

<p>EU-UKRAINE CIVIL SOCIETY PLATFORM</p>		<p>ПЛАТФОРМА ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА УКРАЇНА-ЄС</p>
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**FREEDOM OF SPEECH IN UKRAINE – PUBLIC BROADCASTING ESTABLISHMENT, PRINT MEDIA REFORM
AND EUROPEAN STANDARDS IMPLEMENTATION**

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Summary

The report covers the state of play in the compliance with the commitments of respecting for freedom of speech in Ukraine in the following aspects: public broadcasting creation, print media reform, access to public information and implementation of the European standards in the field of audiovisual media services in 2016.

In the process of elaboration of this report, media collectives in various oblasts were interviewed to gather information about the implementation of the print media denationalization reform. The responsible authorities were interviewed, as well – the National Council of Television and Radio Broadcasting, the State Committee for television and radio broadcasting and members of the Supervisory Board of the National Public Broadcasting Company of Ukraine.

The challenges that should be pointed out – fragmentation of reforms, lack of strategic vision of the final goal in reforming mass media and public broadcasting, lack of unified position of responsible authorities, the absence of effective control over public authorities on information disclosure and its accessibility to physical and legal entities, gap in regulation of new convergent media. It's worth mentioning the systemic problems with the accusers and journalistic investigations, which lead not to the inevitable punishment for misuses, found during investigations, but, on the contrary, provoke aggression against them.

Introduction

The signing of the Association Agreement with the European Union and the European Atomic Energy Community and their member states (hereinafter – The Association Agreement) and commitments, taken by Ukraine, of recognition and support of common values on which the European Union is based (democracy, respect for human rights, fundamental freedoms and rule of law) may significantly impact the understanding of the areas of legal support development, right to information as well as freedom of speech.

International law, EU *acquis communautaire*, legislation of various leading countries as well as international standards have a greater history of regulation than Ukrainian legislation in terms of regulation of access to information, realization of the right to freedom of speech and access to information, protection of information and personal data, electronic access. When the regulation mechanisms have already its second, third and in some cases tenth iteration, it is possible to study in detail such experience and, taking into account the process of European integration, to settle legally the right to information, guaranteed by Article 34 of the Constitution of Ukraine.

In our opinion, the information sector would require refining of the regulatory framework, notably bringing national legislation into line with the *acquis* (audio-visual media services, telecommunication services, digital signature services, e-commerce, access to environmental information etc.) – two dozen of directives, decisions and regulations of the European Parliament and Council. It would also require gradual improvement of institutional mechanisms to ensure the right to information and freedom of speech.

The establishment of public broadcasting

The adoption of the law «On Public Television and Radio Broadcasting of Ukraine» on April 17, 2014, establishing the legal principles of public broadcasting in Ukraine, was one of the first reform following the Revolution of Dignity. In March 2015, the Parliament of Ukraine adopted the changes to this law, clearing the way for the launch of transformation process of several dozens of state broadcasters into the single National Public Broadcasting Company of Ukraine. (NPBU, UA:PBC)

According to the law, public broadcasting is owned by the state without the right of dispossession. Its independence is guaranteed in terms of human resources and programme policy, while financed by the government annually in the amount of 0.2% of the previous year's State budget. The NPBU also comply with strict rules on transparency and accountability to society. The Supervisory Board, comprised of the CSOs' representatives (majority) and the parliamentary factions and groups' representatives (minority), ensures political independence of the broadcaster. The Supervisory Board itself, not any state body, selects on a competitive basis and appoints the leadership of the broadcaster, approves its budget, picks an audit company for the annual audit, establishes the working conditions and wages, approves and publishes the NPBU's annual public report.

Throughout 2015, the Supervisory Board witnessed the election of 9 CSOs' representatives as wells as the nomination of 8 representatives by parliamentary factions and groups. The composition of the Board was approved in December 2015.

However, the transformation of some state broadcasters into public broadcasting lasted until January 2017.

The first «unification» stage of the reform ended in September 2016. It envisaged bringing together under the umbrella of the Ukraine's National Television Company (NTCU) of a number of the state broadcasters - Television and Radio Companies (TRC) in oblasts and regions, National radio company and TRC «Culture». Here are some significant figures to demonstrate the scale of changes. Overall, as for October 2016, the unified NTCU had 7124 employees, 274 real property objects (administrative buildings, garages, hostel, cinema, warehouses, production facilities, bomb shelter) with total area over 193 thousand square meters; 39 land plots with total area over 34 hectares; 162 licenses, including 73 TV broadcasting ones and 89 for radio transmission.

Starting from October 1, 2016, the second stage of transforming the NTCU into NPBU was under way. At this stage the NPBU's Statute was elaborated with participation of the Supervisory Board members. It also passed through public consultations before being approved by the Government in late December 2017. The State Property Fund performed a market assessment of property (besides property on the temporarily occupied territories) and determined the amount of statutory capital in 2 billion 544 million 273 thousands UAH.

On December 19, 2017, the PJSC «National Public Broadcasting Company of Ukraine» was registered¹ as legal entity. From that day the NPBU's Supervisory Board was empowered and the public broadcasting officially commenced in Ukraine. On February 3, 2017, the Supervisory Board announced a competition for the position of the NPBU's Chairman. With 8 candidates participating at the competition, Zurab Alasania was selected and appointed to the position on April 10, being a candidate supported by a majority of the

¹ http://stv.detector.media/reformuvannya/movlennya/zareestrovano_yuridichnu_osobu_pat_nstu/

CSOs². He is expected to start the work in May. At the same time the Supervisory Board will elect six members of the NPBU's Executive Board, when nominated the Chairman.

New composition of the Board should ensure the implementation of public broadcasting mission, approved³ by the Supervisory Board: «Protect freedoms in Ukraine. Provide the public with accurate and balanced information about Ukraine and the world, to establish public dialogue for strengthening of public confidence, development of civil responsibility, Ukrainian language and culture, personality and Ukrainian people».

In the first weeks of the public broadcasting existence an attempt of political interference in its work was noted, in particular – a tentative to revoke Vyacheslav Kozak, a member of the Supervisory Board, appointed based on the nomination by the parliamentary faction of Oleh Liashko Radical Party⁴. Notwithstanding that the law prohibits a person on this position to follow instructions by the political party as well as establishes an exhaustive list of grounds for termination the powers of a Supervisory Board member, the faction leader sent to the regulator authority a letter requesting to replace the member delegated by faction to another, without pointing out any of the statutory grounds. However, Oleg Lyashko publicly declared⁵ that «revokes» Vyacheslav Kozak due to his voting in the course of the election of the Chairman of the Supervisory Board. This attempt was confronted by the members of the Supervisory Board, CSOs (Reanimation Package of Reforms), Special Advisor of the Secretary General of the Council of Europe for Ukraine in Strasbourg Regis Brillat, Ambassador of Sweden to Ukraine Martin Hagström, Delegation of the European Union to Ukraine and other diplomats. The regulator refused to consider the issue until the faction did not give grounds specified by the law for termination of member's power. Undoubtedly, the tentative to replace a member of the Supervisory Board in the first of the country's history open competition for the post of head of public broadcasting carries risks of interference in the competitive process and future functioning of the company. As a result it could affect the freedom of speech in the country.

Besides an attempt of direct political interference, risks remain in relation to political pressure through financial levers. In spite of the requirement of financing the NPBU in the amount of 0.2% of the previous year's State budget, that should have constituted 1.28 million UAH in 2017, the actual funds allocation was 75%. This fact significantly complicates technical upgrade and creation of quality content. Without these funds, a swift change of programs at the «UA:First» or regional broadcasters is improbable, since the balance just covers minimum salaries and utilities, instead of investing in production of TV and radio products.

Reform of print media

In the context of reforming the print, founded by the state and local authorities, the situation was less successful, due to a soft position of The State Committee for television and radio broadcasting as well as existing flaws of the law «On reforming of state and municipal print media». Due to the insufficient political support, the law was approved without taking into account important proposals from the Council of Europe experts.

According to the law, the print media reform has two stages. The first year after the adoption of the law is a pilot one, reforming only the media which voluntarily expressed their wish to do so within the first stage and were on the list, approved by the Cabinet of Ministers of Ukraine. The second stage (2017-18) foresees the reform of the rest of the print media.

² <http://detector.media/rinok/article/125018/2017-04-11-obrannya-alasani-golovoyu-pravlinnya-nstu-stalosya-divo/>

³ <http://stv.detector.media/reformuvannya/movlennya/naglyadova rada zatverdila misiyu suspilnogo movlennya v ukraini/>

⁴ <http://stv.detector.media/reformuvannya/movlennya/fraktsiya olega lyashka bezpidstavno khoche zaminiti svog o chlena v naglyadoviy radi nstu dokument/>

⁵ <http://stv.detector.media/reformuvannya/movlennya/komitet svobodi slova ne pidtrimav zvernennya olega lyashka schodo zamini vyacheslava kozaka u naglyadoviy radi/>

The first problem was that despite the existing deadlines for determination of the method and reforming phase (the first quarter of 2016) as well as the adoption the decision by the founders (April 2016), the State Committee for television and radio broadcasting approved a decree about the formation of the list concerning the first stage of reform on February 29, 2016, and determined the deadline for receiving documents not at the beginning of May, but only – July 1, that in fact delayed the whole first stage.

In March 10, 2016, the State Committee for television and radio broadcasting approved the Procedure for drawing up a list of print media and editorial offices to be reformed within the first stage. It is available on the official website of the State Committee for television and radio broadcasting in the section «Reform of the print media». Such slow pace, along with the problems arising from the sabotage of some local authorities, has led to the fact that the list was approved⁶ only on November 23, 2016 – 5 weeks before the expected termination of the first stage. In fact it negated all the logic of two-step reform, because these media had no time to demonstrate their «success story» to the rest, as they were reformed only at the end of the first stage.

At the beginning of 2017 more than 600 media are to be reformed.

Some issues remain unsolved:

- editorial offices (they have primary right to lease granted them by law, while leverages of influence on renting remain at the hands of oblasts and regions councils' heads and administrations);
- procedure of reorganization of legal entities;
- the procedures for transfer of assets (state or municipal) may take several years, given that the transfer procedures don't have exceptions to the reformed media, they follow the general procedure for state and municipal property (assessment, competition, sale or privatization);
- attracting investors is possible under the transparent conditions for legal entity. But the media would not be able to provide the final terms of their transformation;
- editorial teams are not able to hire qualified lawyers. At the same time, they are not eligible to use free legal assistance;
- there is no possibility of transforming the print media into the convergent media (the legislation does not regulate this issue);
- future mechanisms of cooperation between local authorities and local self-governments as well as media which are not owned by them already. There is a certain risk of information distortion while communicating it to the public at large while taking into account an opinion of the media owner. This can cause some distortions in the coverage of certain aspects of the state policy.

At the same time, there is a problem with media, owned by central executive authorities, namely absence of individual or special norms for such entities. Meanwhile, on this stage privatization of the media (no exclusions foreseen by the Law for scientific and research media) is not discussed at the national level at all. It seems that decisions about such media have not been elaborated and therefore were not reflected in the legislation.

Implementation of the European standards in the area of audiovisual media services in Ukraine

Chapter 15 of the Association Agreement encourages cooperation in the audiovisual field, both in terms of the product promotion and training of journalists. It is also envisaged that approximation of Ukrainian legislation to the Directive No. 2010/13/EU (Directive on Audiovisual Media Services) should take place within the two years from the entry into force of the Agreement.

The Law of Ukraine «On Audiovisual Services» should be adopted to replace the outdated Law of Ukraine «On Television and Radio Broadcasting in Ukraine», which is still in force. This is not only one of the key issues of approximation of Ukrainian legislation to the *acquis* but a precondition for reforming of Ukrainian

⁶ <http://zakon2.rada.gov.ua/laws/show/848-2016-%D0%BF>

media sphere as well. This law is intended to address the issues of independence, sustainability and efficiency of the regulator as well as to change the licensing concepts and solve issue of digital broadcasting.

As a result of the lack of political support for the adoption of a new edition, in 2016 the Parliament adopted a number of amendments which determined the point of political compromise on such sensitive issues as language quotas, sanctions by the regulator, limiting the products of the aggressor-states. The chosen tactics of «small changes» gave the first positive results. Yet in 2017, the regulator has imposed fine on a TV channel in amount of 1.6 million UAH for broadcasting programs that might harm children.

However, the issue of transition from the analogue to digital broadcasting has certain risks – meeting deadlines of the transition may leave 60% of the population without broadcasting this summer as the quality of the digital broadcasting coverage raises certain warnings among the experts.

The adoption of amendments to the legislation on transparency of the media ownership in 2015, became one of the important developments in the media field. The Ukrainian Law places Ukraine among most developed countries in the context of transparency of the media ownership. Since 2016 TV channels and radio stations are obligated to annually publish their ownership structure and data on final beneficial owners. However, the experts' recommendations have repeatedly stressed the need for regulator to adopt a short-, medium- and long- term plan for Law implementation. This has not been done yet.

The access to public information

The Law of Ukraine «On peculiarities of access to information in the sphere of electricity, natural gas, heating supply, centralized hot and drinking water supply and sanitation» and the Law of Ukraine «On amendments to some legislative acts of Ukraine to ensure the transparency of the activity of the Antimonopoly Committee of Ukraine» entered into force in 2016. These Laws establish obligation to publish decisions adopted by the Antimonopoly Committee of Ukraine after consideration of the cases on violations of the legislation on protection of economic competition. As well as establish obligation of considering the applications and cases on concerted actions or concentration. Adoption of this Law corresponds to the obligations of Ukraine to implement the provisions of the Article 256 of the EU-Ukraine Association Agreement in 2014-2017 years. It is early to say about advantages or disadvantages of the implementation of these norms as it is impossible to compare efficiency of such decisions in dynamics.

The Law of Ukraine «On peculiarities of access to information in the sphere of electricity, natural gas, heating supply, centralized hot and drinking water supply and sanitation» defines the types of information to which the access of consumers is granted as well as establishes the ways to access this information. Namely, receiving information via official websites of the state authorities and local self-governments empowered to set prices/tariffs as well as from business entities that carry out activities in relevant areas, in mass media, on information stands and payment documents. This Law also envisages the access by the consumers to electronic payments systems via official websites of such entities as well as establishes the frequency of updating such information.

On 11 February 2016, the Cabinet of Ministers of Ukraine adopted the Order № 92 «On approval of the Concept of establishment of an integrated information-analytical system «Transparent Budget» within the «E-data» project framework. The Concept foresees the establishment of the system of public access to the information on public funds at all stages of its planning and usage. Its implementation would provide the automation of the budget process, enhancing of the investment climate of the country due to more open governmental policy, reducing the probability of misuse and corruption at all stages of the budget process. There is no information on the results of the Government's activities on this project, thus requiring additional research on the topic.

The amendments to the Tax Code and certain legislative acts of Ukraine on ensuring the balance of budgetary revenues entered into force on 1 February 2016. In particular, these amendments introduced 2

public registers with chronological system of VAT refunds. In this regard, the Cabinet of Ministers of Ukraine approved the «Procedure of maintenance of the registers for the applications on the budgetary remuneration of the VAT» by adoption of the Resolution of Ukraine on 22 February 2016 № 68. The implementation of such measures should have facilitated the introduction of transparency in all the processes of public finance management and relations with taxpayers. Still these have caused a political scandal with Presidential Administration of Ukraine⁷, therefore the goals have not been achieved.

On 24 February 2016, the Government approved the Resolution № 122 «On amendments to the Procedure of maintenance of the National Register of the Legal Acts and its Usage». This Resolution was supposed to simplify access to the information fund of the Unified National Register of the Legal Acts. This fund's information was attributed to be the public information in a form of open data which, in accordance with the Law of Ukraine «On access to public information», should be published and regularly updated on the unified state web-site of the Ministry of Justice of Ukraine.

In July 2016, at the meeting of the Vice Prime Minister for European and Euro-Atlantic Integration and other Government officials with the In July 2016, at the meeting of the Vice Prime Minister for European and Euro-Atlantic Integration and other Government officials with the representatives of the Ukrainian Side of the EU-Ukraine Civil Society Platform, the question was raised that norms of the Constitution of Ukraine envisages that «Laws and other regulatory legal acts that define the rights and duties of citizens shall be brought to the notice of the population in compliance with the procedure established by law». Today, neither law nor draft law exists. Although, the issue was repeatedly raised in order to establish an analogue of the European system – <http://eur-lex.europa.eu/homepage.html?locale=en>, as well as to improve the mechanism of delivering decisions of the European Court of Human Rights, EU judicial practice, authentic data base of Ukrainian translations of Directives, Regulations, Resolutions to be implemented by Ukraine under the Association Agreement as well as those, adopted by the EU, replacing the ones, specified in the Agreement.

In addition, improvements are required for the functions of the supervisory authority in the area of access to public information as well as empowerment of such body. Namely, a review of powers of the authorities in charge of the supervision and control in the area of access to public information and consideration of the requests (complaints) while taking into account the European experience of the independent institution in place (the parliamentary control should remain the prerogative of the Parliamentary Commissioner for Human Rights) in area of access to public information and protection of privacy.

Freedom of speech in Ukraine

In 2016, the unoccupied territory of Ukraine witnessed 262 recorded cases of violations of freedom of speech (as of 27 December) which is approximately 15% less than last year (Institute of Mass Information recorded 310 violations of freedom speech in Ukraine in 2015 and 995 cases in 2014), according to the annual «Freedom of Speech Barometer»⁸ research of Institute of Mass Information. Adding incidents on the territory of the occupied Crimea (31) and of Donbass region (12), the total figure of violations of freedom of speech was 305 cases in 2016.

The obstruction of journalists' activities was the category that witnessed the highest number of violations, namely 107 (in 2015 – 100, in 2014 – 150, in 2013 – 130 cases). Private persons, law enforcement officials and local authorities have hindered such activities the most.

Threats and intimidation of journalists holds the second place – 42 incidents. In 2016, this category exceeded the number of cases documented last year, when 36 cases of threat of journalists were

⁷ <http://www.unn.com.ua/uk/news/1659463-v-ap-poyasnili-chomu-khochut-otrimati-dostup-do-reyestru-vidshkoduvannya-pdv>

⁸ <http://imi.org.ua/barametr/>

registered (in 2014 – 98, in 2013 - 35). Private persons and deputies of different levels are those who threatened the most.

Beatings and attacks on journalists were on the third place as well as restrictions on the access to public information – 30 cases each.

In 2016, number of cases of beating and attacks on the journalists decreased by almost half compared to 2015 (58 attacks) and almost by 10 times, compared to 2014 (286). This year the main attackers on the journalists were private individuals. The IMI recorded such trend for the second consecutive year in contrary to 2014 and 2013, when the main aggressors were representatives of the law enforcement agencies and local officials.

This year, the figure of restrictions concerning the access to public information was almost align with the previous year (33), in 2014 – 14, in 2013 – 13. In 2016, journalists' access to public information was restricted mainly by the local authorities as well as in the previous year.

Besides, in 2016 one murder of journalist (in 2015 – 2, in 2014 – 7, in 2013 – none) was registered in Ukraine. On 20 July in Kyiv, prominent journalist Pavlo Sheremet was killed by the car explosion while driving. The Police have classified this incident as «murder committed by a method hazardous to the lives of many persons». Investigation works on four main versions of Sheremet's murder, namely professional activity, personal motives, the Russian track and assassination attempt of Olena Prytula, Chief Editors of the Ukrayinska Pravda.

IMI has registered 12 cases of violence of freedom of speech on the occupied territories of Donbass and Lugansk regions, taking into account restricted access to these territories. In particular, it's worth mentioning the blocking of Ukrainian TV channels broadcasting, websites and publishing the journalist's personal data on the separatists' websites. Also, 3 bloggers – residents of the Luhansk are now in captivity of the so-called «LPR». They are accused by militants of dissemination of «extremists materials» about the self-proclaimed republics. For comparison – IMI has registered 16 cases on the occupied territories last year.

In 2016, there were registered 31 violations of freedom of speech in Crimea, annexed by the Russian Federation, which is slightly less than last year (43 incidents). On the peninsula, the same as last year, media and journalists were pressured by the Russian special services – Roskomnadzor and occupational Crimean authorities. Yet, Crimean journalist Mykola Semena, has been charged by the FSS with committing criminal offence envisaged by part 2 of the Article 280.1. of the Criminal Code of the Russian Federation on «Public Appeals to commit actions aimed at the violation of territorial integrity of the Russian Federation». Mr. Semena mentioned during the FSS interrogation that he considers «a conversation about affiliation of Crimea to Russia as controversial» and that in his journalistic article he «has used the right to express his views».

The situation in the context of legislation on protection of journalistic activity and journalists' access to information has worsened. Despite adoption of amendments to the Article 171 of the Criminal Code of Ukraine in February 2016, which strengthened legal basis for protection of journalists' rights, any denial to provide information to journalist is a ground for the National Police to conduct verification on the presence of signs of a criminal offense. Due to the limited timeframe, foreseen in the Code of Administrative Offences, it creates obstacles for bringing to responsibility the persons who violated right to information.

The issue of recovery of so-called «progressive scale» of court fees in cases against media remains unresolved. Such scale served as a preventive mechanism for media and journalists from excessive numbers of lawsuits, especially during the election campaigns.

Based on the abovementioned, the EU-Ukraine Civil Society Platform brings attention to the following most important tasks to strengthen the freedom of speech in Ukraine:

- 1) Full launch of the public broadcasting, conduction of transparent competition for the election of the Board of the National Public Broadcasting Company of Ukraine, audit of the company, optimization of the structure and staff as well as beginning of the content change.
- 2) Increase of financing of public broadcasting in 2017 to the minimum amount, legally foreseen, which would allow starting the technical upgrade of public broadcasting. To ensure full public broadcasting funding in a state budget for the coming years.
- 3) Passing to the Parliament and adoption of amendments to the Law of Ukraine «On privatization of print media» while taking into account the propositions of the international experts and lessons learnt from practical implementation of the first stage. This would allow to correct drawbacks and efficiently implement the second phase of the reform as well as to develop a plan of implementation of such amendments for its adoption by the Government.
- 4) Passing to the Parliament and adoption of the draft law «On audiovisual media services» which would allow to move from a «random» regulatory level in the sphere of the audiovisual content and media to the efficient state policy as well as to the existence of the independent regulator or self-regulating media activities.
- 5) Amendments to the legislation on access to information:
 - to clarify the object of the regulation (public or socially important information or any information in possession of authority, except confidential), the subject of an application, through extending it to any natural persons or entities with no reference to the nationality or territorial residence;
 - to specify eventual forms of appeal and request – written, electronic, verbal (via telephone/hotline, etc.);
 - to clarify documents requisites while taking into account the availability of electronic form of the documents and possibility to apply digital signature;
 - to unify the procedure of consideration and procedure of the registration of the documents, considering the application of electronic document management systems;
 - to unify terms for consideration (urgent – 2 working days, other – 15 working days), except for cases of urgent provision of information in order to ensure life and health of the citizens (environmental information);
 - to establish absence of the fee for the provision of information on appeals and requests;
 - to unify grounds for refusal;
 - to clarify the procedure for appealing against actions (inaction) of state officials and other persons in charge of non-response and review liability mechanism of all kinds of responsibility established for these violations;
 - to review the powers of the persons responsible for the supervision and control in area of access to the public information and consideration of the appeals (complaints) with taking into account the availability of independent institution (the parliamentary control remains for the Parliamentary Commissioner for Human Rights) in area of access to public information and privacy protection;
 - to cease practice of «partial» regulation of the access to public information in certain areas;
 - to amend the order of the State Committee for Television and Radio Broadcasting of Ukraine, aiming at reviewing mechanism of monitoring of the official web sites of the state authorities and local self-governments.
- 6) Improvement of the provisions of the legislation concerning journalists' activities – correct gaps in the Criminal Code, restoration of progressiveness of the court fees scale to 10% of the claim amount in cases against media, normalization of the provisions on the right of reply and confutation of information, protection of whistle-blowers.
- 7) Revision of the legislative norms which will allow state authority to influence the media activity, in particular, the Law «On the procedure of mass media coverage of the activities of state authorities and local self-Government in Ukraine».
- 8) Development of legislation basis for creation of free automatic public 24/7 constantly updating system «Law of Ukraine and the EU».