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The Polish Interim Broadcasting Act 2015 in the Light of Article 10 ECHR

A Legal Analysis

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I. The Polish Interim Radio and Television Broadcasting Act – A cause for European concern

On 30 December 2015 an Act amending the Polish Radio and Television Broadcasting Act of 29 December 1992 was rushed through both houses of the newly-elected Polish Parliament, the “Sejm” (lower house) and the Senate.

Poland's conservative party “Prawo i Sprawiedliwość” (“Law and Justice”, abbreviated “PiS”), presided by party leader *Jarosław Kaczyński*, holds a majority in both houses of parliament, which has empowered it to shape the government on its own, including nominating the Prime Minister *Beata Szydło*. Polish President *Andrzej Duda* is also a member of PiS.

The Interim Act introduces major changes to the governance framework of the Polish public radio and television broadcasting companies, which operate as joint-stock companies owned by the State Treasury, described in detail in chapter IV. The Interim Act changes the appointment procedures entirely and entrusts to the sole Treasury Minister the appointment and dismissal of members of the broadcasters’ management and supervisory boards; this is cause for serious concern as regards the independence and internal pluralism of the public service broadcasters. The Interim Act also brought to an immediate end the terms of office of the Management and Supervisory Boards in place at the public service broadcasters.

The amendments to the 1992 Act were designed to be temporary and to be in force only until 30 June 2016. The “sunset clause” was not part of the initial proposal but was introduced during the legislative proceedings; it was later repealed by the “bridge law” adopted on 22 June 2016 (see below). Measures taken under the Interim Law will – at least provisionally – remain in place and their practical effects will stay. Thus, the situation has not reverted in July 2016 to the situation prevalent before the entry into force of the Interim Act. Quite the contrary, recent government interference on the basis of the Interim Act, with all of its implications for managerial staff and senior journalists, as well as its repercussions on the impartiality and the editorial lines of TVP and PR, has not been corrected.

The Parliament's Explanatory Memorandum justified the amendments, *inter alia* with following arguments:

- Under the existing regulations the National Broadcasting Council decided, amongst other matters, on the composition of governing bodies in companies owned by the Treasury as well as on the content of their statutes.
- However, as the National Broadcasting Council is an independent regulatory authority according to the Constitution, it should not be endowed with any specific powers as regards the public media.
- Therefore, the National Broadcasting Council should not be involved in forming the management and supervisory boards of Treasury-owned companies operating on the media market.
- Until a new organization for the national media is launched, this will remain within the purview of the Minister of the Treasury, who is accountable to the Polish Parliament.

It is striking that the Explanatory Memorandum does not mention any alternative regulatory options for appointing members of Treasury-owned companies. With regard to the fact that the Interim Act confers all these powers to the Treasury Minister, the following passage of the Explanatory Memorandum hints at the drafters' intention of gaining more political influence over public service media (PSM):

“In terms of the owner’s supervision and corporate powers, the proposed legislative modifications bring joint-stock companies wholly owned by the Treasury, which are *public radio and television organizations, closer to the standard applicable to other companies controlled by the Treasury*” (emphasis added).

Whether the Treasury Minister's legal and political accountability to Parliament can and will serve as an effective control is more than dubious, particularly as long as PiS hold the political majority. And the Explanatory Memorandum's assertion that the proposed changes in the broadcasting law will contribute “to restoring the professional and ethical standards required of the public mission” of public radio

and television, by quoting Article 21.1 of the amended Broadcasting Act, does not alleviate these doubts.

The Interim Act could thus have a negative "lasting effect" on the regulatory framework for public service media and its practical implementation, jeopardizing political independence and freedom of the media in Poland.

The adoption of the Interim Act and its impact on the independence, integrity, objectivity and impartiality of the Polish public broadcasters as well as on their tasks has raised concern within several European institutions. As early as 30 December 2015, the OSCE Representative on Freedom of the Media, *Dunja Mijatović*, expressed deep concern about the proposed law that gives the government direct control over management positions in public service broadcasters. Also in December 2015, *Frans Timmermanns*, Vice-President of the European Commission, stressed the importance of media freedom and pluralism to the "common values on which the union is founded".

Several NGOs also took a stand against the Interim Act, such as the *European Broadcasting Union* (EBU), which was deeply concerned about the changes in Poland's media law, fearing that they could adversely affect the independence of public service media in Poland, because "pluralism and political independence are key tenets of public service media in a democratic society and the direct government appointment of public service media supervisory and managerial personnel puts this independence and the ability to conduct non-partisan journalistic endeavors at risk".[1] The *European Regulators Group for Audiovisual Media Services* (ERGA) issued a statement on "The necessity of independent media" in January 2016.[2] Other major organizations, like the *European Federation of Journalists* (EFJ), the *Association of European Journalists* (AEJ), *Reporters Without Borders* (RSF), the *Committee to Protect Journalists* (CPJ), the *Index on Censorship* and the *Helsinki Foundation* voiced serious concerns about the Interim Act as well.

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1 See https://www3.ebu.ch/news/2016/01/ebu-news-committee-deeply-concer; (19 January 2016); before then https://www3.ebu.ch/news/2016/01/ebu-expresses-dismay-at-signing (7 January 2016).

2 https://ec.europa.eu/digital-single-market/en/news/statement-european-regulators-group-audiovisual-media-services-erga-necessity-independent-media.

The Secretary General of the Council of Europe, *Thorbjørn Jagland*, invited Poland's President, *Andrzej Duda*, on 5 January 2016 to enter into dialogue with Council of Europe experts so as to have the best possible basis for consideration before signing the new Act into law. On 4 January 2016 a media alert was submitted to the Council of Europe's "Platform to promote the protection of journalism and safety of journalists" calling on the Polish ruling party to abandon the proposed legislation at once.[3] On 5 January 2016 the Council of Europe Commissioner for Human Rights, *Nils Muižnieks*, implored Poland's President not to sign the law and to uphold the independence of Poland's public service television and radio. However, these interventions did not prevent the President from signing the Interim Act.

On 3 January 2016, the European Commissioner for Digital Economy and Society, *Günther Oettinger*, had already warned about potential political consequences and accused Poland of infringing "common European values" by passing legislation that gave the government control over public service media and the power to directly appoint the heads of public broadcasters.

Finally, on 13 January 2016, the changes in the law on the Public Service Broadcasters, together with the political and legal dispute concerning the composition of the Polish Constitutional Tribunal, gave rise to concerns regarding the respect of the rule of law, prompting the European Commission to start the so called "pre-Article 7 procedure", based on the "Rule of Law Framework for the European Union".

This Framework was established on 11 March 2014 as an additional element to the preventive and sanctioning mechanisms pursuant to Article 7 TEU. Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission can launch this procedure by initiating a dialogue with that Member State. Its purpose is to find a solution with the Member State concerned in order to prevent a threat from developing into a "clear risk of a serious breach" of one of the EU values mentioned in Article 2 TEU, which would potentially trigger the use of

[3] http://www.euractiv.com/section/central-europe/news/press-organisations-file-complaint-against-polish-media-law/.

Article 7 TEU.[4] Since Article 2 TEU mentions, *inter alia*, "freedom" and "respect for human rights" as values of the EU which "are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, (…) prevail",[5] it is obvious that threats to freedom of expression and freedom of the media (which are guaranteed and protected in Article 11 of the EU Charter for Fundamental Rights as well as in Article 10 of the European Convention on Human Rights) occur whenever the independence and integrity of PSM are at stake. The European Commission thus requested information from the Polish Government on the situation regarding the composition of the Constitutional Tribunal and on the amendment of the Radio and Television Broadcasting Act.

As the dialogue between the European Commission and the Polish Government did not lead to an agreement on the issues, on 27 July 2016 the Commission adopted a Recommendation regarding the rule of law in Poland.[6] It invites the Polish Government to solve the problems identified within three months. While the main focus of the Recommendation is to restore the functioning of the Constitutional Tribunal and the effectiveness of the constitutional review of new legislation, it refers to the Interim Law as a particularly sensitive legislative Act which must be subject to an effective constitutional review to ensure its compliance with fundamental rights, in view of the concerns it raises relating to freedom and pluralism of the media.[7]

At the domestic level, Polish Commissioner for Human Rights, *Adam Bodnar*, lodged an appeal to the Polish Constitutional Tribunal and requested that several legal provisions contained in Articles 1 to 4 of the Interim Act be declared as non-compliant with the Polish constitution and with the European Convention on Human Rights.

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4 See the European Commission's Communication "A new EU Framework to strengthen the Rule of Law", 19.3.2014, COM(2014) 158 final/2, and its Annex 1, 11.3.2014, COM(2014) 158 final, Annexes 1 to 2.

5 Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

6 Commission Recommendation of 27.7.2016 regarding the rule of law in Poland, C(2016) 5703 final.

7 Ibid. paragraphs 65-71.

The Interim Act raises serious issues with worrying consequences and possible long-term effects, for this reason, it requires a careful analysis, bearing in mind that freedom of expression and of the media constitutes – according to the case law of the European Court of Human Rights – one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every person. Without pluralism, tolerance and broadmindedness, in the opinion of the ECtHR, there is no democratic society.

These considerations also apply to subsequent developments, including the Act on the National Media Council of 22 June 2016, the so-called “bridge law”, which replaced the Interim Act, thus allowing the Polish Parliament more time for the so-called “big media reform”.

In short, the “bridge law” provides for the creation of a super-supervisory body for PSM, the National Media Council (NMC), competent for appointing and dismissing members of the Management and Supervisory Boards of each of the PSM organizations. The “bridge law” deletes the “sunset clause” on the temporary nature of the Interim Act of 30 December 2015, thereby eliminating possible doubts about the effects of the Interim Act after 30 June 2016. However, with the entry into force of the “bridge law”, the provisions granting the Minister of Treasury the power to appoint and dismiss the members of the boards of PSM organizations are changed again, with these powers being attributed to the NMC. However, the Management and Supervisory Boards of TVP, PR and regional radios, whose members were appointed by the Minister of Treasury in accordance with the provisions of the Interim Act, shall remain in office in their composition existing at the date of entry into force of the “bridge law”, until changes are made under the new rules.

The NMC shall consist of five members, three of whom will be appointed by the Sejm and two by the President; the President is bound to appoint members nominated by parliamentary “clubs” whose members are not part of the government (“opposition clubs”). If there are two vacancies, the right to nominate candidates will be vested with the two biggest opposition clubs. In this way the drafters have reserved two of the five seats for the opposition parties, assuming

that the Sejm will elect representatives from the governing parties. The Chairman of the NMC would be appointed by the NMC, among its members.[8]

The law does not provide a deadline for the appointment, by the NMC, of new boards for the PSM organizations, and the timing may depend on the procedure that the NMC will decide to apply.

II. Aim and terms of reference of this study

The purpose of this study is to assess the Interim Act of 30 December 2015 amending the Polish Radio and Television Broadcasting Act of 29 December 1992. It discusses whether or not the Interim Act respects the requirements of freedom of expression and of the media. In particular, the study deals with the question whether or not the amendment observes the principles of independence of PSM, and its potential impact on media plurality in Poland overall. The "larger" media law reform announced in April 2016 and which was supposed to replace the "Interim Act" is not the focus of this study, nor is the so-called bridge law adopted on 22 June 2016. Nevertheless, its results may provide insights and evidence for assessing further developments of the Polish media law.

The legal context for this study is the European fundamental rights framework, as laid out by Article 10 of the European Convention on Human Rights (ECHR). The fundamental freedoms and human rights of this instrument are legally binding for all Member States of the Council of Europe, and it serves as a reference for all European media service providers. Thus, the guarantee of freedom of expression and of the media provided by Article 10 ECHR must clearly be the centrepiece of our investigation. The comparable guarantees found in Article 11 of the European Charter of Fundamental Rights regarding freedom and pluralism of the media (Article 11 §2) could also be taken into consideration, however it is uncertain whether these guarantees extend to the regulation of broadcasters by Member States with respect to their organization and governance, and whether these

[8] On 22 July 2016, the Sejm elected three NMC members, all nominated by the majority party PiS: *Krzysztof Czabański* (the former Deputy Minister in charge of the media law reform), *Joanna Lichocka* and *Elżbieta Kruk*. All three were active Parliamentarians with media experience. On 27 July 2016, President *Duda* appointed two candidates out of the four proposed by the opposition parties: *Juliusz Braun*, a former President of TVP, and *Grzegorz Podżorny*, a journalist. At its first meeting, the NMC elected Mr *Czabański* as its Chairman.

guarantees exceed those of Article 10 ECHR.[9] Therefore, we will focus here only on Article 10 ECHR and the relevant case law of the European Court of Human Rights (ECtHR) that serves as a sound source of legal knowledge.

In addition to the case law of the ECtHR, several national constitutional courts have developed media freedom principles that have an impact on the organizational structure of public broadcasters. Because such jurisprudence deals with national constitutional guarantees it does not have a direct effect on the interpretation of Article 10 ECHR or on the European standards stemming from this fundamental right. For this reason we have not undertaken a systematic analysis of national case law and any references to national jurisprudence has only parenthetic significance.[10]

The Constitution of the Republic of Poland of 2 April 1997 protects the freedom of media. It stipulates that the Republic "shall ensure freedom of the press and other means of social communication" (Article 14) and grants freedom of expression as a constitutional right in Article 54. By referring to these provisions, the Polish Commissioner for Human Rights (RPO) has filed a constitutional appeal with the Polish Constitutional Court (Trybunał Konstytucyjny) against the recent media reform bill.[11] Since Poland is member of the ECHR, Polish laws not only have to comply with the Polish Constitution but also with the ECHR. Pursuant to Article 9 of the Constitution "the Republic of Poland shall respect international law binding upon it". Therefore, we can assume that the ECHR, and namely Article 10, will also be an important point of reference when considering the constitutionality of these political reforms under the Polish Constitution. Because the ECHR functions as an

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[9] See Article 11 of the European Charter in the context of public service media with further references *Berka/Tretter*, Public Service Media under Article 10 of the European Convention on Human Rights. Study on behalf of the European Broadcasting Union (2013) 16 et seq. [also available under https://www3.ebu.ch/files/live/sites/ebu/files/Publications/Art%2010%20Study_final.pdf (15 April 2016)]; *Brogi/Gori*, Legal Analysis of the EU Instruments to Foster Media Pluralism and Media Freedom, in Robert Schuhmann Centre for Advanced Studies/The Centre for Media Pluralism and Media Freedom (ed), European Union Competencies in Respect of Media Pluralism and Media Freedom (2013) 43 (49 et seq) [available under http://cmpf.eui.eu/Documents/CMPFPolicyReport2013.pdf (15 April 2016)].

[10] For an analysis of national constitutional jurisprudence see *Institut für Europäisches Medienrecht (EMR)*, Public Service Media According to Constitutional Jurisprudence. The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence, 2nd edition (2012).

[11] https://www.rpo.gov.pl/en/content/commissioner-human-rights-appeal-constitutional-tribunal-media-law (24th March 2016). See the full text at: https://www.rpo.gov.pl/sites/default/files/Application%20to%20the%20Constitutional%20Tribunal%20on%20media%20law.pdf.

integral part of the *acquis communautaire* in terms of fundamental rights, the Convention also plays an important role in the pre-Article 7 procedure which could lead to the sanction mechanism under Article 7 TEU. However the constitutionality of the media reform with respect to the Polish Constitution lies outside the scope of this study.

III. Governance and remit of public service media in the light of Article 10 ECHR

Article 10 ECHR reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for pre-venting the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1. Article 10 ECHR and public service media

Article 10 ECHR represents a human right with a guarantee which is shaped and formulated according to the traditional concept of an individual right, granting freedom from State interference to any natural and legal person. In its core, Article 10 protects freedom of communication in a very broad sense, regardless of its content, and by any means.[12] It therefore includes the freedom to impart and receive information and ideas, including through broadcasting and other electronic media. The guarantee can be invoked by journalists working in media enterprises,

[12] See e.g. *Van Dijk/Van Hoof* (eds), Theory and Practice of the European Convention on Human Rights, 4th edition (2006), 778 et seq; *Grabenwarter*, European Convention on Human Rights (2014), 253 et seq.

against interference by State authorities[13] or employers[14], and by media service providers against any encroachment on their freedom of communication as legal persons.

With respect to media service providers, Article 10 ECHR is applicable to private/commercial broadcasters and to PSM, including public broadcasters owned and/or financed by the State.[15] This has been established by the case law of the ECtHR, which has explicitly acknowledged that public broadcasters can be considered as "non-governmental organizations" in the sense of Article 34 ECHR, with the right to appeal to the Court.[16] This is evident where there is a legal framework guaranteeing the public broadcaster's editorial independence and institutional autonomy exists. But this does not mean that a public broadcaster would lose its right of appeal if its independence were substantially infringed upon or abolished by a prior State action. Otherwise one would end up with the paradoxical situation that by depriving a public service broadcaster of its independence a State would also deny it of any protection under Article 10. This would be incompatible with the principle that the rights of the Convention have to be effective rights.[17]

Public service broadcasters can therefore invoke their fundamental freedom of communication against any State action that infringes on said freedom. The right to appeal can be exercised both by the broadcaster as an undertaking, and by the individuals working in administrative or journalistic positions within it. Having established that principle, we now turn to the substantive dimension of Article 10 ECHR.

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13 See ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02.

14 See e.g. ECtHR *Wojtas-Kaleta v Poland*, judgment of 16 July 2009, no 20.436/02; ECtHR *Nenkova-Lalova v Bulgaria*, judgement of 11 December 2012, no 35.745/05.

15 Similar the freedom of expression and of the media in Art 14 and 54 § 1 of the Polish Constitution, see the Application of the Polish Commissioner for Human Rights to the Polish Constitutional Court, 10: https://www.rpo.gov.pl/sites/default/files/Application%20to%20the%20Constitutional%20Tribunal%20on%20media%20law.pdf.

16 ECtHR *Radio France and others v France*, judgment of 30 March 2004, no 53.984/00; ECtHR *Österreichischer Rundfunk v Austria*, judgment of 7 December 2006, no 35.841/02, § 46 et seq; ECtHR *RTBF v Belgium*, judgment of 29 March 2011, no 50.084/06, § 94. In agreement e.g. *Jarass*, EU-Grundrechte (2005), 203; *Grabenwarter* (footnote 12), 258.

17 As to this argument see *Berka/Tretter* (footnote 9), 10, 23.

2. Governance principles deriving from Article 10 ECHR for PSM: general observations

Article 10 ECHR grants all mass media the freedom to disseminate and publish news and ideas. This freedom can only be restricted when this is necessary in a democratic society, and in accordance with the conditions laid down in Article 10 §2 ECHR.

At the heart of this liberty lies the freedom to publish any content using means of mass communication without interference by the State or public authorities. This freedom first and foremost protects against indoctrination by the State.[18] In this way the objective of Article 10 can be ensured, namely that all citizens and members of society can receive objective and impartial information and form opinions independently, and that the power of the State is subject to control by the media, acting as a public watchdog.[19]

Infringements to the fundamental freedom of the media do not only occur by regulations of, or restrictions on, content. Usually mass media operate as relatively complex organizations. Freedom of expression and of the media can thus only be effective if the mass media providers are also protected as organizations, and their organizations are safe from infringements by the State. Historically modern press law has always been concerned with interferences in media undertakings in the form of licenses being refused,[20] the establishment of a monopoly,[21] or other intrusions into the organizational autonomy. It has always been clear and uncontested that such measures were infringements of media freedom: freedom of media is only guaranteed if the organization of the media and their decision-making

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[18] *Grabenwarter* (footnote 12), 253 with further references.

[19] See instead of many ECtHR *Jersild v Denmark*, judgment of 23 September 1994, no 15.890/89, § 31; ECtHR *Goodwin v United Kingdom*, judgment of 27 March 1996, no 17.488/90, § 39.

[20] See e.g. ECtHR *Groppera Radio AG and others v Switzerland*, judgment of 28 March 1990, no 10.890/84.

[21] See ECtHR *Informationsverein Lentia and others v Austria*, judgment of 24 November 1993, no 13.914/88, § 32.

structures, i.e. their governance,[22] are protected and allow them to freely and autonomously pursue their goals.[23]

The implementation of these principles can take different forms for private media service providers and PSM. Private or commercial media require independence from the State above everything else. This is based on the assumption that, overall, a society can rely on impartial and balanced information only if their independence is sufficiently protected. It is generally understood that plurality of opinions and objectivity of news are ensured by the diversity of independent media outlets, through "external media pluralism".[24]

In contrast to private media, PSM are required to perform a public service remit, which defines the organization's specific democratic, cultural and social role for society and differentiates PSM obligations from those of commercial broadcasters. Fulfilment of these objectives is usually laid out in the form of a binding set of special obligations. Although these obligations imply further principles of governance for public service media, they do not reduce, let alone nullify, their need for independence.

3. Governance principles: the case of public service media

According to the case law of the ECtHR, PSM play a specific role in securing a pluralistic media system, referred to as "the essence of democracy".[25] In this

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[22] As to the notion of governance in the context of media law see e.g. *Wagner/Berg,* Governance Principles for Public Service Media (2015), 6 [available under http://www3.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Gov-Prin_EN.pdf (4 May 2016)].

[23] As to the mission of mass media and its public remit see e.g. ECtHR *Sunday Times v UK*, judgment of 26 April 1979, no 6538/74, § 65; ECtHR *Jersild v Denmark*, judgment of 23 September 1994, no 15.890/89, § 31 *et alia*.

[24] As to the concept and theory of media pluralism see e.g. *Czepek/Hellwig/Nowak*, Press Freedom and Pluralism in Europe: Concepts and Conditions (2009); *Valcke*, A European Risk Barometer for Media Pluralism: Why Assess Damage When You Can Map Risk? Journal of Information Policy 1 (2011), 185; Robert Schuhmann Centre for Advanced Studies/The Centre for Media Pluralism and Media Freedom (ed), European Union Competencies in Respect of Media Pluralism and Media Freedom (2013) [available under http://cmpf.eui.eu/Documents/CMPFPolicyReport2013.pdf (15 April 2016)]; with a critical approach *Karppinen*, Rethinking Media Pluralism (2013). Regarding ongoing efforts to evaluate media pluralism see the European Media Pluralism Monitor-Project with its last report (2015) [available under http://cmpf.eui.eu/Documents/CMPFPolicyReport2013.pdf [15 April 2016)].

[25] ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02, § 95, 100. Further to the functions PSM should perform *Jakubowicz*, From PSB to PSM: A New Promise for Public Service Provision in the Information Society, in *Klimkiewicz*, Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe (2010), 193 (211 et seq).

regard, PSM contribute to the aim envisioned in Article 10 ECHR that is to provide a free and pluralistic flow of information and to contribute to the independent formation of opinions within and for the democratic society. By doing so, it must be ensured "that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment."[26] Independence is, therefore, a *conditio sine qua non* for PSM. [27] Independence means that there is no dominance by the State but also that "no other powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media."[28] Independence and pluralism are mutually related because each one is a necessary condition for the other. Whereas independence ensures autonomy by limiting the influence of the State and other powerful groups, thus creating space for different opinions, pluralism gives room for societal diversity. In the case of PSM the realization of these principles confronts media policy with special challenges.[29]

In the dual broadcasting system typically found in European States, private/commercial and public service media coexist and complement each other. Unlike in the private sector, where commercial competition is expected to lead to plurality, pluralism within the PSM organization and of its programme output must be secured by other means. Whatever means are employed, it is the State's responsibility to set up a framework for PSM and a governance system that secures independence and contributes to media pluralism.

Obviously the organization of PSM varies greatly in many respects across Europe. Requirements of national constitutional law and different cultural and political traditions lead to different frameworks. Public broadcasters may have closer or more distanced relationships with the State, and their legal statuses may differ

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[26] ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02, § 100.

[27] See also the Recommendation of the Committee of Ministers of the CoE on public service media governance from 15 February 2012 Rec(2012)1: „Independence is the core requirement for every public service media organization" (§ 21).

[28] ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02, § 98.

[29] See with respect to public broadcasters in Germany, Switzerland and Austria *Berka*, Unabhängigkeit, Pluralität und Transparenz, Medien und Recht 4/2015, 216.

considerably. Consequently, the principles of governance are implemented in different ways.

As an example, consider the European trend towards the so-called “decentralized approach” for appointment procedures of management positions in public service media. Here, independent supervisory bodies rather than political bodies such as the government or parliament are in charge of the appointments, thus creating a certain distance from political powers and providing more space for independence.[30] Several comparative analyses have characterized these differences, in certain cases by referring to the jurisprudence of the national constitutional courts.[31] For instance, the German *Bundesverfassungsgericht* has placed the principle of freedom from governmental influence (“*Staatsfreiheit”*) at the heart of broadcasting freedom. In consequence, the proportion of representatives of the State or connected to the State must be strictly limited.[32] A decision of the French *Conseil constitutionnel*, on the other hand, recognized the competence of the President of the Republic to appoint the presidents ("PDGs") of the national public broadcasting companies. However, the President must not compromise the principles of media pluralism and freedom of communication in doing so, a requirement that is met by making appointments conditional to the approval of the *Conseil supérieur de l‘audiovisuel* (CSA)*,* the independent regulatory authority for the audiovisual sector.[33] However, in 2013 the French legislator basically reinstated the appointment system of 1982, giving the CSA full power to appoint the

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30 *Wagner/Berg* (footnote 22), 15.

31 See *inter alia Institut für Europäisches Medienrecht* (footnote 10) with national reports on France, Germany, Hungary, Italy, Poland and Spain and references to the case-law of the ECtHR and the ECJ; *Psychogiopoulou* et al., A comparative analysis of the freedom and independence of public service broadcaster in fourteen European countries, MEDIADEM, Comparative Report (2012); *Hitchens*, Broadcasting pluralism and diversity: a comparative study of policy and regulation (2006).

32 See the recent decision of the German Constitutional Court (Bundesverfassungsgericht in the case of ZDF; see BVerfG 25.3.2014, 1 BvF 1/11 (BVerfGE 136, 9).

33 Decision of 3 March 2009 n° 2009-256 DC and n° 2009-257 DC [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2009/2009-576-dc/decision-n-2009-576-dc-du-3-mars-2009.42439.html and http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2009/2009-577-dc/decision-n-2009-577-dc-du-3-mars-2009.42424.html (6.5.2016)]. See further Decision of 26 July 1989 n° 89-259 DC and Decision of 27 July 2000 n° 2000-433 DC.

presidents of *France Télévisions*, *Radio France* and *France Médias Monde*.[34] At the same time, the law strengthened the independence of the CSA.

Such differences in national frameworks are not decisive for the present analysis. What we seek to develop is the core meaning of the above-mentioned principles in the light of the ECtHR case law. The main question is therefore: are there evident minimum standards of independence and pluralism in Europe of which a State must not fall short in order to respect its obligations under the ECHR? In other words, how broad is the margin of appreciation granted to CoE Member States when they regulate the organization of PSM, as recognized by the ECtHR?[35]

4. Governance principles for PSM: ECtHR case law

The leading case in this context is the judgment of the ECtHR in the case of *Manole and others versus Moldova* from September 2009.[36] The case deals with complaints by journalists, editors and publishers, who were employed by the Moldovan state-owned broadcaster TRM. After the communist party's electoral victory in 2001, there was massive interference by the new government when a large number of senior managers at TRM were replaced with individuals loyal to the government. The broadcaster was thus subjected to strict control of programming, censorship and inappropriate disciplinary sanctions against journalists and employees.

In a unanimous decision, the ECtHR found that there had been a violation of Article 10 ECHR. Moldova had failed to ensure the independence of the public broadcaster because “during the period from February 2001 onwards, when one political party controlled the Parliament, Presidency and Government, domestic law did not provide any guarantee of political balance in the composition of TRM's senior management and supervisory body, for example by the inclusion of members appointed by the political opposition, nor any safeguard against interference from the ruling political party in these bodies' decision-making and

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[34] Article 12 of the *Loi n° 2013-1028 du 15 novembre 2013 relative à l'indépendance de l'audiovisuel public modifiant l'Article 47-4 de la Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication* https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028199587&categorieLien=id.

[35] As to this margin of appreciation see e.g. ECtHR *Handyside v UK*, judgment of 7 December 1976, no 5493/72, § 48; ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02, § 100.

[36] ECtHR *Manole and others v Moldova*, judgment of 17 September 2009, no 13.936/02.

functioning."[37] The ruling of the Court contained several aspects that are salient for the purposes of this study, namely with regard to the principle of pluralism:

- Pluralism in audiovisual media is important because both pluralism and freedom of expression are essential foundations of a democratic society and media service providers play an especially important role for public opinion forming (§§95 – 97).
- The fundamental role of freedom of expression in a democratic State would be undermined if "a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom" (§98).
- A pluralistic service includes the transmission of "impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed" (§101).
- The State has the responsibility to act "as the ultimate guarantor of pluralism". Therefore, "where a State does decide to create a public broadcasting system […] domestic law and practice must guarantee that the system provides a pluralistic service" (§§101, 107).[38]

With respect to the principle of independence, the Court refers to certain standards relating to public service broadcasting which were agreed upon by the CoE Member States through the Committee of Ministers.[39] According to the Court's judgment, certain requirements derive from these standards:

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[37] ECtHR *Manole and others v Moldova*, judgement of 17 September 2009, no 13.936/02, § 109.

[38] As to this responsibility see already ECtHR *Wojtas-Kaleta v Poland*, judgment of 16 July 2009, no. 20.436/02, § 47, and earlier ECtHR *Informationsverein Lentia and others v Austria*, judgment of 24 November 1993, no 13.914/88, § 38. To the concept of "positive obligation" see in this context *Berka/Tretter* (footnote 9), 20 et seq.

[39] The Court refers to Resolution No. 1 on the Future of Public Service Broadcasting (1994), to the Appendix to Recommendation No R(96)10 on the Guarantee of the Independence of Public Service Broadcasting and to the Appendix to Recommendation Rec(2000)23 on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector. Regarding these documents see e.g. *Berka/Tretter* (footnote 9) 12 et seq. and *Institut für Europäisches Medienrecht* (footnote 10), 34 et seq. As to the relevance of legally not binding documents of the CoE as a "guidance" to interpreting Article 10 ECHR see also *Berka/Tretter* (footnote 9), 12 et seq.

- The legal framework governing public service broadcasting organizations should clearly stipulate their editorial independence and their institutional autonomy, with particular reference to a number of key activities (editing and presentation of news and current affairs programmes and the recruitment and management of staff, §102). Independence from political interference and control has to be secured by practical means, e.g. by ensuring that the appointment of board members respect a political balance or through guarantees against dismissal (§109).
- In addition to the independence and autonomy of the organs of a broadcaster (such as the management boards), the independence and functions of regulatory authorities for the broadcasting sector also have to be secured. This can notably be secured by the adoption of detailed rules covering the composition and the functioning of such regulatory authorities, thereby protecting them against political interference and influence (§102).

In cases following the *Manole* judgment, the ECtHR has had further opportunities to express these fundamental views on pluralism in audiovisual media, e.g. in the case of *Centro Europa 7 S.R.L. and Di Stefano versus Italy*.[40] In addition, the recommendation adopted by the CoE Committee of Ministers in 2012 on public service media governance should be mentioned.[41] The principles laid down in this recommendation hold the same weight as those in earlier recommendations quoted by the ECtHR in the *Manole* case and should also be considered here.

5. Consequences: the requirements stemming from Article 10 ECHR

As stated above, the aim of this legal analysis is not an assessment of how PSM governance structures are designed in individual European States, or how they could be optimized. There are many different models and strategies for "good governance", such as those found in the recommendation of the Committee of Ministers on governance of PSM.[42] But these are clearly not the only models that are compatible with Article 10 ECHR. Even “poor governance”, characterised by a

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[40] See ECtHR *Centro Europa 7 S.R.L. and Di Stefano v Italy*, judgement of 7 June 2012, no 38.433/09, §§ 129 et seq.

[41] Recommendation CM/Rec(2012)1 on public service media governance.

[42] See footnote 41.

suboptimal achievement of the relevant governance principles, will only be in violation of Article 10 ECHR if the conflict with the principles of independence and plurality is serious and manifest. We are not seeking to identify “best practices” for PSM governance but rather the criteria that clearly indicate an infringement of Article 10 ECHR.

These criteria are best described as a set of indicators suggesting that a PSM's mission, according to the maxims of Article 10 ECHR, is being sabotaged. We have identified the following points:

- There must be no one-sided, dominant influence over programming by powerful political, economic or other social groups (editorial independence).
- There must be no undue political influence on decisions in other areas essential for carrying out the PSM remit, i.e. rights or programme acquisitions, recruitment and management of staff (operational independence and institutional autonomy).
- To fulfil both preceding requirements, the appointments of the broadcaster's central leadership positions, such as the management board or key supervisory bodies, are crucial. No single political or social group must exercise undue or dominant influence on such appointments (independence of key personnel).

It follows from the decision of the ECtHR in the *Manole* case that these aspects are core requirements. A breach of any of these will necessarily lead to a violation of Article 10 ECHR. The CoE recommendation on PSM governance confirms this finding by naming the above conditions as “fundamental requirements” for the design of governance structures for PSM organizations.[43]

The question of whether or not the legal framework for PSM is shaped in a way that prevents the subversion of editorial, operational and personnel independence, in violation of Article 10 ECHR, necessarily demands an overall assessment. Several aspects must be considered in such an assessment because independence can be secured or endangered by a variety of legal provisions or actions. The conditions for the appointment of the highest supervisory or decision-

[43] See §§ 21 – 23 of the Recommendation as quoted in footnote 41.

making bodies of PSM are typically the most indicative. These decisions have the greatest impact on editorial independence and on the scope of operational independence. The key contributing factors are a fair and pluralistic appointment procedure, protection against arbitrary dismissal, existence of fixed terms of service, and the scope and presence of incompatibility rules. Such means can protect the independent status of the PSM management and their absence would be a key negative indicator that management is under a heightened risk of political interference.[44]

Further, it is important that these requirements are addressed in practical terms, and not just in form.[45] To determine if the independence of PSM under Article 10 ECHR is at stake, political and corporate culture is just as important as the legal framework and the formal governance structures. Threats to editorial independence can come from within the organization, e.g. through the threat of disciplinary measures, and not just from external interference, e.g. through formal instructions.

To summarize, public authorities' influence over PSMs, including government and parliament, is not illegal per se. However, it is incompatible with Article 10 ECHR to expose PSM to a one-sided political or State influence that affects the areas of editorial freedom, central decision-making of the organization, and staff management, thus preventing the proper fulfillment of its public service mission and remit. If after taking into consideration all relevant circumstances, including the legal framework and actual practice, it appears that the editorial, operational or personnel independence are not sufficiently secured because a political group can exert a dominant, one-sided influence, then Article 10 is obviously violated.

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[44] As to safeguards in this respect see *Wagner/Berg* (footnote 22), 15 et seq; explained with Austrian media law *Berka*, Zur Governance autonomer öffentlicher Institutionen: das Beispiel des öffentlich-rechtlichen Rundfunks, in Ennöckl et al (eds), Festschrift für Bernhard Raschauer zum 65. Geburtstag (2013), 49.

[45] As to the distinction and the relation between *de jure* and *de facto* independence see *Wagner/Berg* (footnote 22), 9 et seq.

IV. Analysis of the Polish Broadcasting Act as amended on 30 December 2015, in the light of Article 10 ECHR

1. Introduction

The Act of 30 December 2015 amending the Broadcasting Act (the "Interim Act") introduces fundamental changes to the Radio and Television Broadcasting Act of 20 December 1992 (hereinafter referred to as the "Broadcasting Act").[46]

The changes brought by the Interim Act concern the regulatory framework establishing the composition of the Management and Supervisory Boards of the Polish public service broadcasting companies, which operate in the form of joint-stock companies fully-owned by the State Treasury, namely the public television company "Telewizja Polska – Spółka Akcyjna" and its regional branches and the public radio company "Polskie Radio – Spółka Akcyjna" and the regional radio companies (see Article 26 Broadcasting Act). The most significant change brought about by the amendment of Articles 27 and 28 of the Broadcasting Act is to confer upon the Minister of State Treasury the sole competence to appoint and dismiss members of the Management and Supervisory Boards – a competence previously assigned mainly to the National Broadcasting Council.

The National Broadcasting Council was established by the Broadcasting Act as the State authority competent in matters of radio and television broadcasting and responsible for safeguarding freedom of speech and the interests of the public, as well as to ensure the open and pluralistic nature of radio and television broadcasting (see Articles 5 and 6). The Council is an independent body[47] whose five members are appointed by the Lower House (Sejm), the President and the Senate (Upper House). While the Broadcasting Act formerly entrusted this independent regulator with the leading role in appointing and dismissing members of both the Supervisory and Management Boards, aiming to ensure an impartial

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[46] As for the Broadcasting Act see *Jakubowicz*, Poland, in Institut für Europäisches Medienrecht (EMR), Public Service Media according to Constitutional Jurisprudence – The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence (2nd edition 2012), 165.

[47] The independence of the National Broadcasting Council is not mentioned explicitly in the Broadcasting Act but can be deduced from the interpretation of its Article 6 § 1 which obliges the Council "to protect the independence of media service providers and the interests of the public"; and from Article 214 of the Constitution which reads: "A member of the National Council of Radio Broadcasting and Television shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function".

and independent regime for the Polish public broadcasters, the Interim Act entirely deprives the Council of its competences in this regard, a deprivation of power in a very sensitive area.

In addition, the Interim Act eliminates fixed terms of office for Board members, abolishes professional requirements for the mandate, repeals the competition for the selection of candidates and annuls the reasonable grounds for dismissal.

According to its Article 4, the Interim Act entered into force on the day following its publication, 8 January 2016. According to the same Article, the Act was temporary and was supposed to cease to be in force on 30 June 2016, but this "sunset clause" was later repealed by the so-called "bridge law" (see point I.).

In order to implement the Interim Act, the Minister responsible for the State Treasury was to bring the statutes of the companies "Telewizja Polska – Spółka Akcyjna", "Polskie Radio – Spółka Akcyjna", and the regional radio companies in line with the provisions referred to in Article 1 of the Interim Act within 30 days of its entry into force.

2. Mandate, appointment and dismissal of the Management Boards

2.1. Mandate and tasks

First and foremost, the Management Boards are the governing bodies of the public broadcasters, with overall responsibility for editorial issues, personnel management, etc. According to Art 30 §3 of the Broadcasting Act, revised by the Interim Act, it is now for the Management Boards alone to appoint the directors of the regional branches.[48]

Additionally, under the Broadcasting Act as well as under the Interim Act the Management Boards have, *inter alia*, the following competences:

- The Management Boards provide the programme council with resources to evaluate the programme output and its reception and to commission

[48] Before then the Management Boards made a motion to the Supervisory Boards for appointment of the directors of the regional branches of "Telewizja Polska".

independent audience research as well as studies of its social impact (Art 28a §5).

- The Management Board submits a motion to the National Broadcasting Council[49] regarding the minimum share of programmes produced by the regional television branches (Art 30 §5).
- The Management Boards submit various reports to the National Broadcasting Council and publish them (Art 31b).
- Guidelines and prohibitions regarding programme service content, imposed by the general meeting of shareholders, are not binding upon the Management Boards (Art 29 §2).

2.2. Appointments

Appointment of the members of the **Management Board** (Article 27)	
Broadcasting Act	**Interim Act**
The Supervisory Board holds an open competition to select the candidates according to the rules defined by the National Broadcasting Council. The National Broadcasting Council appoints the members on the recommendation of the Supervisory Board, for a five year term of office.	The Minister responsible for the State Treasury appoints the members of the Board for an indefinite term of office.
The Management Board consists of one to three members with experience in management as well as radio and television broadcasting.	The Board consists of one to three members competent in the field of radio and television broadcasting who must not have been convicted by a final court judgment of an intentional offence subject to public prosecution or a tax offence.

Figure 1*: *Appointment procedure for the Management Board

Pursuant to Article 27 of the Broadcasting Act, members were appointed for a period of five years by the National Broadcasting Council upon recommendation by the Supervisory Board, which had conducted a public and open competition. This process was governed by the rules of the competition defined by the National Broadcasting Council, in consideration of the need to ensure accessibility, impartiality, openness and efficiency.

[49] Later changed to NMC by the "bridge law".

The complex appointment procedure was radically simplified by the Interim Act, to the detriment of its balanced approach. The Management Board continues to consist of one to three members but the Interim Act entrusts the authority of their appointment exclusively to the Minister competent for matters of the State Treasury and without stipulating a fixed term of office. The Minister has full discretion over the appointment without any input from the Supervisory Board let alone the National Broadcasting Council.

The Broadcasting Act required members of the Board to be competent in management as well as in radio and television broadcasting and stipulated a public and open competition held by the Supervisory Board. In contrast, the Interim Act simply states that the candidates appointed as member of the Management Board should have competencies in the field of radio and television broadcasting and must not have been convicted for an intentional offence subject to public prosecution or a tax offence.

Apart from professional criteria for the candidates, the Broadcasting Act required the National Broadcasting Council to define detailed procedural rules for the competition, including a procedure for announcing, organizing and holding the competition as well as for announcing results of the competition (Article 27 §5). The provision clearly required the National Broadcasting Council to ensure the general accessibility of the competition, impartiality, the open nature of the proceedings as well as the efficient holding of the competition and the assessment of the competencies of candidates.

These legal requirements designing a fair and transparent appointment procedure were entirely repealed by the Interim Act without being replaced by any other kind of procedural rules for the appointment process. The National Broadcasting Council and the Supervisory Boards are no longer involved in the selection and appointment process. The Interim Act grants the Minister of State Treasury sole discretionary power, which could be used to increase the political influence of the governing party over the composition of the broadcasters' Management Boards. This in turn would have a negative impact on their independence and defy the idea and legal requirement that freedom of the media can only be safeguarded by a diverse and pluralistic media landscape.

2.3. Dismissal

Dismissal of a member of the **Management Board** (Article 27)	
Broadcasting Act	**Interim Act**
The National Broadcasting Council may dismiss a member on a motion by the Supervisory Board or the General Meeting, only on one of the following grounds: - the member has been convicted of an intentional criminal offence subject to public prosecution or of a tax offence, by virtue of a valid court judgement, - the member has acted to the detriment of the company, - occurrence of circumstances that permanently prevent the member from serving their function.	The minister responsible for the State Treasury may dismiss a member without any grounds or justification.

Figure 2*: *Dismissal of the Management Board

With regard to the dismissal of Board members, the Broadcasting Act defined specific criteria limited to situations where the loss of credibility or the incapacity of exercising their function could be presumed. Additionally, for a dismissal to be legally valid, a previous motion by either a Supervisory Board or a General Meeting was required. Therefore, two bodies were involved in the dismissal process, providing a balanced procedure to prevent arbitrary decision making. In stark contrast, the Interim Act does not require any grounds for dismissal, but also removed the National Broadcasting Council's powers in the appointment and dismissal process, leaving it to the sole discretion of the Treasury Minister.

2.4. Assessment

In summary, the National Broadcasting Council and the Supervisory Boards have been deprived of any kind of influence regarding the appointment or dismissal of Management Board members. All rules regarding a competition, the required expertise/experience and the definite selection of candidates were repealed by the Interim Act, leaving the appointment and dismissal to the sole discretion of the Treasury Minister.

The Explanatory Memorandum questions the legitimacy of the National Broadcasting Council's power, under Art. 27 Broadcasting Act, to appoint the members of the Management Boards (upon a motion by the relevant Supervisory

Board). It suggests that the National Broadcasting Council can perform its constitutional tasks of safeguarding freedom of speech, the right to information and the public interest in radio and television broadcasting only as a regulatory body for all market participants, and it should thus not be involved in the governance of public radio and television organizations. In practice, having the same body involved in both (regulatory and governing) activities is not uncommon in Europe and the above-mentioned case of France, where the power to appoint the presidents of the PSM organizations lies with the independent regulatory authority, the CSA provides an example of that practice.[50]

However, if a government or parliament does decide to strip an independent regulatory authority of such a mandate, it must establish an alternative procedure that ensures an independent and well-balanced selection and appointment process, such as in the so-called “decentralised model”, which has been adopted by the great majority of European countries.[51]

Independence is jeopardized to the highest degree if a government minister, especially if the government is composed only of members of the same political party, has sole discretionary power to appoint the members of the Management Boards of all public broadcasters of the given State.

It can be assumed that rather politically-affiliated persons will be selected and appointed. Furthermore, there is no defined term of office for the Board members. Board members who act too autonomously and do not please the government can be easily dismissed because there are no conditions or restrictions established in the law which might curtail the decisions of the responsible Minister of Treasury.

In view of the wide powers held by the Management Boards, the amendments regarding the powers, procedures and criteria for the appointment and dismissal of their members could put at very high risk the independence, pluralism, and institutional autonomy of the public service broadcasters (see point IV.2.1).

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[50] *Wagner/Berg* (footnote 22), 16.

[51] *Wagner/Berg* (footnote 22), 15.

3. Mandate, appointment and dismissal of Supervisory Boards

3.1. Mandate and tasks

The main function of the Supervisory Boards is to act as controlling organs for the public radio and television organizations organized in the form of joint-stock companies. Some of their previous competences were not considered as essential tasks of the supervisory organ and were thus repealed by the Interim Act:

- to make a motion to the National Broadcasting Council for the appointment of Management Board members (Art 27 §3).
- to make a motion to the National Broadcasting Council for the dismissal of a Management Board member (Art 27 §3).
- to select the candidates participating in the competition for the Management Board (Art 27 §4).

However, the Supervisory Boards retained the following competences under the Interim Act:

- Under Art. 28 §6, the Supervisory Board's approval is required to:
    - employ or dismiss persons holding executive positions,
    - conclude or accede to a collective employment agreement,
    - establish or accede to a company, or transfer shares or interest,
    - transfer or encumber real estate.
- The Supervisory Board adopts resolutions (Art 28 §2) and its own internal rules of procedure (Art 28 §4), and elects a Chairman from amongst its members (Art 28 §3).
- In regard to programme matters, the Supervisory Board acts upon resolutions adopted by the programme councils (Art 28a §3).

3.2. Appointment

Appointment of the members of the **Supervisory Board** (Article 28)	
Broadcasting Act	**Interim Act**
"Telewizja Polska" and "Polskie Radio": Five of the seven members are appointed by the National Broadcasting Council, from candidates nominated by collegial bodies of university-type higher education institutions. One member is appointed by the Minister in charge of culture and national heritage, and one member is appointed by the Minister responsible for the State Treasury. **Regional radio broadcasting companies:** Four of the five members are appointed by the National Broadcasting Council from candidates nominated by collegial bodies of university-type higher education institutions. The fifth member is appointed by the Minister responsible for the State Treasury, in agreement with the Minister in charge of culture and national heritage. The Supervisory Boards have a term of office of three years.	The Interim Act reduces the number of members of all Supervisory Boards to three. Members have to pass an examination referred to in the Commercialisation and Privatisation Act as a criterion for appointment. All members are appointed by the Treasury minister for an indefinite term of office.

Figure 3*: *Appointment of the Supervisory Boards

The Broadcasting Act contained provisions for "Telewizja Polska – Spólka Akcyjna" and "Polskie Radio – Spólka Akcyjna" and different ones for the regional radio broadcasting companies.

Five of the seven members of TVP and PR were appointed by the National Broadcasting Council based on an open competition. The Minister of Culture and National Heritage and the Treasury Minister respectively appointed the additional members. For the regional radio broadcasting companies, four of the five members were selected by the National Broadcasting Council on the basis of a competition and one by the Treasury Minister, in consensus with the Minister of Culture and National Heritage.

The Polish Broadcasting Act followed the principle of "institutional pluralism" (regarding the appointments of the members of both the Supervisory and Management Boards) by distributing the powers for appointments among different bodies, and sometimes requiring cooperation between them, thus allowing for checks and balances. The fact that two out of seven (or one out of five) members

were appointed directly by two government ministers could be qualified as a reasonable involvement of the State.

However, the Interim Act repealed Article 6 §2 no. 11 which granted the National Broadcasting Council competence to hold public and open competitions to select Supervisory Board members of public radio and television broadcasting organizations. Instead, the Interim Act entrusted the Minister of State Treasury with the exclusive power to appoint the members of the Supervisory Boards, abolishing any involvement whatsoever of the independent National Broadcasting Council or other experts in the area of culture and media. Such a system can no longer be considered as a reasonable public involvement.

Under the Broadcasting Act, candidates for the Supervisory Boards were nominated by collegial bodies from university-type higher education institutions and had to be competent in law, finance, culture and media (Article 28 §1). The National Broadcasting Council would then hold an open competition among the candidates and in accordance with previously defined rules. These provisions constituted a transparent appointment process and took into account the need to ensure impartiality, open proceedings and an efficient conduct of the competition and assessment of each candidate's competencies (Article 28 §1b).

In contrast, the Interim Act neither stipulates criteria for the selection of members nor for the composition of the Supervisory Board. In terms of professional qualifications of the candidates, Article 28 §1f of the Interim Act requires Supervisory Board members to pass the examination referred to in the Commercialisation and Privatisation Act. This Act applies to companies with particular economic importance and the examination is tailored for chartered auditors, lawyers or holders of PhDs in economics or law. The examination is not adapted to the special role and remit of public service media and does not consider the same skills and expertise which were required by the Broadcasting Act. Apart from the examination which solely covers economic questions and thus cannot be truly regarded as a professional requirement for the candidates, no predetermined and transparent decision-making procedure is provided for.

3.3. Dismissal

Dismissal of a member of the **Supervisory Board** (Article 28)	
Broadcasting Act	**Interim Act**
A member of the Supervisory Board can be dismissed by the authority that appointed the member, only for the following reasons: - the member has been convicted of an intentional criminal offence subject to public prosecution or of a tax offence, by virtue of a valid court judgement, - the member has acted to the detriment of the company, - circumstances that permanently prevent the member from serving their function.	The minister responsible for the State Treasury can dismiss members without any restriction.

Figure 4*: *Dismissal of the Supervisory Board

The Broadcasting Act guaranteed that a Supervisory Board member could only be dismissed in the event of certain circumstances, exhaustively listed in Article 28 §1d. Only the respective authority that had appointed the member could decide upon a dismissal. The Interim Act repealed all existing criteria for dismissal without stating any new grounds for which a member could be dismissed and without stating the requirement that a dismissal be based on clear reasons. In that respect the Interim Act substantially simplifies the dismissal process to the extent that the Minister of State Treasury can dismiss any member at any time without being bound by specified reasonable grounds. In summary, the Interim Act gives the Minister of the State Treasury sole responsibility for the dismissal of Supervisory Board members, without any procedural or material conditions.

3.4. Assessment

The loss of competences by the Supervisory Boards with regard to the appointment and dismissal of Management Board members (see point IV.3.1.) – and which normally form an essential part of a Supervisory Board's tasks – has a tremendous impact on the guidance and monitoring of PSM. In particular, it is obvious that the manner in which PSM are governed will depend decisively on who is appointed to the Management Boards, as these have overall responsibility for editorial issues, personnel management, etc.

The changes to the competences for the appointment and dismissal of Supervisory Board members (see points IV.3.2. and 3.3.), which are placed in the sole hands of

the Minister of State Treasury, counteract and cause grave damage to a system which aimed for a pluralist and well-balanced composition of PSM supervisory bodies in a democratic society.

In the same vein, the Interim Act enables the Minister of State Treasury to appoint members of Supervisory Boards without any transparent and open contest, regardless of their professional qualifications, suitability and values, and to dismiss them at any time without being bound by certain grounds.

In stark contrast to the situation under the previous Act, candidates have only to pass an examination referred to in the Commercialisation and Privatisation Act, with no requirement to be competent in "law, finance, culture and media" as was laid down by the Broadcasting Act before its amendment.

V. Overall assessment of the Interim Act in the light of Article 10 ECHR and conclusions

1. Introduction

It remains for this study to assess whether the Interim Act amending the Polish Broadcasting Act *taken as a whole* is in line with the governance principles for PSM, taking into account the European standards of "good media governance" outlined in chapter III/1-4, and, in particular and decisively, with freedom of expression and information and of the media, as laid down in Article 10 ECHR and interpreted by the ECtHR in its case law. Accordingly, it must be determined whether the Interim Act is in serious and manifest conflict with the principles of independence and pluralism and, if so, is violating Article 10 ECHR.[52] For this purpose, it is not necessary to deal with the components of the Interim Act separately, as done in chapter IV. The approach should follow the assessment scheme of the ECtHR according to which a case "*must be taken as a whole*".

The explanations and considerations in chapter IV highlight that the Broadcasting Act 1992 – based on the "dual system" of private and public service media – established a legal framework for the public television and radio broadcasting companies which were generally committed to the principles of independence,

[52] See the deliberations in chapter III/4.

pluralism and accountability; it provided a convincing and functioning system of "checks and balances" between various interacting bodies (the National Broadcasting Council, Supervisory Boards, and Management Boards) aimed at implementing and securing these principles.[53]

With the Interim Act the Polish legislation departs from this reasonable system without good cause and without a convincing justification. This suggests that the reform was guided by reasons or intentions other than those of improving the existing model according to European standards. The Interim Act does not establish a model of selection, appointment and dismissal procedures based on common European standards or at the very least observing the requirements of Article 10 ECHR. On the contrary, the Interim Act devolves all powers to the Treasury Minister, without even limiting these powers by certain formal and substantial criteria.

Hereinafter, the Interim Act will be assessed in reference to the requirements that are explained in detail in chapter III (case law of the ECtHR and Recommendations of the CoE's Committee of Ministers), which function as a check-list in order to determine whether European standards and ECtHR case law on Article 10 ECHR have been observed or not.

2. European PSM standards

As already highlighted in this study, the amended Articles 27 and 28 of the Broadcasting Act assign to the sole Treasury Minister the competence to appoint members of the Management and Supervisory Boards, for unspecified terms of office. The Minister also has competence to dismiss the members of the Boards without being bound by certain grounds.

It will be the rule rather than the exception, that a minister will be a member of the political party which has won the elections and formed the government. Normally, a minister and a government will be interested in implementing their political programme and ideas, in winning the next elections, and in having favourable media coverage as well as strong media support of the government policy and the political orientation of the governing political party.

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[53] See *Jakubowicz* (footnote 46), 165, 203.

Due to the robust discretionary powers granted to the Minister of Treasury by the Interim Act, the Minister has free reign to select and appoint to the Board persons who are willing to follow the Minister's policy line.

It is quite obvious that such concentration of power, solely in the hands of a member of the government, namely the Minister responsible for the State Treasury, is in total opposition to European PSM standards as outlined above in chapter III/3. According to these standards, PSM can only be successful in fulfilling their role within a democratic pluralistic society[54] "if they are, and are perceived as being, truly independent from the government and from other political and economic powers." [55] This is why, *inter alia*, institutional autonomy is absolutely essential for PSM, to avoid undue interference by political or economic powers.[56] Independence is therefore a *conditio sine qua non* for PSM.[57] In order to reduce the risk of undue interference, most countries have introduced legal safeguards and supervisory systems which distance PSM from political institutions, in particular from the executive and legislative branches, but also from political parties. These safeguards often take the form of independent supervisory bodies, which act at arm's length from the political powers and can serve as buffers between them and the management and editorial staff of PSM. As a consequence, procedures for the selection, appointment and dismissal of supervisory bodies, as well as for PSM management bodies, must guarantee an independent pluralistic composition. Therefore, State representatives or politicians must be prevented from gaining a determining influence in these bodies.

This can be achieved in different ways, as demonstrated in chapter III/3:[58] the prevailing model, which can be considered as the main European trend, is based

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[54] See also the Protocol on the System of Public Broadcasting in the Member States, Official Journal of the European Union, 16th December 2004, C 310/372.

[55] *Wagner/Berg* (footnote 22), 9.

[56] *Wagner/Berg* (footnote 22), 9. See also *Garlicki/Hofmański/Wróbel*, Konwencja o Ochronie Praw Człowieka i Pod-stawowych Wolności. Komentarz do artykułów 1-18, Vol I. Komentarz, Warsaw 2010, Legalis, cited in the Application of the Polish Commissioner for Human Rights to the Polish Constitutional Court, p. 11: https://www.rpo.gov.pl/sites/default/files/Application%20to%20the%20Constitutional%20Tribunal%20on%20media%20law.pdf.

[57] See for the following chapter III/3, and *Wagner/Berg* (footnote 22), 9, 12.

[58] *Wagner/Berg* (footnote 22), 13-16, identifying different appointment procedures for PSM which are ensuring independent and pluralistic compositions of supervisory bodies as well as of the management.

on a decentralised approach for appointment procedures for management positions in public service media, where independent supervisory bodies rather than governmental bodies or parliament take the decisions, thus creating a certain distance from political powers and strengthening independence. The Interim Act leaves no room for this.

3. Case-law of the ECtHR on Article 10 ECHR

In chapter III/5 of this study we have pointed out that there are different models and strategies for "good PSM governance". But even "poor PSM governance", characterised by a suboptimal attainment of European standards and governance principles, can still be consistent with Article 10 ECHR. However, if the conflict with the principles of independence and plurality is serious and manifest, the margin of appreciation of a member State to the Convention ceases and Article 10 ECHR will be infringed.

In the light of the relevant case law of the ECtHR, it is obvious that the Interim Act is in clear contradiction to following requirements:

- In the *Manole* judgment, the ECtHR dealt with the principle of pluralism. The Court stated that the freedom of expression in a democratic state would be undermined in a situation "whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom" (§98).
- The State "as the ultimate guarantor of pluralism" has to create a public broadcasting system that provides a pluralistic service (*Manole* judgment, §107). Therefore, it is indispensable that PSM transmits "impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed" (*Manole* judgment, §101).
- According to the standards developed by the Committee of Ministers of the Council of Europe, which were quoted by the ECtHR in its *Manole* judgment, independence of PSM from political interference and control has to be secured by practical means, and in particular through an appropriate

structure, e.g. with respect to the appointment of board members in an open and pluralistic manner or through guarantees against dismissal (§109).

By granting the exclusive competence to appoint and dismiss the members of the PSM Management and Supervisory Boards to the Minister of Treasury, i.e. a member of the government and of the politically dominating PiS, the Interim Act manifestly neglects all of the listed requirements in a serious manner. The Minister of Treasury is now in a position – without any system of "checks and balances" – to appoint politically convenient members to the PSM Management and Supervisory Boards, and to dismiss unwanted ones, in order to exert or expand the political influence of the governing political party PiS on PSM.

If, in addition, we apply the check-list of indicators developed in point III/5 to reflect the core requirements ensuing from Article 10 ECHR, we come to the conclusion that the Interim Act undoubtedly violates Article 10 ECHR:

- PSM must have editorial independence and must not be exposed to one-sided, dominating influence over programming from powerful political, economic or other social groups. The discretionary power of the Minister of Treasury on the selection and composition of the Management and Supervisory Boards will have an indirect but clear impact on the programming choices of the public broadcasters.
- Similarly, an indirect political impact on the operational independence and institutional autonomy of the PSM is to be expected in terms of rights or programme acquisitions, as well as for the recruitment and management of staff. This will affect the independent exercise of the PSM remit.
- In order to fulfil both requirements of editorial independence and institutional autonomy, the appointment of central leadership positions of the broadcasters is a core issue. Therefore, no single political or social group must exercise undue influence over such decisions or dominate them. The Interim Act counteracts this condition in a direct and excessive way.

Coming to a final conclusion, we would like to reiterate that the question of whether or not the Interim Act is in line with Article 10 ECHR demands an overall assessment. Several aspects must be considered because independence can be secured or alternatively jeopardized by a variety of legal provisions and spheres of influence. The conditions for the appointment of the highest PSM supervisory or decision making bodies are typically the most important indicators. Other decisive factors are fair and pluralistic appointment procedures, protection against arbitrary dismissal, or the existence of fixed terms of office. We cannot see any sign of this in the Interim Act. On the contrary, we ascertain a heightened risk of political interference due to the new legal provisions which disregard European PSM core principles as well as, and in particular, the case law of the ECtHR.

It follows from the above that we can conclude that the Polish Interim Broadcasting Act – whose temporary nature was modified by the "bridge law" of 22 June 2016 – violates freedom of expression and of the media, pursuant to Article 10 ECHR.