communication suggests that member states should set up an ex ante screening procedure to evaluate whether “significant new services”,⁹⁷ can be part of the public service remit and receive state support.

D.3. Financing models in EU

⁹⁴Burnley, Richard. Public funding principles for public service media. EBU. 2017. https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Pub-Fund_EN.pdf (Accessed 20.03.2018).

⁹⁵CoE Recommendation on public service media governance.

⁹⁶Commission Communication on state aid 2001.

⁹⁷It is up to the member state to decide what qualifies as a significant new service (where the significance of the service may consider e.g. the financial resources required for its development and the expected impact). (Communication from the Commission on the application of State aid rules to public service broadcasting [Official Journal C 257 of 27.10.2009]).

PSB is often financed from public funding that may be provided via:

- a licence fee model (a levy on broadcasting equipment holders); or
- direct receipt of public funds from the state budget.⁹⁸

According to the Audiovisual Observatory, revenues of the PSB in the EU in 2016 consisted mostly from public funding. On average, among the 28-EU member states, public funding constituted 78% of the total revenues of PSB.

While funding from state budget is more common in Eastern Europe, Western and Southeast Europe prefers the licence fee model.

Most of the countries have a dual or mixed funding, a so-called funding pot, where the PSB is financed by different combinations of state funds and revenues from commercial or public service activities, such as sale of advertising space or programmes and the offering of services against payment.⁹⁹

The CoE envisages the following sources of funding:¹⁰⁰

- flat broadcasting licence fee,
- taxation,
- state subsidies,
- advertising and sponsoring revenues,
- specialised pay-per-view or on-demand services,
- sale of related products

More recent financing sources for PSB include:¹⁰¹

- online advertising;
- provision of pay services (such as access to archives for a fee; special interest TV channels on a pay-per-view basis, paid online content downloads etc);
- payment of network distribution fees or copyrights by platforms etc.

D.4. Licence fee model, its advantages and disadvantages

⁹⁸Burnley, Richard. European Broadcasting Union. Public funding principles for public service media. 2017. https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Pub-Fund_EN.pdf (Accessed 20.03.2018).

⁹⁹Commission Communication on state aid 2009.

¹⁰⁰CoE Parliamentary Assembly, Recommendation 1878 (2009) on funding of public service broadcasting

¹⁰¹Commission Communication on state aid 2009.

The licence fee remains the main source of funding for PSBs in Europe, providing at least 2/3 of the funding mix of PSB organisations.¹⁰² It is said to have several advantages compared to an allocation from the state budget:¹⁰³

- it is usually more predictable than an annual allocation from the state budget;
- there is more space for self-administration; and
- it fosters more direct contact with the public (licence fee payers).

At the same time, there is a risk of the unnecessary pressure from the state, since government or parliament can change the size of the licence fee. Thus, it is important to make sure that if such changes take place, they are transparent and grounded on objective factors.¹⁰⁴

The justification for collecting a licencing fee based on the possession of a radio or TV set can be perceived as unfit for today's multi-channel environment.¹⁰⁵

Finally, according to the EBU, direct funding from the state budget in a form of a specific amount (e.g. a percentage of GDP) is more adequate for new or emerging democracies than "*a complex system*"¹⁰⁶ like the licence fee.

The licence fee model is challenged by the growing popularity of the video sharing platforms like Netflix which has almost the same subscription fee price as the average licence fee. Average licence fee in Europe is €10, 3 per month¹⁰⁷ while basic monthly fee for Netflix is €7.99 EUR and premium – €13,99 (price in Belgium).

D.4.a) National perspectives on a licence fee

According to the survey published in Cologne on 4 May 2018 on behalf of the media group, RTL, the broadcasting fee in Germany, which currently amounts to €17.50 per household per month, is controversial because only 44% of German citizens consider this amount appropriate.¹⁰⁸

¹⁰²EBU. Licence fee 2017. [https://www.ebu.ch/files/live/sites/ebu/files/Publications/MIS/login_only/funding/EBU-MIS_Licence-Fee-2017-\(Public%20version\).pdf](https://www.ebu.ch/files/live/sites/ebu/files/Publications/MIS/login_only/funding/EBU-MIS_Licence-Fee-2017-(Public%20version).pdf) (Accessed 20.03.2018).

¹⁰³EBU. Public service broadcasting model law, p 5.

¹⁰⁴Ibid.

¹⁰⁵Ibid, p.6.

¹⁰⁶Burnley, Richard. Public funding principles for public service media. EBU.

¹⁰⁷EBU. Licence fee 2017.

¹⁰⁸Cullen International. Majority of German citizens support dual broadcasting system. Country updates. 23.05.2018. <https://www.cullen-international.com/product/documents/sections/?section=4e321884-250d-4ae7-bbcc-37ff15754ac9&orderBy=country&uniqueNumber=B5MEEU20180003> [restricted access] (Accessed on 23.05.2018).

In the report on the Future Funding of Public Service Broadcasting,¹⁰⁹ the Irish Parliamentary Committee on Communications recommends a household-based licence fee instead of the fee based on the possession of the traditional TV set. With the new approach every household consuming media would be captured, regardless of the technology used.¹¹⁰ The Committee also recommends introduction of the retransmission fees (fees paid by pay-television platforms to broadcasters for the right to distribute or retransmit the broadcasters' channels).¹¹¹

According to the Cullen International cross-country analysis, in some EU countries (such as UK, Spain, Poland, France) PSBs are not allowed to charge retransmission fees from platform operators. In some countries (such as Finland and the Netherlands) this question is not regulated and is subjected to contractual agreements. In Germany, on the contrast, cable network operators argued that PSBs must pay distribution fees. Italian media regulator AGCOM confirmed the right for RAI (Italian PSB) to require compensation in view of the (economic) interests of Sky Italia in offering RAI channels on its satellite pay TV platform.¹¹²

D.5. Provisional conclusions

Independence of PSB is guaranteed through an independent governance and editorial policy.

Members of the supervisory body and management should be appointed in a transparent way, in accordance with the CoE standards. They should be accountable only to the public and the persons/organs that appointed them.

Further, countries should assure that PSBs have sufficient and stable funding. The system of funding and the process of deciding the level of such funding should not interfere with the editorial policy of PSB.

¹⁰⁹Joint Committee on Communications, Climate Action and Environment of Ireland, Report on the Future Funding of Public Service Broadcasting. 27.11.2017.
https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_communications_climate_action_and_environment/reports/2017/2017-11-28_report-on-the-future-funding-of-public-service-broadcasting_en.pdf
(Accessed 12.04.2018).

¹¹⁰ Ibid.

¹¹¹In Europe the situation regarding the retransmission fees differs among the states. E.g., in Spain and Poland must-offer or must-carry obligations include the prohibition of a payment flow between platforms and the channels concerned by the obligations. In contrast, Italian media regulator confirmed the right for RAI to require compensation in view of the (economic) interests of Sky Italia in offering RAI channels on its pay TV platform (Cullen International. Retransmission fees for carriage of free-to-air channels on TV platforms. Cross-country analysis. 11.07.2018. <https://www.cullen-international.com/product/documents/CTMEEU20180052> [restricted access] (Accessed on 22.08.2018).

¹¹²Cullen International. Retransmission fees for carriage of free-to-air channels on TV platforms.

Finally, to provide for independence of PSB and media pluralism, there should be an independent NRA which besides granting licences, monitors the fulfilment of the broadcasting law and applies sanctions against broadcasters.

The CoE issued a number of recommendations on the independence of PSB with detailed rules on governance and management and on the independent media regulatory authority.

On the EU level, the importance of PSB is recognised. However, it is the competence of member states to determine organization and funding model of PSB. European Commission is only competent in deciding if the state funding schemes for PSB are in line with the EU competition rules.

Current EU audiovisual legislation (AVMS Directive) does not address PSB specifically, but a revised version of the Directive will oblige member states to have independent regulatory authority.

III. Media landscape in Ukraine

This part describes the media landscape in Ukraine since the fall of the Soviet Union. It explains media culture in Ukraine and the process of transformation of state broadcasting into a public broadcasting. It further describes principles, tasks and programming requirement of the newly established Ukrainian UA: PBC and speaks about its audience.

A. Political situation in Ukraine and its relationship with Europe

Ukraine is an Eastern European country with a population of 42,3mln¹¹³ people, the second largest country in Europe after the European part of Russia. Ukraine gained its independence in 1991, after the fall of the Soviet Union.

*“Ukraine has since veered between seeking closer integration with Western Europe and being drawn into the orbit of Russia [...]”*¹¹⁴

A significant minority of the population is using Russian as the first language, but it does not always say anything about political views of the people in Ukraine.

In 2013 Ukrainian students started protesting to force the Ukrainian President to sign an association agreement with the EU. After the night when they were beaten by special forces, the mass protests started. The protests were not only about the relationship with the EU but also denounced an incredibly high level of corruption and a lack of respect for human rights.¹¹⁵

In March 2014, in the middle of the chaos following the fall of president Viktor Yanukovich, Russia once again seized and annexed Crimea, an autonomous republic of Ukraine on the Black Sea. Crimea was part of Soviet Russia until 1945. There is still a war in the eastern part of Ukraine on the *“temporarily occupied territories”*¹¹⁶ of Donetsk and Luhansk oblasts *“within which the armed formations of the Russian Federation and the occupation administration of the Russian Federation established and exercise general control”*¹¹⁷

There are still ongoing military activities in the eastern part of Ukraine which is not under the Ukrainian control and is considered as a territory with a special status according to the Ukrainian law.

¹¹³State Statistics Service of Ukraine. Data from 01.06.2018.

¹¹⁴Ukraine country profile. *BBC.co.uk*. 18.05.2018. <https://www.bbc.co.uk/news/world-europe-18018002> (Accessed on 11.06.2018).

¹¹⁵Kurkov, Andrey. Ukraine's revolution: Making sense of a year of chaos. *BBC.co.uk*. 21.11.2014 <https://www.bbc.com/news/world-europe-30131108> (Accessed 12.05.2018).

¹¹⁶Law of Ukraine On peculiarities of state policy on ensuring state sovereignty of Ukraine in temporarily occupied territories in Donetsk and Luhansk oblasts (The Vidomosti Verkhovnoi Rady (VVR), 2018, No. 10, page 54), art. 1

¹¹⁷Ibid.

In June 2014, with the new president Petro Poroshenko, an Association Agreement was finally signed between Ukraine and EU. According to the agreement, Ukraine should abide to the EU standards in a number of areas, including audiovisual law within two years of final ratification by all EU member states.¹¹⁸ The agreement entered into force on 1 September 2017. A new broadcasting law has to correspond to the European standards i.e. European Convention on Human Rights, the AVMS Directive, the European Convention on Transfrontier Television, the EU Framework Directive on Electronic Communication, Documents of the Council of Ministers of the CoE and the Parliamentary Assembly of the Council of Europe (PACE) and the recommendations of CoE experts.¹¹⁹

The CoE requested Ukraine to transform its state broadcaster into PSB already in 2003.¹²⁰

The CoE Action Plan for Ukraine for 2015- 2017 sets public broadcasting as one of the key priorities.

In the Action Plan for 2018-2021 the CoE points at the steps achieved during previous years in relation to establishing PSB i.e.¹²¹

- the registration of the public broadcaster as a legal entity was completed on 19 January 2017;
- the development of a Statute for UA: PBC (adopted in December 2016) and the Regulations on its Supervisory Board and Management Board (approved in the beginning of 2017);
- the election of its General Director and members of the Management Board of the public broadcaster under a transparent and competitive process in April 2017.

According to the Action Plan for 2018-2021, the CoE will further support UA: PBC to:¹²²

- improve the quality of the content, particularly for minorities, children and on gender issues;
- optimise the structure and personnel of the UA: PBC,
- improve the capacity building of the Supervisory Board; and
- implement an effective regional structure for the public broadcaster.

The CoE will also offer expert advice on designing a regional structure of the public broadcasting company of Ukraine.¹²³

¹¹⁸Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part.

¹¹⁹CoE report on institutional mapping analysis in media in Ukraine, pp.13-14.

¹²⁰CoE Parliamentary Assembly, Resolution 1466 (2005) Honouring of obligations and commitments by Ukraine (Adopted at Assembly debate on 5 October 2005 (28th Sitting) obliged Ukraine before the CoE to transform the state broadcasters into public service broadcasting channels in line with relevant Council of Europe standards.

¹²¹CoE Committee of Ministers, Action plan for Ukraine 2018-2021, GR-DEM(2017)18-final. 21.02.2018.

<https://rm.coe.int/168078b606> (Accessed 02.05.2018).

¹²²ibid.

¹²³ibid.

Foreign media highlighted that since 2014 the National Council on Television and Radio banned a number of Russian TV channels (e.g., RTR Planeta, Russia 24, First Channel, Global Network and NTV)¹²⁴ because they infringed the national broadcasting law and the law on advertising.¹²⁵

Similarly, in 2018 Lithuanian media regulator banned RTR Planeta based on Article 6 of the AVMS Directive which prohibits incitement to hatred based on race, sex, religion or nationality. Later this decision was approved by the European Commission in accordance with the AVMS Directive.¹²⁶

B. National Public Broadcasting Company of Ukraine

B.1. Establishment of the public broadcasting company.

State monopoly and beginning of commercial broadcasting

Commercial broadcasting appeared in Ukraine only after the fall of the Soviet Union in 1991 (except for a TV channel Tonis – now Pryamyi, founded in 1987). Since then, a two-tier system of broadcasting has existed: a weak and underfinanced state broadcaster and commercial broadcasters, financed by a small group of wealthy businessmen often involved in politics.¹²⁷

Commercial broadcasting has been developing much faster than state broadcasting, investing into mostly entertainment content. The quality of the programmes shown by the state broadcaster remained very low, including news and current affairs programmes.

2014 was a year of changes in the Ukrainian media market.¹²⁸ Until November 2013, according to many observers, the Ukrainian information space was under “*total control*.”¹²⁹ This control was carried out through state pressure on the owners of large

¹²⁴Dziadul, Chris, editor. Ukraine approves huge ban on Russian media. *Broadband TV News*.

16.05.2017. <https://www.broadbandtvnews.com/2017/05/16/ukraine-approves-huge-ban-on-russian-media/> (Accessed on 12.03.2018).

¹²⁵Art 6(2) of the Law of Ukraine on TV and Radio Broadcasting forbids using broadcasting companies for inciting to a violent change of the constitutional order of Ukraine; inciting to aggressive war or its propaganda, inciting to hatred. Art 13(9) of the Law of Ukraine on Advertising forbids advertizing on the channels that are transmitted (retransmitted) from the countries which are not the part of the EU jurisdiction or that have not ratified European Convention on Transfrontier Television. Russia has not ratified the latter convention.

¹²⁶According to Art. 3 of the Audiovisual Media Services Directive, member states can block the retransmission of linear broadcast services (other conditions apply to on-demand services) in case of manifest, serious and grave infringement of the provisions on the protection of minors or of the prohibition to incite to hatred. Such decision must further be approved by the European Commission.

¹²⁷Freedom House. *Freedom of the Press 2015 Report*. 2015. <https://freedomhouse.org/report/freedom-press/2015/ukraine> (Accessed 12.03. 2018).

¹²⁸Yevseytseva, O.S. and Sobtseva, G.M. Analysis of the Media Market of Ukraine. *Effective economics* No 5 (2016). <http://www.economy.nayka.com.ua/?op=1&z=4983> (Accessed 17-02-2018).

¹²⁹Ibid.

media holdings or their corruption links with the authorities. In 2014, the media market was “redistributed in the interests of a small group of people in power.”¹³⁰

During the political crisis of 2004 and 2014 commercial television as well as the state broadcaster were widely accused of spreading disinformation regarding different political matters including the relationship of Ukraine with the EU.¹³¹ During the Revolution of Dignity of 2013 – 2014 a journalistic project Hromadske TV was among the most popular sources of information.¹³² Two internet-based projects, Hromadske TV and Hromadske Radio were launched in 2013 “to provide an alternative to state media and politically influenced commercial outlets.”¹³³ For Hromadske Radio it was a re-start of the project, since it had early operated in 2001-2005.

Transformation from the state broadcaster into a PSB

The PSB Law was adopted in April 2014, even though first attempts to create PSB were made already in 1997. The first law on PSB was adopted in 1997 but it has never been implemented.

The National Public Broadcasting Company of Ukraine (UA: PBC) was established in 2017 based on former state TV and radio companies, which were separate legal entities (with a legal status of the government agencies), headed by directors in every region. With the new law, all regional TV and radio except Ukrainian Movie and Television Studio “Ukrtefilm” are now branches of UA: PBC.¹³⁴

According to Olga Herasymjuk (first deputy chairman of the media regulator), the process of establishing PSB in Ukraine is different from other European states because in Ukraine more than 30 state broadcasting companies are reorganized into a single PSB company

¹³⁰Ibid.

¹³¹Institute of Mass Information. *Media Ownership Monitor. Ukraine*. <https://ukraine.mom-rsf.org/en/ukraine/media/> (Accessed 05.06.2018).

¹³²Freedom House. *Freedom of the Press 2015 Report*; Minchenko, Olga. Hromadske is being watched by 100 thousand people simultaneously. *Watcher*. 01.12.2013. <http://watcher.com.ua/2013/12/01/hromadske-telebachennya-zaraz-dyvytsya-ponad-100-tys-lyudey-odnochasno/> (Accessed 05.06. 2018).

¹³³Minchenko, Olga. Hromadske is being watched by 100 thousand people simultaneously. Later, one of the co-founders of Hromadske, Zurab Alsanian, has been appointed as Director General of the Public Broadcasting Company of Ukraine (Zurab Alsanian elected Director General of UA: PBC. *EBU News*. <https://www.ebu.ch/news/2017/04/zurab-alsania-elected-director-general-of-uapc> (Accessed 23.04.2018).

¹³⁴Ukrtefilm was to join the newly formed PSB together with the other entities, however, due to the sabotage of the reform inside the company and large issues with debt proceedings in Ukrainian courts, the legislation was amended in May 2016 to enable the merger between the two joint stock companies after the resolution of problematic issues (Center for Democracy and Rule of Law. *Building independent media through public service broadcasting: a case of Ukraine (policy brief)*. 24.05.2018. <https://cedem.org.ua/en/analytics/building-independent-media-through-public-service-broadcasting-a-case-of-ukraine-policy-brief/> (Accessed 02.06.2018)).

(in contrast to creating a new one).¹³⁵ The process of launching PSB was slowed-down by the sabotage of the groups inside the broadcaster that were opposed to the changes.¹³⁶

Ownership

UA: PBC is a public joint stock company 100% of which belongs to the state.¹³⁷ UA: PBC cannot sell or transfer ownership or privatize its real estate, land plots on which it is located, as well as shares owned by the state.¹³⁸

The Cabinet of Ministers of Ukraine controls the use and maintenance of the assets transferred to the UA: PBC.¹³⁹

The UA: PBC decides itself how to use the property acquired from its own economic activities.¹⁴⁰

The CoE report criticizes the power given to the Cabinet of Ministers to control the use and maintenance of the assets transferred to UA: PBC as this gives the Cabinet the ability to exercise “considerable control”¹⁴¹ over the running of UA: PBC. According to the CoE standards, it should be entirely a prerogative of the UA: PBC to decide how to use its property and arrange for its maintenance.¹⁴²

The CoE encourages the legislation regulating the powers of a shareholder in public joint stock companies (in this case, state/government) to be amended by making a specific exclusion for the UA: PBC.¹⁴³

B.2. Principles and tasks

Unlike during state broadcasting, principles of functioning and guarantees for independence of UA: PBC are now stipulated by law.

The mission of PSB in Ukraine is to:

- meet the information needs of the society;

¹³⁵Notes of the speech of Olga Gerasymjuk.

¹³⁶Jegoshuna, Valerija. "Real Estate Agency" Ukrtefilm: who and how is sabotaging the creation of PSB (investigation). *Radio Freedom*. 26 April 2016. <https://www.radiosvoboda.org/a/27705146.html> (Accessed 02.06.2018).

¹³⁷Law of Ukraine on PSB, Art.1.

¹³⁸Ibid.

¹³⁹Ibid, Art. 15(2).

¹⁴⁰Ibid, Art. 15.

¹⁴¹CoE report on institutional mapping analysis in media in Ukraine, p.40.

¹⁴²Ibid.

¹⁴³Ibid, pp.32-33.

- involve citizens in the discussion and solving of the most important socio-political issues;
- ensure national dialogue;
- promote the formation of a civil society.

According to the law on PSB and the statute, UA: PBC should:¹⁴⁴

- provide objective, complete and timely information for the public on most important social, political and economic developments in Ukraine and abroad;
- promote the unity of Ukrainian society;
- promote the development of Ukrainian language and culture and ethnic minorities' languages and cultures;
- satisfy informational, cultural and educational needs of population;
- provide prompt information to the public about emergency situations;
- provide citizens with informational products that are not available on commercial television;
- promote Ukraine internationally;
- spread information online.

The law on PSB stipulates that UA: PBC must offer radio and television services on:

- 2(two) nationwide TV channels (social/political, and cultural/educational): UA: First and UA:Culture respectively;
- 3(three) nationwide radio channels;
- regional TV and radio channels.

According to the Law of Ukraine on the Universal Services, programmes of the PSB (including regional) must be carried by all television and radio network operators.

B.3. Programming requirements

¹⁴⁴Law of Ukraine on PSB; Statute of the public joint stock company "National Public Broadcasting Company of Ukraine", approved by the Decree of the Cabinet of Ministers of Ukraine of 28.12.2016 No 1039 (As amended in accordance with the Decree of the Cabinet of Ministers No 34 of 30.01.2017).

UA: PBC should produce and make available on its platforms programmes of all types (informational, social – political, educational and entertaining).¹⁴⁵

The share of films and programmes in Ukrainian language in the periods between 7am and 6pm and between 6pm and 10pm should be 75% (60% for local broadcasters). 75% of all news should be broadcast in Ukrainian.¹⁴⁶

B.4. Audience

According to trusted sources, only half the population of Ukraine knows of UA: PBC and is able to distinguish its program channels.¹⁴⁷ The audience is mostly the older generation: 41% of its audience is retired.¹⁴⁸

According to a Kantar TNS study of 2017, programmes on politics interest Ukrainians the most however only 36% obtain relevant information from PSB. Results also showed that PSB is critically lacking entertaining content which is even more interesting for Ukrainians than politics: only 7% obtain such content from PSB.¹⁴⁹

At the same time, PSB channel UA:First is the most popular in covering regional news.¹⁵⁰

B.5. Provisional conclusions

While in most European countries transformation from state broadcasting to PSB took place in 1970s and 1980s, Ukraine remained one of the last countries to overcome this process.

Finally, in 2014 the law on PSB of Ukraine was adopted and the UA: PBC was established three years later. Because state broadcasting existed for so long, many Ukrainians including politicians still do not realise what PSB is and its value for democracy and media pluralism.

Meanwhile, ownership of commercial channels is concentrated in a group of Ukrainian oligarchs. Commercial television remains the most watched because of its superior entertainment content.

¹⁴⁵Law of Ukraine on PSB.

¹⁴⁶Centre for Democracy and Rule of Law (CEDEM). The law on language quotas on television entered into force). 17.10.2017. [in Ukrainian] <http://cedem.org.ua/news/nabuv-chynnosti-zakon-pro-movni-kvoty-na-telebachenni/> (Accessed 25-02-2018).

¹⁴⁷Kantar TNS. Audience measurement of the Ukrainian PSB. 2017.[in Ukrainian].[http://stv.detector.media/content/images/2018/KantarTNS_Presentation_2017_ukr_v2%20\(2\).ppt](http://stv.detector.media/content/images/2018/KantarTNS_Presentation_2017_ukr_v2%20(2).ppt) (Accessed 25.04.2018).

¹⁴⁸Ibid.

¹⁴⁹Ibid.

¹⁵⁰Ibid.

The UA: PBC of Ukraine was established in 2017 based on former state TV and radio companies, which were separate legal entities. The process of transformation is still ongoing and is opposed from inside the PSB, since it involves massive staff reduction.

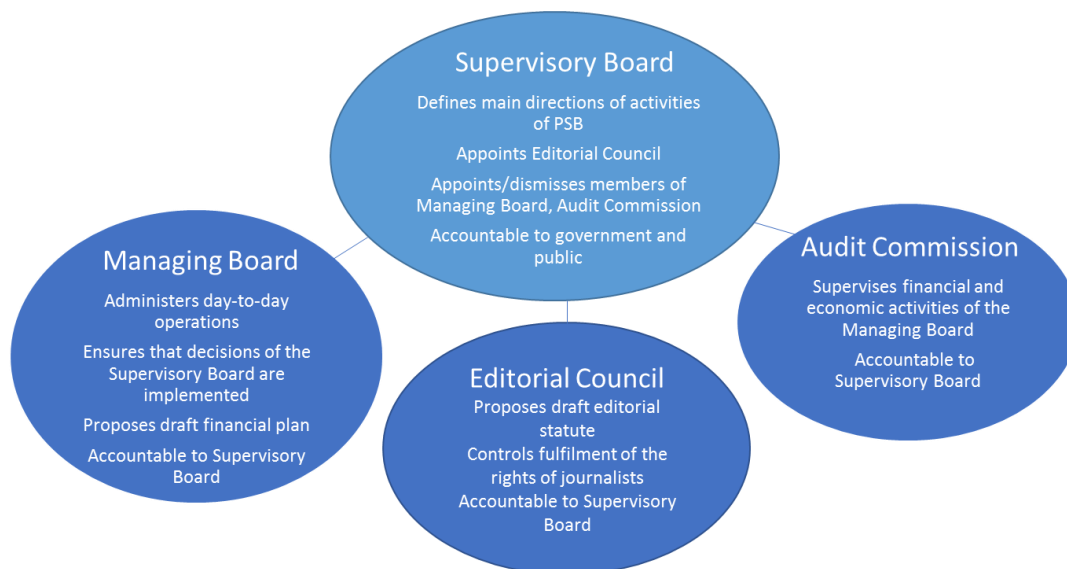
In contrast to the state broadcaster, the mission, principles and tasks of PSB are now stipulated by law and correspond to the European standards. The PSB is therefore obliged to provide objective, complete and timely information to the public on the most important social, political and economic developments in Ukraine and abroad.

IV. Assessment of the independence of the National Public Broadcasting Company of Ukraine in relation to the European standards

This part contains a detailed assessment of independence of UA: PBC in relation to European standards described in the previous part. It evaluates the governance and management of UA: PBC to assess if it is independent from political pressure and if its editorial policy is respected by its governance body and by external actors. It further evaluates if the National Council on Television and Radio Broadcasting enjoys the required level of independence.

A. Governance and management

Figure 1 Overview of management structure of UA: PBC



A.1. Supervisory Board

A.1.a) Tasks of the Supervisory Board

The Supervisory Board of the UA: PBC is its highest decision-making body of the PSB. It is specifically responsible for:

- defining the main directions of the UA: PBC activities, approving the Editorial Charter, supervising its implementation;
- appointing/dismissing five members of the editorial board;
- appointing and dismissing executive members and members of the Audit Commission;
- electing from among its members the Chairman, the Vice-Chairman and the Secretary of the Supervisory Board, deciding on the termination of their powers;
- approving the regulations on the Audit Commission, approving other internal documents in accordance with the Statute and amends them;
- approving the annual activity report of UA: PBC and ensuring its promulgation;
- deciding on the creation, reorganization, liquidation of subsidiary legal entities;
- creating and liquidating public councils and other advisory bodies, determining the order of their activities, and their composition;
- drafting proposals for improvement of regulation of UA: PBC and submitting them to the relevant state authorities;
- determining working conditions and wages of employees of the UA: PBC.

A.1.b) Composition of the Supervisory Board

The Supervisory Board consists of the delegates from political groups and from the civil society organisations. i.e.¹⁵¹:

- nine members are delegated by civil society organisations occupied in different areas listed in the law on PSB (science and education, rights of minorities, journalism etc); and
- one member is delegated by each political group/faction in the parliament.

¹⁵¹Law of Ukraine on PSB, Art. 8(1).

The number of members is not stable, it can vary depending on the number of political representatives. Now there are 17 members in the Board, with 8 political representatives and 9 representatives from the civil society organizations. The number of representatives from the civil society organizations should always be higher (formula +1) than the number of political representatives.¹⁵²

According to Olga Gerasymjuk, first deputy chairman of the National Council for Television and Radio Broadcasting (NCTRB), the media regulator, involvement of citizens is the main principle of functioning of UA: PBC which did not exist during the state broadcasting. This principle is implemented through participation of the civil society organisations in the Supervisory Board of UA: PBC.

Members of the board do not get paid for fulfilling their tasks¹⁵³ and according to the law they cannot work for or represent other broadcasters who have broadcasting licenses in Ukraine or perform any paid work for such broadcasters or their representatives.¹⁵⁴

Members of the board should be citizens of Ukraine and have high professional and moral qualities, a higher education diploma and be permanently (not less than five years) resident in Ukraine. They should comply with the rules on incompatibility and cannot have a criminal record, and can only be removed in accordance with the procedure established by law.¹⁵⁵

A.1.c) Appointment and dismissal of the members of the Supervisory Board

Political groups appoint the representative and submit to the media regulator a confirmation that the person they chose complies with the above requirements for the member of the Supervisory Board.

In case of early termination of the powers of a member of the Supervisory Board, elected from a deputy faction or group, such parliamentary faction /group elects a new member.¹⁵⁶

Members from civil society are elected at the conferences, separately for each type of activity.¹⁵⁷

¹⁵²Ibid.

¹⁵³Ibid, Art. 8(7).

¹⁵⁴Ibid, Art. 9(2)(3).

¹⁵⁵Ibid, Art. 9.

¹⁵⁶Ibid, Art 8(5).

¹⁵⁷Ibid, Art 8(4).

In 2015, 133 civil society organisations submitted their application and 117 of them could participate in the conferences.¹⁵⁸ The conferences are organized and held by the National Council on Television and Radio Broadcasting.¹⁵⁹

The Council on Television and Radio Broadcasting approves the composition of the Board.¹⁶⁰ The members of the Board are appointed for 4 years (this term can be renewed once). Members can be dismissed by the regulator. The grounds for dismissal are clearly defined in the law (e.g., non-fulfilment of rules on compatibility, arrest or conviction for a crime etc.).¹⁶¹

The system of appointment is compatible with the EU standards, nevertheless there were some attempts to put a political pressure on the members of the Supervisory Board. The parliamentary faction of the Radical Party Oleg Lyashko appealed to the Ukrainian media regulator with a request to replace the member of the Supervisory Board of UA: PBC, previously delegated to this Supervisory Board by this faction, for another candidate. The Supervisory Board considered it as a political pressure from the faction and opposed it.¹⁶²

Ihor Rozkladai, Lawyer of Media Law Institute of Ukraine, said that some members from the civil society organizations seem to have political ties

On the other hand, according to Mr. Jevgen Hlibovytskyj (Supervisory Board member of the UA: PBC), some political feedback is needed. Mr Hlibovytskyj said that *“the mechanism of representation of political parties is not elaborated and does not have a canvas of political tradition. Because of this, representatives from political parties are different in weight, the nature of the mandate and the level of integration into the environment of political parties. Some have ideological unity with the parties, and some are focused on personal sympathies. Representatives from the political parties mainly do not see themselves as the representatives of the UA: PBC in the parties, thus feedback from the political parties is limited.”*

According to European standards, the appointments of the highest supervisory or decision-making authority within the PSB:

“cannot be used to exert political or other influence over the operation of the public service media; the appointments are made for a specified term that can only be shortened in

¹⁵⁸Heads of the departments of the National Council on Television and Radio Broadcasting (Licencing, Legal affairs, Monitoring, Radio frequencies, Press).

¹⁵⁹Law of Ukraine on The National Council on Television and Radio Broadcasting, art. 14.

¹⁶⁰Decision of the National Council on Television and Radio Broadcasting On the procedure of electing and dismissing of the members of the Supervisory Board, part VIII.

¹⁶¹Ibid, Art. 10.

¹⁶²Members of the Supervisory Board of Public Broadcasting opposed the attempt of political interference.

STATEMENT. *Detector Media*. 13.03.2017. [in Ukrainian].

http://stv.detector.media/kontent/movlennya/chleni_naglyadovoi_radi_suspiynogo_movlennya_vistupili_prot_i_sprob_i_politichnogo_vtruchannya_zayava/ (Accessed 13.04.2018).

*limited and legally defined circumstances – which should not include differences over editorial positions or decisions”.*¹⁶³

A.1.d) Accountability of the Supervisory Board

The Supervisory Board is accountable to the government and the public.

The head of the Supervisory Board submits to the Cabinet of Ministers of Ukraine an annual report on the financial and economic activities of UA: PBC. The report is published on the website of the UA: PBC and of the media regulator.

A.1.e) Comments on the legislation

(A.1.e.1) Composition, appointment and dismissal of the members

Certain gaps in the appointment procedure have been found during this study.

According to the procedural rules when the member of the Supervisory Board leaves/is dismissed, the second person from the list of nominees takes his/her position. However, the procedural rules do not foresee the situation when the second person from the list is no longer a member of the organization that delegated him/her or when his/her activity does not correspond to the mission of UA: PBC.

According to the procedural rules, if a member of the Supervisory Board leaves (is dismissed), the Board should give the place to the second from the list of candidates for the membership in the Board.

During the interview, Ms Tatijana Lebedeva (head of the Supervisory Board), described the actual case when the second person in the list left her previous position in the civil society organisation that delegated her. Another example given by Ms Lebedeva was the person in the list of candidates after not being elected as a member of the Supervisory Board, made some statements that contradict values of UA: PBC.

To solve this gap in the legislation, procedural rules should foresee the situation when the person in the list is no longer a member of the organization that delegated him/her or when his/her activity does not correspond to the mission of UA: PBC.

The rules should prevent people which act in contradiction with the values of UA: PBC to become a member of the Supervisory Board.

Besides that, the CoE report points to a number of other issues:

¹⁶³CoE Recommendation on public service media governance.

- The number of members of the Supervisory Board is too high in comparison to European standards. Moreover, it could grow even more (depending on the number of political groups), since the law allows all groups to appoint their members. According to the CoE,

*“The number of members of the Council should be fixed, with each member entitled to four years term in the board regardless of any changes in the make-up of the parliament”.*¹⁶⁴

- It is problematic that the entire Supervisory Board is replaced every four years. This should be avoided by appointing members in a staggered manner.¹⁶⁵
- The chairman should be selected from the members who were nominated by the civil society organization and not by the political groups to avoid undue political interference in the work of the Supervisory Board.¹⁶⁶ The current law stipulates that the chairman is selected from the members, without specifying anything else.

According to Mr. Rozkaldai, such requirement if implemented could be undermined by political ties of the members from the civil society organizations.

- Current provisions on incompatibility apply only to the members of the Supervisory Board but not to their relatives. According to European standards, such rules should also be extended to family members.¹⁶⁷
- Members from the Parliament should have necessary qualifications and expertise.¹⁶⁸ The current law does not contain any additional requirements to the members selected from political groups, beyond that they must belong to these groups.

Besides that, Mr. Rozkladai said that the national media regulator de facto must accept any member selected by political group.

(A.1.e.2) Responsibilities of the Supervisory Board

The CoE report highlights that the provision that empowers the Supervisory Board to determine the size and conditions of pay of the employees of UA: PBC should be deleted or amended (in practice, the Supervisory Board of UA: PBC establishes *delta* for the payments). According to the CoE standards, the Supervisory Board should not be

¹⁶⁴CoE report on institutional mapping analysis in media in Ukraine, p33.

¹⁶⁵Ibid.

¹⁶⁶Ibid.

¹⁶⁷Ibid, p.37.

¹⁶⁸Ibid, p.37.

responsible for setting the pay and conditions of staff; this should be the responsibility of the Management Board. The Council should only agree the overall budget. ¹⁶⁹

(A.1.e.3) Working conditions

During the interview for this study, Ms Lebedeva said that voluntary basis of the work in the Supervisory Board is very discouraging.¹⁷⁰ The fact that this work cannot be combined with the work in other journalistic organizations motivated a known Ukrainian journalist Mr Vitalij Protnikov to leave the Board, she said.

The fact that a member of the Supervisory Board is not getting remunerated for its work is not against the European standards,¹⁷¹ however, Ukrainian law could at least provide that members of the Board are compensated for actual expenses, including travel, accommodation and subsistence, incurred because of their duties as members of the Board.¹⁷²

The CoE in its report recommended to pay the members of the Board for their participation. *“If they are not paid, they will be less likely to take the job seriously and do the work that is required.”*¹⁷³ The CoE further drew an example from Poland where members are paid an average state salary in accordance with the number of days worked.¹⁷⁴

A.2. Management Board

A.2.a) Tasks of the Management Board

The Management Board mainly carries out the day-to-day operations of UA: PBC, develops proposals for the draft financial plan of UA: PBC, and ensures implementation of decisions of the Supervisory Board.¹⁷⁵

A.2.b) Composition, appointment and dismissal of the Management Board members

¹⁶⁹Ibid, p.36.

¹⁷⁰Interview with Tatjana Lebedeva, Head of Supervisory Board of the National Public Broadcasting Company of Ukraine. Kyjiv, Ukraine, 27.02.2018.

¹⁷¹Article 19. A Model Public Service Broadcasting Law. 2015. <https://www.article19.org/wp-content/uploads/2018/02/model-psb-law.pdf> (Accessed 25-02-2018).

¹⁷²Article 19. A Model Public Service Broadcasting Law.

¹⁷³CoE report on institutional mapping analysis in media in Ukraine, p.37.

¹⁷⁴Ibid, p.38.

¹⁷⁵Law of Ukraine on PSB, Art. 12(2), Art. 12(3).

The Management Board of UA: PBC consists of 7 members, appointed for 4 years by the Supervisory Board on the submission of the chairman of the Management Board.¹⁷⁶ The chairman is selected on a competitive basis by the Supervisory Board.

The Supervisory Board can dismiss chair or members of the Management Board for not fulfilling their tasks prescribed by the law on PSB.¹⁷⁷ The procedure and grounds for dismissal of the chairman and members of the Management Board are determined by the regulations on the Management Board and the employment contracts concluded with the chairman and members.

Rules on incompatibility apply to chair and members of the Management Board.¹⁷⁸

A.2.c) Accountability of the Management Board

The Management Board is accountable to the Supervisory Board.¹⁷⁹

The chairman and members of the management should provide the Supervisory Board, the Audit Commission and the firm that conducts an annual obligatory audit (its representatives, shareholder or management) with the complete and reliable information about the activities and financial position of UA: PBC.¹⁸⁰

A.2.d) Comments on the legislation

The CoE report highlights that the termination of appointment of the chairman or any member of the Board must be subject to duly reasoned arguments and may be appealed to the court.¹⁸¹ The current Article 12(6) of the law of Ukraine on PSB only stipulates that the Supervisory Board can dismiss the chair or members of the Management Board for not fulfilment of their tasks.

In January 2019, Zurab Alsanija, the chairman of the management board, was dismissed by the supervisory board of UA: PBC. The reasons for his dismissal were not made public. The decision to dismiss Mr. Alsanija took place 2 months before the presidential elections in Ukraine even though there had been earlier attempts to dismiss him for not covering by UA: PBC of the national procession for a single independent Ukrainian orthodox

¹⁷⁶Ibid, Art. 12(1).

¹⁷⁷Ibid, Art 12(6).

¹⁷⁸Ibid.

¹⁷⁹Ibid, Art 12(2).

¹⁸⁰Regulations on the Managing Board of the UA: PBC, approved by the Order of the State Committee for Television and Radio Broadcasting No 6 from 18.01.2017.

¹⁸¹CoE Recommendation on the guarantee of the independence of PSB, Part II, para 3; CoE report on institutional mapping analysis in media in Ukraine, p. 39.

church. The idea of creating the independent church is backed by the current Ukrainian President Petro Poroshenko.¹⁸²

Such “unexpected”¹⁸³ decision of the Supervisory Board was actively discussed among deputies, journalists and civil society. Many considered it as a political attack on the PSB, while the initiators of the dismissal denied any political motives.

Mr. Alsanija filed a lawsuit regarding the early termination of his employment contract where he asked the court to declare unlawful and to cancel the decision of the Supervisory Board.¹⁸⁴

A.3. Audit Commission

A.3.a) *Tasks of the Audit Commission*

The Audit Commission supervises the financial and economic activities of the Management Board by controlling the accuracy of data contained in the annual financial statements, monitoring the compliance of maintenance of accounting, tax, statistical records and reports etc.

Audit Commission conducts annual and unscheduled inspections of the activities of the UA: PBC.

Annual obligatory audit is conducted by an external audit firm chosen by the Supervisory Board on a competitive basis.¹⁸⁵

A.3.b) *Composition, appointment and dismissal of the members of the Audit Commission*

The Audit Commission consists of 5 members appointed for 4 years. The Supervisory Board is responsible for appointing and dismissing the members of the Audit Commission.¹⁸⁶

¹⁸²Svitlana Ostapa. The Supervisory Board has dismissed Zurab. How it was. *Detector Media*. 08.02.2019. https://stv.detector.media/kontent/resonans/the_supervisory_board_has_dismissed_zurabhow_it_was/ (Accessed on 08.02.2019).

¹⁸³TSN Ukraine. "Reminds of the seizure of Rome by the barbarians": how social networks responded to the dismissal of Alsanija. 01.02.2019 [in Ukrainian] <https://tsn.ua/ukrayina/nagaduye-zahoplennya-rimu-varvarami-yak-u-socmerezah-vidreaguvali-na-zvlnennya-alasaniyi-1289898.html> (Accessed 02.02.2019)

¹⁸⁴ Detector.Media. Zurb Alsanija sues NPBC of Ukraine and Supervisory Board. 25.02.2019. [in Ukrainian] https://stv.detector.media/kontent/resonans/zurab_alasaniya_podaє_do_sudu_na_pat_nstu_ta_chleniv_naglyadovo_i_radi/ (Accessed on 26.02.2019).

¹⁸⁵Law of Ukraine on PSB, Art 16.

¹⁸⁶Ibid, Art 13.

Members of the Audit Commission should have at least a bachelor's degree and three years of experience in the area related to the sphere of activities i.e law, economics, management, finances etc. Members of the Audit Commission cannot be also members of the Supervisory Board, Management or any other body of UA: PBC.¹⁸⁷

A.3.c) Accountability of the Audit Commission

The Audit Commission is accountable to the Supervisory Board to whom it informs the results of the inspections.¹⁸⁸

A.3.d) Comments on the legislation

As the CoE report notes, the regulations of the UA: PBC Audit Commission should specify that the audit of the UA: PBC may not be conducted by the member of the Audit Commission (or his/her firm) as this would constitute a conflict of interest.¹⁸⁹

B. Editorial policy

In contrast to the state broadcaster, editorial tasks of UA: PBC are separated from its administrative tasks. Like this, two bodies were created:¹⁹⁰

- The Editorial Council responsible for creative tasks; and
- The Directorate occupied with administrative matters.

According to the current Supervisory Board, this is *“one of the major changes which guarantees the balance of governing process in UA: PBC.”*¹⁹¹

On the regional level, TV and radio channels previously managed by directors are managed now by a manager and a producer, who are chosen on a competitive basis. The producer of the regional broadcaster is responsible for the content, and the manager performs only administrative functions and does not have the authority to interfere with the creative issues.¹⁹²

B.1. Tasks

¹⁸⁷Regulations on the Managing Board of the UA: PBC.

¹⁸⁸Law of Ukraine on PSB, Art 13(5).

¹⁸⁹CoE report on institutional mapping analysis in media in Ukraine, p.40.

¹⁹⁰UA: PBC. Public broadcasting in Ukraine celebrates its first anniversary.19.01.2018. [in Ukrainian] <https://suspiilne.media/news/97> (Accessed 25.02.2018).

¹⁹¹Ibid.

¹⁹²Ibid.

According to the Statute of UA: PBC, the Editorial Council:

- proposes a draft editorial statute for approval by the Supervisory Board;
- controls that journalists' rights are respected and makes sure that the rules prohibiting censorship and interference with editorial policy are fulfilled;
- can refer to the Supervisory Board a matter of dismissal of the official from the Management Board of the UA: PBC if he or she violated the said rules.

B.2. Composition

The Editorial Council consists of 15 employees of the UA: PBC. The Supervisory Board, the general meeting of the creative team and the conference of the regional editorial councils each appoints five members to the editorial council.¹⁹³ Members of the Editorial Council can be dismissed by the body which appointed them.¹⁹⁴

B.3. Accountability

The Editorial Council is accountable to the Supervisory Board.

B.4. Coverage of political messages

Editorial independence has a direct connection to the coverage of political advertising during elections and in non-election periods. This is an area where the country's law contains a contradiction which should be resolved according to international standards.

Based on general audiovisual law, NPBC does not show any political advertising i.e. *"covering the activities of executive and other state bodies, bodies of local self-government, their officials"* in a non-election period.¹⁹⁵ The law does not say anything about political advertising during election periods which is a subject of election laws.

Regarding "official messages", free airtime that is given to state officials is limited to emergency situations.¹⁹⁶

In contradiction to that, according to the Law on the Status of the Deputy of the Parliament, *"broadcasters should allocate at least 20 minutes of the broadcasting time to*

¹⁹³Law of Ukraine on PSB, Art.19(2).

¹⁹⁴Editorial Statute of the UA: PBC of Ukraine (Annex No 4 to the Protocol No 19 of the Supervisory Board meeting of 27 February 2018). <https://suspijne.media/documents/83> (Accessed 17.04.2018).

¹⁹⁵Regulations on the advertising and sponsorship policy on the channels and platforms of the PSB of Ukraine, approved by the report of the Managing Report No 38 of 02.02.2018, para 3.8.

¹⁹⁶Law of Ukraine on PSB, Art. 20.

*the deputy speeches on the matters of their activity, when the broadcaster is founded (co-founded) or financed (fully or partially) by state.”*¹⁹⁷

In July 2017, Ukrainian deputies tried to amend the law so that public broadcaster would be obliged *“to provide free air time quotas for every member of Parliament (20 minutes per month on state-owned or funded channels).”*¹⁹⁸ After a flow of negative reactions from the civil society and the CoE, the draft law was revoked.

The CoE recommendation on the guarantee of the independence of PSB states that the law on PSB should clearly stipulate the editorial independence and institutional autonomy of the PSB, especially in providing news and current affairs programmes.¹⁹⁹

According to the recommendation,

*“the cases in which PSB organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.”*²⁰⁰

B.4.a) Comments on the legislation

According to the European standards, PSB should enjoy editorial independence, especially when providing news and current affairs programmes. The current law of Ukraine on PSB does not provide clarity on the coverage of political messages and, as a result, the UA: PBC is facing pressure from the politicians.

The law on the status of the deputies should be amended in accordance with the law on PSB. The latter law stipulates that UA: PBC does not provide political advertising in a non-election period.

Despite that, the CoE in its report highlights that the law on PSB should clearly state that Supervisory Board cannot interfere in editorial decisions.²⁰¹

C. National Television and Radio Broadcasting Council of Ukraine

¹⁹⁷Law of Ukraine On the Status of the Deputy of the Parliament of (The Vidomosti Verkhovnoi Rady (VVR), 1993, No. 3, page 17) {As amended in accordance with the Law No 2148-VIII. of 11.10.2017}, Art. 18.

¹⁹⁸EBU. Legislative amendment threatens independence of Ukrainian public service broadcaster. 16.04.2018. <https://www.ebu.ch/news/2018/04/legislative-amendment-threatens-independence-of-ukrainian-public-service-broadcaster> (Accessed 20.05.2018).

¹⁹⁹CoE Recommendation on the guarantee of the independence of PSB.

²⁰⁰Ibid.

²⁰¹CoE report on institutional mapping analysis in media in Ukraine, p.37.

C.1. Functions and priorities

The National Council of Television and Radio Broadcasting (NCTRB) was established in 1994 as a constitutional authority that fulfils regulatory and supervisory powers in the broadcasting area. The NCTRB is a member of the European Platform of Regulatory Authorities (EPRA), of the Black Sea Broadcasting Regulatory Authorities Forum and has its representative in the CoE Steering Committee on Media and Information Society (CDMSI).

According to the Law of Ukraine on the National Council, the main functions of the Council are to:

- issue licenses to broadcasters and programme service providers;
- monitor TV and radio programmes;
- supervise adherence to legislation and licensing conditions;
- carry out competitions for broadcasting frequencies;
- implement the plan of development of the national television and radio information landscape of Ukraine.

The Council has the following priorities:

- facilitation of efficient and stable competition in the media market;
- gradual digital switch-over;
- forming efficient and transparent regulation of the media industry.

The Council also has powers in relation to the regulation of the use of the radio frequency resource of Ukraine. Like this, the Council:²⁰²

- approves the draft National Radio Frequency Allocation Table and the Plan for the Use of the Radio Frequency Resource of Ukraine;
- determines the users of the radio frequency resource of Ukraine in the bands allocated to broadcast channels and networks;
- requests the conclusions from the Ukrainian State Center of Radio Frequencies (USCRF) regarding the possibility and conditions for the use of the radio frequency resource of Ukraine for the needs of broadcasting, including for temporary broadcasting.

²⁰²Law of Ukraine on Radio frequency resource, Art. 24.

Besides, the Council ensures implementation of the Law of Ukraine on ensuring the transparency of media ownership.²⁰³ According to this law, broadcasters and programme service providers operating in Ukraine should submit information to the media regulator related to their structure and beneficiary owners. The law aims to improve the media regulation and transparency provisions. The law also introduces a number of restrictions on media ownership, e.g., that no physical or legal person can own (solely or collectively) more than 35% of the relevant market.²⁰⁴

C.2. Financing

The Council is financed from the state budget.²⁰⁵ In 2018, its budget has been increased more than twice in comparison to 2017 (from €1,5mln to €3,4mln), while the budget of the PSB faced a 50% budget cut (see below a part on “The lack of appropriate financing...”).²⁰⁶

C.3. Powers in relation to PSB.

As one of its priorities, the Council promotes the introduction of PSB and supports the development of national broadcasting production.²⁰⁷

The Council takes part in appointing and dismissing the members of the Supervisory Board: it receives the candidates’ names from civil society organisations and organises the conferences of civil society organizations to choose the members of the Supervisory Board.²⁰⁸

The Council can decide to dismiss the member of the Supervisory Board in the cases foreseen by the law on PSB.

The Council controls if broadcasters (including PSB) fulfil the broadcasting law i.e. requirements on advertising, quota requirements for national productions, Ukrainian language quotas etc.

C.4. Composition, appointment and dismissal of the members

²⁰³Law of Ukraine On the National Council on Television and Radio Broadcasting of Ukraine, Art.13.

²⁰⁴Law of Ukraine on Television and radio broadcasting of 1994, Art. 8.

²⁰⁵Law of Ukraine on PSB, Art. 25.

²⁰⁶Zakusyla, Marjana. State Budget 2018: punishment of PSB and encouragement of the National Council. *Detector Media*. 10.01.2018. <http://detector.media/rinok/article/133560/2018-01-10-derzhbyudzhnet-2018-pokarannya-suspilnogo-ta-zaokhochennya-minstetsya-i-natsradi/> (Accessed 12.06.2018).

²⁰⁷Law of Ukraine on PSB, Art.10.

²⁰⁸Ibid, Art.8(3); Law of Ukraine on the National Council on Television and Radio Broadcasting of Ukraine, Art. 14.

The Council consists of eight members, four are assigned by the Parliament and four by the President of Ukraine.²⁰⁹

There are no rules on how the President selects and appoints the members. In the Parliament, candidates for a member of the Council can be nominated by political groups and/or by civil society organizations active in the field of media.²¹⁰ The nominations are considered by the Parliamentary Committee on Freedom of Speech and Information Policy who provides its recommendations to the Parliament. As noted in the CoE report, *“it is not known whether these recommendations tend to be followed.”*²¹¹

The law on the Council stipulates requirements for the members of the Council i.e. that they:²¹²

- should have Ukrainian citizenship;
- should be experts in the areas which fall within the competence of the Council i.e. journalism, law, broadcasting, management, science, arts etc. who have higher education, at least 5 years working experience in the field of broadcasting, be resident in Ukraine for the last 10 years and should not have reached retirement age;
- cannot have a criminal record;²¹³
- cannot occupy any other position, including on a voluntary basis, in state and private bodies, organizations, institutions and enterprises, receive remuneration for other work, except scientific, creative work or teaching (this exception does not apply for scientific and creative activity in TV and radio organizations).

Decision for an early termination of a member’s mandate is taken in most cases by the Council and is subject to judicial review.

Members’ mandate can be terminated earlier in certain circumstances listed in the law: member’s resignation, reaching the retirement age, termination of citizenship of Ukraine or permanently living abroad, non-fulfilment of incompatibility requirements, being sentenced by court, sickness confirmed by court, absence in Council meetings for more than two months, and death.²¹⁴

In specific cases, such decision is taken by the court (e.g., non-fulfilment of incompatibility requirements).²¹⁵ The President and the Parliament can also decide to dismiss the member of the Council based on the consideration of the Council annual report.²¹⁶

²⁰⁹Law of Ukraine On the National Council on Television and Radio Broadcasting of Ukraine, Art. 4.

²¹⁰Ibid, Art 5.

²¹¹CoE report on institutional mapping analysis in media in Ukraine, p.61.

²¹²Law of Ukraine On the National Council on Television and Radio Broadcasting of Ukraine, Art 7.

²¹³The law specifies: “an unserved conviction for intentional crime.”

²¹⁴Ibid, Art.8.

²¹⁵Ibid.

²¹⁶Ibid, Art 16(5).

The staff of the Council comprises of 230 persons who are employees of the central administrative office in Kyiv and the representatives of the media regulator in regions.

C.5. Comments on the legislation

Appointment and dismissal procedures are not transparent

According to the CoE report, the current method of appointment and dismissal of members of the National Council is highly politicized.²¹⁷

The report found that Article 16 of the law on the National Council, which allows members of the Council to be dismissed if in light of the annual report their work has been found unsatisfactory, *“significantly lowers their independence from nominating bodies and should therefore be removed or revised.”*²¹⁸

Further, the CoE pointed that the board should not be renewed entirely every four years which means that developed expertise is lost at the same time.²¹⁹

According to the European standards, appointment process of the members of the Council should be open and transparent and include participation of the civil society.²²⁰

The law on the National Council does not provide any procedural rules (selecting criteria, requirement to make public the list of nominees etc) on selecting and appointing the members by the President of Ukraine.

Besides that, procedural rules for selecting and appointing the members by the Parliament are also not clear i.e the law does not stipulate if the nominees by the civil society organization are necessarily considered by the Parliament.

To make the procedures more transparent, the law should provide procedural rules on selecting and appointing the members by the President of Ukraine and oblige the President to make public the list of candidates and selecting criteria. Further, the law should guarantee that nominees from the civil society organization are also elected by the Parliament.

Rules on incompatibility of the members are not compliant with the CoE standards.

The CoE in its report highlighted that *“it is fairly axiomatic that members (and their close family) should not hold political offices or have any financial interests in any part of the sector they will be regulating.”*²²¹

²¹⁷CoE report on institutional mapping analysis in media in Ukraine, p.56.

²¹⁸Ibid

²¹⁹Ibid, p.60.

²²⁰Article 19 and HFHR. Poland: independence of public service media.

²²¹CoE report on institutional mapping analysis in media in Ukraine, p.50; Article 19 and HFHR. Poland: independence of public service media.

Ukrainian law does not mention that “*direct or indirect significant financial interest in telecommunications and broadcasting*”²²² is incompatible with becoming a member of the Council. Ukrainian law only says that the members cannot have any position or an income from another state or private body. The current law does not have provisions to address interests of close family members.

According to the CoE, to make the rules compliant with EU standards, the law should specify that the members of the Council cannot have any direct or indirect significant financial interest in telecommunications and broadcasting and that the rules on incompatibility also apply to the close relatives of the Council members.

D. Provisional Conclusions

The law on UA: PBC stipulates that the bodies governing the UA: PBC are the Supervisory Board, the Management Board and the Audit Commission.

In contrast to the former state broadcaster, editorial tasks are now separate from the administration which induces the independence of the editorial policy.

Certain political pressure is observed on the editorial policy of the broadcaster when it comes to providing political advertising in non-election period. A collision exists between the provisions of the law on PSB, on the one hand, and the law on the status of the deputies, on the other hand. The latter law requires PSB to cover political activity of the deputies in a non-election period, while the former law stipulates that PSB does not show political advertising in a non-election period.

Certain gaps in the procedure of appointment of the Supervisory Board members have been observed during this study. Besides that, an interview with the head of the Supervisory Board showed that voluntary basis of work does not motivate the members and results in a loss of valuable professionals.

The CoE in its report mentioned several other shortcomings regarding the procedure of appointment and dismissal of the Supervisory Board members, e.g. the fact that the chair of the Supervisory Board should be appointed by the members from civil society organizations.

Regarding the Management Board and the Audit Commission, no additional shortcomings to those mentioned in the CoE report were found.

In relation to the National Council, the Ukrainian media regulatory authority, it has been found that the law on the National Council does not provide any procedural rules on selecting the members by the President of Ukraine. Rules on selecting and appointing the

²²²Article 19 and HFHR. Poland: independence of public service media.

members by the Parliament are also not clear. According to the CoE report, the procedure of appointing and dismissing of the members of the Council is highly politicised.

V. The lack of appropriate financing that undermines functioning of PSB in Ukraine

In this part the financing model of the UA: PBC is described, the issue of serious budget cuts, possible reasons and legal roots of underfinancing. The information has been obtained among others from the round table on underfinancing organised by the Ukrainian media regulator and the CoE that took place on 28 February 2018. In this part alternative sources of financing for UA: PBC are also discussed, estimating which of them would be more suitable to Ukrainian realities.

A. Financing model of the National Public Broadcasting Company.

The lack of appropriate financing is probably the most serious issue UA: PBC is facing.

UA: PBC was seriously underfinanced in 2018, the second year of its functioning. It obtained only 50% of the sum from the state budget it was entitled to.²²³

According to the law on PSB, the state must ensure independent financing of UA: PBC, which can be obtained from:²²⁴

- selling its own TV and radio productions;
- revenues from copyright and neighbouring rights;
- state and local budgets (see below);
- subscription fees;
- advertising (see below);
- other sources not forbidden by law (no further explanation).

Financing of UA: PBC is foreseen in the separate provision in the state budget of Ukraine and cannot be less than 0,2% expenditures of the general fund of the state budget of Ukraine for the previous year.²²⁵

Currently UA: PBC is financed mostly from the state budget, only 5-6% of financing comes from advertising. Almost all the programmes of UA: PBC are financed from the donor funds.²²⁶

²²³Law of Ukraine On the State Budget for 2018, Art. 4.

²²⁴Law of Ukraine on PSB, Art.14.

²²⁵Law of Ukraine on PSB, Art. 14(3).

²²⁶Round table "Financing models for PSM: International experience and Ukrainian context", 28.02.2018., Kyjiv, Ukraine.

A broadcasting licence fee is allowed by law but is not in place at the moment. According to surveys, only 9% of the population is willing to pay it. 14mln Ukrainians are ready to pay €1,50 monthly for PSB. Another survey shows that 29% of Ukrainians are ready to pay 0,30 €cents monthly.²²⁷ To put things into perspective, the minimal salary in Ukraine in 2018 was UAH 3723 (€117).²²⁸ To compare, in Italy a licence fee is €90 per year and in Poland it is €65, but of course the minimum salaries in these countries are higher than in Ukraine.

In 2016-2017 *“only 3% of the budget [of UA: PBC] was spent on the production of the programmes (the main task of PSB), the rest was spent on maintenance of the infrastructure [buildings, equipment etc].”*²²⁹

In 2017, UA: PBC was supposed to receive UAH 1.2 bn (€32 mln), but the government allocated only UAH 970 mln (€31 mln). In 2018, the government allocated UAH 776 mln (€24 mln) to UA: PBC instead of €49mln it was entitled to. In 2020 the lack of financing will constitute 35% of the budget that UA: PBC is supposed to get according to the law.²³⁰

If we look at the financing of UA: PBC during the last few years, it went down from around €75 mln in 2012 (still during the former state broadcaster) to €23,4 mln in 2018. Interestingly, the radio PSB has been fully financed as well as the UA:TV – the state foreign broadcasting channel (not a PSB).²³¹

A study conducted by EBU shows that current funding of UA: PBC per capita of population is the lowest among EBU countries: €1,29 per year. To compare, in Moldova, it is €1,45, Georgia – €4,20; Poland - €10,81. In 2016 the average financing of PSB constituted 0,18% of the GDP among the EBU countries, while in Ukraine, it was 0,01 %. Even if fully financed, UA: PBC would still have the lowest financing.

In addition to underfinancing, inflation at 14,6% *“also eats into the broadcaster’s minuscule budget.”*²³²

A.1. Legal roots of underfinancing

²²⁷Round table “Financing models for PSM: International experience and Ukrainian context”

²²⁸Law of Ukraine On the State Budget of Ukraine for 2018.

²²⁹Miskyj, Vadym. Improving of the financing model of PSB to guarantee stable funding from the state budget of UA: PBC. In, *Materials for the round table on Financing models for PSBs: International experience and Ukrainian context.2018.*

²³⁰Budget Resolution of the Ministry of Finances of Ukraine, Main Directions of the Budget Policy for 2018-2020.

²³¹Round table “Financing models for PSM: International experience and Ukrainian context.”

²³²Rybak, Vitalii. Ukraine’s Oligarchs Still Control the Media. Will Anyone Ever Challenge Them? Atlantic Council.

19.12.2017. <http://www.atlanticcouncil.org/blogs/ukrainealert/will-ukraine-s-oligarchs-ever-get-challenged>

(Accessed 15.03.2018).

Legal roots of underfinancing of the Ukrainian PSB lie in the collision between the provision of the PSB law and the Budget Code.

According to the Budget Code, provisions of the Law on PSB on financing are applied *“in accordance with the amounts established by the Cabinet of Ministers of Ukraine [the government], based on the available financial resources of the state budget.”*²³³ In other words, even if the law on PSB envisages the exact percentage of the state budget that PSB should receive every year, this percentage can be changed by the annual state budget.

A.2. Possible reasons behind underfinancing

- **Lack of knowledge in the society:**

According to the survey published by Detector Media, 50% of Ukrainians know what PSB means and can recognise its programmes. Many do not distinguish PSB from the former state broadcaster or even from the commercial broadcasters.

It is said that the Ukrainian public broadcaster is in a deadlock situation. With more support of the society, politicians might have been more careful in cutting its budget. At the same time, without adequate financing, it is difficult to compete on the market and get more support from the population.

- **Decision of UA: PBC not to show political advertising:**

Many participants of the round table mentioned that deputies lack the knowledge about PSB, thus are not realizing the value of it. A decision of UA: PBC of 20 November 2017 to not show any political advertising in a non-electoral period only worsened relationship with the deputies.

Ms Lebedeva said that UA: PBC received many complaints from the deputies for not giving them broadcasting time. She said that UA: PBC was not going to give up its position regarding political advertising. Nevertheless, Ms Lebedeva added that position of the public broadcaster on political advertising considering upcoming elections could have caused budget cuts, however it is not the main reason. The lack of support from society is probably the most decisive factor, she said.

A.3. Alternative ways of financing

²³³ Budget Code of Ukraine (The Vidomosti Verkhovnoi Rady (VVR), 2010, No.50-51, page 572) {As amended in accordance with the Laws 1763-VIII, 1793-VIII, 2125-VIII, 2233-VIII, 2246-VIII of 01.01.2018}, clause 26 of the Concluding and Transitional Provisions.

A.3.a) *Financing from advertising*

Revenues from advertising on UA: PBC's linear channels currently constitute 5-6% of its budget.²³⁴ Funding from advertising is not enough because the price for advertising space depends on the popularity of the channel. Besides, according to the law on PSB, the amount of advertising on UA: PBC channels should be reduced within 6 years since 2017.²³⁵ Thus, it will be impossible to get sufficient financing from advertising in the future.

The table below shows how the quantity of advertising on PSB channels should decrease within six years.

Timing	Time limitations for advertising and teleshopping
First 4 years	Same requirements as for the other broadcasters: should not exceed 15% of an hourly limit. ²³⁶ In contrast to commercial broadcasters, sponsorship is included in the time limit for PSB.
Fifth year	Should not exceed a daily limit of 10% (election period - 15%) with an hourly limit of 15% (election period - 20%)
Sixth year	Should not exceed a daily limit of 5% (during elections -10%) with an hourly limit of 10% (election period-15%).

Besides that, rules on advertising are stricter for PSB. Advertising and sponsorship announcement of alcohol is forbidden except when it was purchased together with the right to broadcast international sports events (of the International Olympic Committee, the Federation of National Football Associations, the Union of European Football Associations), and to fulfil the international obligations of the European Broadcasting Union.²³⁷ Commercial broadcasters are not allowed to show advertising of alcoholic beverages from 6 am until 11pm.²³⁸

Many European countries allow advertising on PSB, however subjected to certain restrictions, since increased dependence on the revenues from advertising could hamper

²³⁴Round table "Financing models for PSM: International experience and Ukrainian context".

²³⁵Law of Ukraine on PSB, Art. 14(4).

²³⁶Law of Ukraine on Advertising, Art 13.1, Art 13 (6). Sponsorship, social advertising and self-promotions are not included in this time limit.

²³⁷Law of Ukraine on PSB, Art 14(4).

²³⁸Law of Ukraine on advertising, Art 22(2).

its independence from the private actors. Like this, specific time limit for advertising apply to PSBs in France (maximum duration of advertising breaks), Germany (prohibition to show advertising after 8pm and on Sundays), Italy (weekly limit of 4%) and the Netherlands (yearly limit of 10%). PSBs in Finland, Spain, Sweden and the UK (for the BBC only) are not allowed to show advertising.²³⁹

A.3.b) Financing from revenue from radio frequencies fees

(A.3.b.1) Round table on financing models for PSBs in the Ukrainian context

On 28 February 2018, the CoE together with the Ukrainian media regulator held a round table to discuss the ways of alternative financing of PSB. Media experts at the table suggested to finance UA: PBC from revenues obtained from radio frequency fees.

Ukraine is now in the process of a switchover from analogue to digital TV which started in July 2018 and is expected to be finished in April-May 2019.²⁴⁰

Telecom operators and television and radio broadcasting companies in Ukraine use radio frequencies if they obtain a licence.²⁴¹ Telecom operators need to obtain a licence from the National Commission for the State Regulation of Communications and Informatization²⁴² while broadcasters using radio frequencies based on the broadcasting licence obtained from the media regulator.²⁴³

The issuance of broadcasting licenses, associated with the use of radio frequencies, as well as broadcasting on free channels of multichannel networks are awarded following a competition (beauty contest). The competition for a broadcasting license is announced by the media regulator and is published no later than 60 days before the expiration of the term for filing an application for a license. The deadlines for the summing up of the

²³⁹Cullen International. Advertising time limits (incl. PSB). Cross-country analysis. 11.07.2018. <https://www.cullen-international.com/product/documents/CTMEEU20180043> [restricted access] (Accessed on 22.08.2018)).

²⁴⁰Resolution of the Cabinet of Ministers of Ukraine on approval of the plan for using the radio frequencies of Ukraine, chapter 1 (38).

²⁴¹Law of Ukraine on radio frequency resource.

²⁴²National Commission for the State Regulation of Communications and Informatization established by the Decree of the President of Ukraine of 23.11.2011 No. 1067/2011 on the Law of Ukraine "On Telecommunications". The Regulations on National Commission for the State Regulation of Communications and Informatization (NCCIR) was approved by the same Decree.

²⁴³Law of Ukraine on radio frequency resource.

competition should not exceed 60 days after the completion of applications for the issuance of licensees.²⁴⁴

Media experts from UA: PBC and external experts suggested to reserve 50% of the revenue received from frequencies to fund a special purpose fund for the UA: PBC. According to the media experts, such a model would:²⁴⁵

- allow UA: PBC to manage its budget more independently from the Parliament and the Cabinet of Ministers;
- provide for a correlation between the funding of UA: PBC and economic growth.

According to the current model, the Cabinet of Ministers allocates every year 0,2% of a state budget to the UA: PBC.²⁴⁶ With the proposed model, money would be allocated automatically to UA: PBC. The amount would depend on the economic situation and actual income from renting radio frequencies.

It seems that under the current Budget Code, the Cabinet is able to reduce the annual funding of PSB in accordance with the available funds in the general budget of Ukraine.

The organizers of the round table also suggested that it should be assured in the law that UA: PBC cannot obtain less funding than the previous year.²⁴⁷

Income from frequency fees has been increasing since 2012, in 2017 the planned income was UAH3,12bln (€95 mln). Meanwhile, funding of UA: PBC from the state budget is supposed to be UAH1,26 bln (€32 mln) which is 40% of the expected income from frequency fees. According to the proponents of the model, using 50% of the state income from the rental of radio frequencies could fully satisfy the needs of UA: PBC.²⁴⁸

The proposed model would require amending the Budget Code of Ukraine and the Law on the UA: PBC.²⁴⁹ Under the current system, frequency fees are directed to a general fund. The law would have to be amended so that 50% of the income goes to the special purpose fund and then is allocated for UA: PBC.

²⁴⁴Law of Ukraine on Television and radio broadcasting (The Vidomosti Verkhovnoi Rady (VVR), 1994, No.10, page 43) {As amended in accordance with the Law No 2415-VIII of 22.07.2018}, Art 23, Art 25. For the rules on competition see: <https://www.nrada.gov.ua/license/>.

²⁴⁵Miskyj, Vadym. Improving of the financing model of PSB to guarantee stable funding from the state budget of UA: PBC.

²⁴⁶Payments from the special purpose funds of the State Budget are allocated in accordance with the finances actually received to the special purpose funds. (Budget Code of Ukraine, Art 13(8)).

²⁴⁷Miskyj, Vadym. Improving of the financing model of PSB to guarantee stable funding from the state budget of UA: PBC

²⁴⁸Ibid.

²⁴⁹Ibid.

According to Mr Taras Shevchenko (Director of the Centre for Democracy and the Rule of Law in Ukraine), the best way for Ukraine to provide for an independent financing of the PSB, is to combine several ways of financing, among which a major source of financing should come from frequency fees and from advertising.²⁵⁰

It is important to keep in mind that despite all mentioned advantages, the proposed financing model (as well as any other financing model) can be changed by simple majority in the Parliament, leading to unpredictable financing models over time, which in turn is not source of stability for the broadcaster and audiences in general.²⁵¹

Moreover, according to the Tax Code of Ukraine²⁵² that regulates the procedure of collecting frequency fees, the Cabinet of Ministers can propose to the Parliament to change the fees.

A.4. Provisional conclusions

The lack of appropriate and stable financing is the biggest problem that PSB is now facing, that does not allow to fully launch PSB in Ukraine.

The legal roots of underfinancing are in the Budget Code of Ukraine that allows changes in financing of UA: PBC according to available resources in the general state budget.

At the same time, the law on PSB provides for the main safeguards needed to protect PSB from reducing its financing i.e. the law provides for a concrete percentage from the state budget to be allocated every year to the broadcaster. Nevertheless, during the second year of its functioning, the Cabinet of Ministers allocated only half of the funding that PSB was supposed to get in accordance with the PSB law.

The main reasons for underfinancing are the lack of knowledge and consequently trust from the society to PSB and the lack of a political will. The decision of UA: PBC to not show political advertising in the period before elections caused a wave of dissatisfaction in the Parliament against the public broadcaster.

Among alternative or additional sources of financing are financing from advertising and a licence fee. Due to the economic crisis Ukrainians are apparently not ready to pay a license fee yet. Receiving revenues from advertising is also complicated because UA: PBC

²⁵⁰Shevchenko, T. Standards of public service broadcasting and ways of its implementation in Ukraine. In *European standards in public service broadcasting*. Media Law Institute. Shevchenko, T., Sushko, O. (ed.),256-262. K. :Tiutiukin. 2010 [in Ukrainian].

²⁵¹The Constitution of Ukraine (The Vidomosti Verkhovnoi Rady (VVR), 1996, No.30, page 141) {As amended in accordance with the Law No 1401-VIII of 30.09.2016}, Art 85(4), Art 91.

²⁵²Budget Code of Ukraine, clause 4 of section XIX "Final Provisions."

channels have low ratings and because the amount of advertising is expected to decrease on the PSB in the next few years.

According to the media experts, financing from the revenues obtained from frequency fees could be a solution. The model would allow to automatically allocate money for PSB in a special fund without involvement of the Cabinet of Ministers. The model would make PSB more independent from the Parliament and government and would create a correlation between the level of financing of PSB and economic growth.

Conclusions

PSB in contrast to state and commercial media should be independent from the state and private actors and can be defined as:

“an independent media company which is funded by the public, with a board appointed by public bodies, to broadcast public interest content – contribute to pluralism and diversity in media landscape. In combination with commercial and community media it is an essential component of a balanced media landscape. “

From the very beginning the mission of PSB was to inform, educate and entertain all people regardless of their social and economic class. Providing trusted and impartial news remains one of the most important tasks of the PSB. Because of widespread disinformation, the level of trust in online media is decreasing while PSBs have a high level of trust “at least in countries where their independence is not in doubt.”²⁵³

Universality, diversity, independence and distinctiveness are essential goals for PSB. This study focused on the independence.

Independent PSB has independent governance, management and editorial policy. Further, it enjoys sufficient and stable financing independent from political and private influence.

Finally, there should be an independent media regulator, empowered to monitor broadcasters under its jurisdiction, including PSB, and impose sanctions on them in case they do not comply with a broadcasting legislation.

PSB, as well as other broadcasters, face competition from new media services such as Netflix. What makes the PSB’s position different from commercial broadcasters, is that they are sometimes subject to ex ante screening procedure to evaluate whether “significant new services”, including those with a pay element, can be part of the public

²⁵³Nic Newman and others. Digital News Report 2018.

service remit and receive state support. Besides, they have to comply with a public service remit and other national broadcasting regulations.

PSB remains important for Europeans. Results of Eurobarometer show that traditional media remains more trustworthy. Referendum in Switzerland and survey in Germany clearly show that society supports PSB, even though there might be a need to have it reformed.

Meanwhile, Ukraine remained one of the last countries without a PSB. Ukrainian deputies finally adopted the law on PSB in 2014, just after the protest movement of 2013-2014 (known as Euromaidan) followed by escape of the former President Victor Yanukovich and annexation of Crimea. The need to have neutral media escalated during Orange revolution and Revolution of Dignity. Like this, an internet TV channel Hromadske TV was launched which became one of the most viewed media during the protests.

The UA: PBC of Ukraine was established in 2017 based on the former state and regional TV and radio broadcasting companies. One of the co-founders of Hromadske TV was appointed as its Director General.

The analysis of the law on PSB of Ukraine showed that it is mostly in line with the European standards on the independence of PSB. Only some gaps were found in the procedure of appointment of the members of the Supervisory Board. The interviews conducted in Ukraine in February 2018 showed that the voluntary basis of work of the members of the Supervisory Board discourages media experts from working there.

In relation to the law on the National Council, it was found that the process of appointment of the members of the Council is not transparent, particularly the process of appointment by the President of Ukraine. Besides, the rules on incompatibility should be stricter and apply also to the relatives of the members of the National Council. It is also not clear from the law what the role is of the civil society in appointing the members of the National Council. These findings support the earlier findings of the CoE according to which, the procedure of appointing the members of the Council is highly politicized.

During the visit to Ukraine, it has been noted that the National Council (in its current composition) is cooperating and broadly supporting the newly created UA: PBC. Nevertheless, the lack of guarantees for the independence of the National Council, in the future, could lead to a political pressure on UA: PBC, particularly during the process of appointing and dismissing the members of the Supervisory Council of UA: PBC.

The study showed that the biggest problem the Ukrainian PSB is facing now are severe budget cuts.

Legal roots for underfinancing lie in the Budget Code provision that allows changes to financing of PSB depending on available financial resources of the state budget. Such a broad wording allows the Cabinet of Ministers to change the budget of PSB every year

and to allocate less than in accordance with the law on PSB. At the same time, the law on PSB, provides all necessary safeguards to provide stable financing.

Speaking about the alternative ways of financing, the licence fee model which would provide for more independence from the government and parliament is not feasible in Ukrainian realities characterised by extremely low salaries, high inflation and the lack of trust in public broadcasting which is still often confused with state broadcasting.

UA: PBC cannot also depend much on the revenues from advertising because of several factors: UA: PBC channels have low ratings in comparison to commercial broadcasters, the amount of advertising on the public broadcaster is set to be reduced within 6 years, increased amounts of advertising revenues could threaten its independence from private actors.

A model whereby financing comes from frequency fees is a model supported by media law experts. The state could allocate 50% of the revenues obtained from telecom operators and commercial broadcasters which they pay for renting frequencies.

Even though with the proposed model UA: PBC would be protected from the annual changes of its funding by the Cabinet of Ministers, but this model, as any other financing model, can be changed by a simple majority in the Parliament.

As a result, we might agree with Mr Siarysevichus, CEO of the Lithuanian PSB (LRT) (TBC), who stated at the round table in Ukraine that the problem of financing lies not in the law and financing model but in the lack of will of the major political players to follow the law.